The Colorado
Rules of Civil Procedure
For
Courts of Record in Colorado

Adopted by the

SUPREME COURT OF COLORADO

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ANALYSIS BY RULE

CHAPTER 1

SCOPE OF RULES, ONE FORM OF ACTION, COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Cross references: For courts and court procedure generally, see title 13, C.R.S.

Rule 1. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district courts, and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. These rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b) Effective Date. Amendments of these rules shall be effective on the date established by the Supreme Court at the time of their adoption, and thereafter all laws in conflict therewith shall be of no further force or effect. Unless otherwise stated by the Supreme Court as being applicable only to actions brought after the effective date of an amendment, they govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(c) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Source: (c) amended and adopted December 5, 1996, effective January 1, 1997; (b) amended and adopted February 1, 2012, nunc pro tunc January 1, 2012, effective immediately; (a) amended and adopted and comments added and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For exemption of certain statutory proceedings from the rules of civil procedure, see C.R.C.P. 81.

COMMENTS

2015

[1] The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

[2] The changes here are based on identical wording changes proposed for the Federal

Rules of Civil Procedure. They are designed to place still greater emphasis on the concept that litigation is to be treated at all times, by all parties and the courts, to make it just, speedy, and inexpensive, and, thereby, noticeably to increase citizens' access to justice.

ANNOTATION

I. GENERAL CONSIDERATION.

The requirements of the rules may be waived by failure to file objection. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

The requirements may be waived by consent. Rose v. Agricultural Ditch & Reservoir Co., 69 Colo. 232, 193 P. 671 (1920); Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Where sufficient objection is made at the proper time and place, there is no alternative but to enforce the applicable rule. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Violation of a rule of civil procedure does not create a private cause of action. Weiszmann v. Kirkland and Ellis, 732 F. Supp. 1540 (D. Colo. 1990).

Applied in Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975); Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976); Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977); Sherman v. District Court, 637 P.2d 378 (Colo. 1981); In re Brantley, 674 P.2d 1388 (Colo. App. 1983).

II. PROCEDURE GOVERNED.

Law reviews. For article, ''Shall Colorado Procedure Conform with the Proposed Federal Rules of Civil Procedure?'', see 15 Dicta 5 (1938). For article, ''The Colorado Rules of Civil Procedure'', see 23 Rocky Mt. L. Rev. 527 (1951).

Section 21 of the Colorado Constitution's article VI confers upon the supreme court the power to make rules governing practice in civil cases. Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1245, 31 L. Ed. 2d 465 (1972).

The Colorado rules of civil procedure are patterned after the federal rules. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

These rules provide a complete and orderly procedure for the trial and determination of civil actions. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

At law or equity. The rules of civil procedure provide for the application of the rules to the procedure in all actions, suits, or proceedings of a civil nature, whether cognizable at law or in equity. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Rules of civil procedure apply to habeas corpus actions when the rules are not in conflict with habeas corpus statutes. Zaborski v. Dept. of Corr., 812 P.2d 236 (Colo. 1991).

The primary purpose of the rules of civil procedure is to simplify and clarify procedure and to expedite litigation. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955); Seymour v. District Court, 196 Colo. 102, 581 P.2d 302 (1978).

The rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955).

Taking into consideration the general policy of the rules, they should be liberally construed. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955); Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958); Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963); Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1245, 31 L. Ed. 2d 465 (1972); Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

Amendments to pleadings should be granted in accordance with overriding purposes of rules of civil procedure — to secure the just, speedy, and inexpensive determination of every action. Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

Technical errors or defects in proceedings not affecting the substantial rights of parties should be disregarded. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

A strict technical application of time requirements is punitive. While unjustified delay in complying with procedural requirements is not condoned, to apply a strict technical application of time requirements appears to be a punitive disposition of the litigation, resulting in an arbitrary denial of substantial justice, contrary to the spirit of the rules of civil procedure. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973); Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999) (construing substantially similar language in CRCP 501).

The rules permit a court to deal with a case on the merits and look through form to

substance; such was the state of the law in Colorado prior to the adoption of these rules. Waite v. People, 83 Colo. 162, 262 P. 1009 (1928).

Although substantive rights are not affected, the rules of civil procedure are procedural, and there is no attempt under them to affect the substantive rights of litigants. Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950).

Special statutory procedures supersede the Colorado rules of civil procedure and must be followed. In re Oxley, 182 Colo. 206, 513 P.2d 1062 (1973).

Language in § 37-92-304 (3) to be construed with section (a). Section 37-92-304 (3)'s mandatory language that hearings shall be held where a protest has been filed and on cases of rereferral by a water referee to a water judge must be construed together with section (a) of this rule. In re Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

Mental health proceedings are not adversary. Where a proceeding is an inquiry into the mental condition of a defendant who has been committed under a plea of not guilty by reason of insanity, the proceeding is not an adversary proceeding in the usual sense of a case which is controlled by the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Historically, the supreme court has considered mental health proceedings to be special statutory proceedings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Juvenile proceedings are governed by the procedural rules contained in the Colorado Children's Code. People ex rel. M.C.L., 671 P.2d 1339 (Colo. App. 1983).

Applied in Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946); Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Stalford v. Bd. of County Comm'rs, 128 Colo. 441, 263 P.2d 436 (1953); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957); Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958); Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964); Rasmussen v. Freehling, 159 Colo. 414, 412 P.2d 217 (1966); Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968); In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979).

III. EFFECTIVE DATE.

Applied in Chamberlin v. Chamberlin, 108 Colo. 538, 120 P.2d 641 (1941) (former code of civil procedure effective to April 6, 1941).

Rule 2. One Form of Action

There shall be one form of action to be known as ''civil action''.

ANNOTATION

The rules of civil procedure are designed to dispense with ritualistic, common-law, forms-of-action pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

The rules of civil procedure clearly provide for only one form of action. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

This rule abolishes distinction between actions at law and in equity. Dunlap v. Sanderson, 456 F. Supp. 971 (D. Colo. 1978).

It is immaterial whether an action is one for damages or one for specific performance, since, under this rule, there is but one form of action. McKenzie v. Crook, 110 Colo. 29, 129 P.2d 906 (1942).

This rule providing for one form of action does not abrogate the common law or equity rules relative to the right of one partner to sue another partner. L.H. Heiselt, Inc. v. Brown, 108 Colo. 562, 120 P.2d 644 (1941).

Applied in Uhl v. Fox, 31 Colo. 13, 498 P.2d 1177 (1972).

Rule 3. Commencement of Action

(a) How Commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons and complaint. If the action is commenced by the service of a summons and complaint, the complaint must be filed within 14 days after service. If the complaint is not filed within 14 days, the service of summons shall be deemed to be ineffective and void without notice. In such case the court may, in its discretion, tax a reasonable sum in favor of the defendant to compensate the defendant for expense and inconvenience, including attorney's fees, to be paid by the plaintiff or his attorney. The 14 day filing requirement may be expressly waived by a defendant and shall

be deemed waived upon the filing of a responsive pleading or motion to the complaint without reserving the issue.

(b) Time of Jurisdiction. The court shall have jurisdiction from (1) the filing of the complaint, or (2) the service of the summons and complaint; provided, however, if more than 14 days elapses after service upon any defendant before the filing of the complaint, jurisdiction as to that defendant shall not attach by virtue of the service.

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

Cross references: For issuance of summons by attorney or clerk, see C.R.C.P. 4(b).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''Civil Procedure'', which discusses Tenth Circuit decisions dealing with jurisdiction, see 65 Den. U. L. Rev. 405 (1988). For article, ''A Modest Proposal: The Rule 3(a) Waiver Agreement'', see 46 Colo. Law. 23 (Mar. 2017).

Annotator's note. Since this rule is similar to § 34 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Applied in Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981); Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981); Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

II. HOW COMMENCED.

A. Complaint or Summons.

An action is commenced by the filing of a complaint or by the service of a summons, which gives a court jurisdiction over the plaintiff and of the action, but not over the person of a defendant, as this can only be acquired through legal service of process. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

For historical review of this alternative procedure, see Haley v. Breeze, 16 Colo. 167, 26 P. 343 (1891); Stevens v. Carson, 21 Colo. 280, 40 P. 569 (1895).

The initial pleading is not required to be filed at the time of the service of summons, but ten days thereafter. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

While a case may pend indefinitely on the filing of the complaint alone, if its status is challenged by the administrative action of the court or by motion to dismiss, then a showing must be made to justify the delay in effecting service of process. Nelson v. Blacker, 701 P.2d 135 (Colo. App. 1985); Cullen v. Phillips, 30 P.3d 828 (Colo. App. 2001).

Where a summons relied upon as an initial pleading does not purport to set forth the claim for relief upon which the action or proceedings is based, it is merely a writ, not a pleading, which must follow within 10 days. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

Complaint fixes the nature of a suit. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Filing of an Equal Employment Opportunity Commission charge does not constitute the filing of a ''complaint'' within the meaning of this rule. Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982).

B. Dismissal.

Dismissal is discretionary. Authority to dismiss an action for failure to file the complaint within the time prescribed rests in the sound legal discretion of the court, because the phrase ''may be dismissed'' is not the language of a command nor of a penalty; it indicates rather that it is discretionary. Knight v. Fisher, 15 Colo. 176, 25 P. 78 (1890); Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

This discretion should not be arbitrarily exercised. Knight v. Fisher, 15 Colo. 176, 25 P. 78 (1890); Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

It would not be proper to dismiss the cause even though jurisdiction of defendant's person is lacking where the action is instituted and jurisdiction of the court is acquired by the filing of the complaint. Everett v. Wilson, 34 Colo. 476, 83 P. 211 (1905).

Dismissals under this rule are without prejudice and do not operate as an adjudication on the merits. Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971).

Case reinstated where seasonable complaint mislaid. Where a case has, arbitrarily and ''ex parte'', been dismissed at the instance of defendant without notice to plaintiff on the alleged ground of failure to file the complaint within ten days, the court may, on a showing that the complaint had been seasonably lodged in the clerk's office and had been mislaid, set aside the dismissal and reinstate the case. Howell v. Goldberg, 98 Colo. 412, 56 P.2d 1330 (1936).

Allowance of attorney's fees held erroneous. Where there is no evidence as to whether the complaint was or was not filed, no expression of the opinion by the trial court that the action was vexatiously commenced, and no evidence as to what amount would constitute a reasonable attorney's fee to be taxed as costs, an allowance of attorney's fees under this rule is erroneous. Schwarz v. Ulmer, 149 Colo. 601, 370 P.2d 889 (1962).

III. TIME OF JURISDICTION.

Jurisdiction of the subject matter attaches in the court upon the filing of the complaint according to section (b) of this rule; and, when all parties involved make a general appearance, the court then has exclusive jurisdiction over both the subject matter and the parties, and no other court of coordinate power can interfere with its action. Pub. Serv. Co. v. Miller, 135 Colo. 575, 313 P.2d 998 (1957); Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

On the filing date, the court acquires jurisdiction. On the date that a complaint is filed stating facts which, if proven, would authorize the court to enter a judgment in favor of the plaintiff and against defendant, an action is pending on such date, and on such date the court acquires jurisdiction thereof. Powell v. Nat'l Bank, 19 Colo. App. 57, 74 P. 536 (1903).

Jurisdiction not properly invoked when court order entered. Gutierrez v. District Court, 183 Colo. 264, 516 P.2d 647 (1973); White v. Dept. of Inst., 883 P.2d 575 (Colo. App. 1994).

Rule 4. Process

(a) To What Applicable. This Rule applies to all process except as otherwise provided by these rules.

(b) Issuance of Summons by Attorney or Clerk. The summons may be signed and issued by the clerk, under the seal of the court, or it may be signed and issued by the attorney for the plaintiff. Separate additional or amended summons may issue against any defendant at any time. All other process shall be issued by the clerk, except as otherwise provided in these rules.

(c) Contents of Summons. The summons shall contain the name of the court, the county in which the action is brought, the names or designation of the parties, shall be directed to the defendant, shall state the time within which the defendant is required to appear and defend against the claims of the complaint, and shall notify the defendant that in case of the defendant's failure to do so, judgment by default may be rendered against the defendant. If the summons is served by publication, the summons shall briefly state the sum of money or other relief demanded. The summons shall contain the name, address, and registration number of the plaintiff's attorney, if any, and if none, the address of the plaintiff. Except in case of service by publication under Rule 4(g) or when otherwise ordered by the court, the complaint shall be served with the summons. In any case, where by special order personal service of summons is allowed without the complaint, a copy of the order shall be served with the summons.

(d) By Whom Served. Process may be served within the United States or its Territories by any person whose age is eighteen years or older, not a party to the action. Process served in a foreign country shall be according to any internationally agreed means reasonably calculated to give notice, the law of the foreign country, or as directed by the foreign authority or the court if not otherwise prohibited by international agreement.

(e) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode,

with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) Upon a natural person whose age is at least thirteen years and less than eighteen years, by delivering a copy thereof to the person and another copy thereof to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control the person may be; or with whom the person resides, or in whose service the person is employed; and upon a natural person under the age of thirteen years by delivering a copy to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to the person in whose care or control the person may be.

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator.

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers, or that officer's secretary or assistant;

(B) A general partner of any form of partnership, or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members, or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant;

(E) A trustee of a trust, or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) Repealed.

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor, city manager, clerk, or deputy clerk.

(7) Upon a county, by delivering a copy thereof to the county clerk, chief deputy, or county commissioner.

(8) Upon a school district, by delivering a copy thereof to the superintendent.

(9) Upon the state by delivering a copy thereof to the attorney general.

(10) (A) Upon an officer, agent, or employee of the state, acting in an official capacity, by delivering a copy thereof to the officer, agent, or employee, and by delivering a copy to the attorney general.

(B) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof, and by delivering a copy to the attorney general.

(C) For all purposes the date of service upon the officer, agent, employee, department, or agency shall control, except that failure to serve copies upon the attorney general within 7 days of service upon the officer, agent, employee, department, or agency shall extend the time within which the officer, agent, employee, department, or agency must file a responsive pleading for 63 days (9 weeks) beyond the time otherwise provided by these Rules.

(11) Upon other political subdivisions of the State of Colorado, special districts, or quasi-municipal entities, by delivering a copy thereof to any officer or general manager, unless otherwise provided by law.

(12) Upon any of the entities or persons listed in subsections (4) through (11) of this section (e) by delivering a copy to any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person. The delivery shall be made in any manner permitted by such appointment or law.

(f) Substituted Service. In the event that a party attempting service of process by personal service under section (e) is unable to accomplish service, and service by publication or mail is not otherwise permitted under section (g), the party may file a motion, supported by an affidavit of the person attempting service, for an order for substituted service. The motion shall state (1) the efforts made to obtain personal service and the reason that personal service could not be obtained, (2) the identity of the person to whom the party wishes to deliver the process, and (3) the address, or last known address of the workplace and residence, if known, of the party upon whom service is to be effected. If the court is satisfied that due diligence has been used to attempt personal service under section (e), that further attempts to obtain service under section (e) would be to no avail, and that the person to whom delivery of the process is appropriate under the circumstances and reasonably calculated to give actual notice to the party upon whom service is to be effective, it shall:

(1) authorize delivery to be made to the person deemed appropriate for service, and

(2) order the process to be mailed to the address(es) of the party to be served by substituted service, as set forth in the motion, on or before the date of delivery. Service shall be complete on the date of delivery to the person deemed appropriate for service.

(g) Other Service. Except as otherwise provided by law, service by mail or publication shall be allowed only in actions affecting specific property or status or other proceedings in rem. When service is by publication, the complaint need not be published with the summons. The party desiring service of process by mail or publication under this section (g) shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service and shall give the address, or last known address, of each person to be served or shall state that the address and last known address are unknown. The court, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the party to send by registered or certified mail a copy of the process addressed to such person at such address, requesting a return receipt signed by the addressee only. Such service shall be complete on the date of the filing of proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made once each week for five successive weeks. Within 14 days after the order the party shall mail a copy of the process to each person whose address or last known address has been stated in the motion and file proof thereof. Service shall be complete on the day of the last publication. If no newspaper is published in the county, the court shall designate one in some adjoining county.

(h) Manner of Proof. Proof of service shall be made as follows:

(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or statement duly acknowledged under oath by any other person completing the service as to date, place, and manner of service;

(2) Repealed.

(3) If served by mail, by an affidavit showing the date of the mailing with the return receipt attached, where required;

(4) If served by publication, by the affidavit of publication, together with an affidavit as to the mailing of a copy of the process where required;

(5) If served by waiver, by the written admission or waiver of service by the person or persons served, duly acknowledged, or by their attorney;

(6) If served by substituted service, by a duly acknowledged statement as to the date, place, and manner of service, accompanied by an affidavit that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(i) Waiver of Service of Summons. A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the defendant.

(j) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(k) Refusal of Copy. If a person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the process knows or has reason to identify the person who refuses to be served, identifies the documents being served, offers to deliver a copy of the documents to the person who refuses to be served, and thereafter leaves a copy in a conspicuous place.

(l) No Colorado Rule.

(m) Time Limit for Service. If a defendant is not served within 63 days (nine weeks) after the complaint is filed, the court —on motion or on its own after notice to the plaintiff —shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under rule 4(d).

Source: Entire rule amended and adopted, April 30, 1997, effective July 1, 1997; entire rule amended and effective March 23, 2006; (h)(1) amended and effective February 7, 2008; (e)(10)(C) and (g)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (e)(1) and (e)(4) amended and effective June 21, 2012; (m) added and effective September 5, 2013.

Cross references: For service of process upon any person subject to the jurisdiction of the courts of Colorado, see § 13-1-125, C.R.S.; for publication of legal notices, see part 1 of article 70 of title 24, C.R.S.; for performance of the duties of the sheriff by the coroner when the former is a party to the action, see § 30-10-605, C.R.S.; for parties, see C.R.C.P. 17 to 25; for subpoenas, see C.R.C.P. 45; for attachments, see C.R.C.P. 102; for garnishments, see C.R.C.P. 103; for replevin, see C.R.C.P. 104.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Rules Committee Proposes Changes in Civil Procedure'', see 21 Dicta 159 (1944). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Substituted Service of Process on Cohabitants'', see 52 U. Colo. L. Rev. 321 (1981). For article, ''Jurisdiction and Service of Process Beyond Colorado Boundaries'', see 11 Colo. Law. 648 (1982). For article, ''Will Contests — Some Procedural Aspects'', see 15 Colo. Law. 787, (1986). For article, ''Prosecuting an Appeal from a Decision of the Colorado Public Utilities Commission'', see 16 Colo. Law. 2163 (1987). For article, ''Civil Procedure'', which discusses Tenth Circuit decisions dealing with jurisdiction, see 65 Den. U. L. Rev. 405 (1988). For article, ''The Rules Have Changed for Quiet Title Actions'', see 27 Colo. Law. 69 (May 1998). For article, ''2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing'', see 35 Colo. Law. 21 (May 2006).

Due process requires notice by actual or substituted service of process. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Purpose of the requirement for serving process and a copy of the complaint upon party defendant is to give that party notice of the commencement of the proceedings so that the party has an opportunity to attend and prepare a defense. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Mere failure to obtain proper service does not warrant dismissal of the cause of action. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

The question of proper service is a factual question to be resolved based upon a preponderance of the evidence. If a court's jurisdiction is contested by means of a C.R.C.P. 12(b)(1) motion and there are contested issues of fact, the trial court is required to hold an evidentiary hearing to resolve those issues. Werth v. Heritage Int'l Holdings, PTO, 70 P.3d 627 (Colo. App. 2003).

Knowledge of a defendant of the pendency of an action cannot be substituted for service of process, for courts acquire jurisdiction in actions ''in rem'' as well as in actions ''in personam'' by lawful service of lawful process or by voluntary appearance. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

A judgment rendered without service, or upon the unauthorized appearance of an attorney, is void, and all proceedings had thereunder are as to all persons, irrespective of notice or bona fides, absolute nullities. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Absence of legal service or authorized appearance is jurisdictional, and, without jurisdiction, no judgment whatever will be entered, nor rights acquired thereunder. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

When jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are an exercise of jurisdiction, and however erroneous, they are not void, but voidable only, and not subject to collateral attack. Brown v. Tucker, 7 Colo. 30, 1 P. 221 (1883).

It is not incumbent upon a defendant to do anything to make service of process upon him valid or regular. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Proper service question of fact. Whether personal or substituted service on a party has been properly made is a question of fact to be resolved by the trial court. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Service on wrong person confers no jurisdiction. Where the person intended to be sued is named as defendant and service is had on a different person who is not acting for, nor an agent of, the defendant, such service confers no jurisdiction over either the person named in the process or the person actually served. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

Distinction between subject matter jurisdiction and personal jurisdiction. Long-arm statute, § 13-1-124, together with defendant's note submitting to jurisdiction of Colorado courts for purposes of enforcement, conferred subject matter jurisdiction. However, in absence of valid service of process, court lacked personal jurisdiction and judgment was void. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

An objection to lack of personal jurisdiction relates to the power of a court to compel a defendant to appear and to defend or face entry of a default judgment. And, an objection to service of process is directed to the manner of notifying a defendant that a plaintiff seeks to have a court exercise personal jurisdiction over the defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

When a delay in service is not found to be the product of either wrongful conduct or a formal impediment to service, then service is not within a reasonable time and the case should be dismissed. Malm v. Villegas, 2015 CO 4, 342 P.3d 422.

An extraordinary delay in effecting service — a delay measured in years rather than days — can be justified only by extraordinary circumstances. Taylor v. HCA-Healthone LLC, 2018 COA 29, 417 P.3d 943.

The 63-day period specified by subsection (m) is not a hard deadline. Rather, the expiration of the 63-day period gives the court discretion to choose among three courses of action: (1) To give the plaintiff notice that it is contemplating dismissing the case for lack of service and ask the plaintiff to show good cause why it should not; (2) to order that service be made within a specified time; or (3) to dismiss the case without prejudice after giving the plaintiff notice. Curry v. Zag Built LLC, 2018 COA 66, 433 P.3d 125.

Interaction with notice-of-claim requirements in the Construction Defect Action Reform Act (CDARA). CDARA contemplates the situation in which a plaintiff may file a claim in court before sending a notice of claim to a prospective defendant; in that situation the action is stayed pending compliance with § 13-20-803.5. After the stay is lifted, the 63-day time limit begins to run again. Curry v. Zag Built LLC, 2018 COA 66, 433 P.3d 125.

A court abuses its discretion if it dismisses a complaint without giving the plaintiff notice and an opportunity to respond. Curry v. Zag Built LLC, 2018 COA 66, 433 P.3d 125.

An amendment to a complaint is permitted to relate back only where a new party had timely knowledge of the original action and the original complaint provided fair and adequate notice of the new claim in the amended complaint. Maldonado v. Pratt, 2016 COA 171, 409 P.3d 630.

An amendment to a civil claim will not relate back to the original complaint under the relation-back test unless the new party receives notice of the institution of the action within the period provided by section (m) of this rule. Maldonado v. Pratt, 2016 COA 171, 409 P.3d 630.

Applied in Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975); Burrows v. Greene, 198 Colo. 167, 599 P.2d 258 (1979); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Dutton, 629 P.2d 103 (Colo. 1981).

II. TO WHAT APPLICABLE.

Law reviews. For article, ''Actions Concerning Real Estate Including Service of Process: Rule 105 and Rule 4'', see 23 Rocky Mt. L. Rev. 614 (1951). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953).

Service of notice in proceedings under § 14-10-105 of Uniform Dissolution of Marriage Act is governed by the rules of civil procedure. In re Henne, 620 P.2d 62 (Colo. App. 1980).

Proceedings commenced under § 37-92-302 (1)(a) are not subject to service of process requirements of rule but rather are handled through the unique resume-notice provisions of § 37-92-302 (3). Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

Proceedings commenced under Torrens Land Registration Act are not subject to service of process requirements of this rule but rather are handled through the notice provisions of the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

III. ISSUANCE OF SUMMONS AND OTHER PROCESS.

Law reviews. For article, ''The Federal Rules from the Standpoint of the Colorado Code'', see 17 Dicta 170 (1940).

Annotator's note. Since section (b) of this rule is similar to § 35 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The summons provided for by this rule is not a writ or process within the meaning of the constitution; there is no definition of ''process'', given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily ''process''. A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is nowhere declared or required that such notice shall be only a writ issuing out of a court. Comet Consol. Mining Co. v. Frost, 15 Colo. 310, 25 P. 506 (1890).

A summons may be signed by an attorney and need not be under seal of court. Rand v. Pantagraph Co., 1 Colo. App. 270, 28 P. 661 (1891).

When a clerk has been appointed by a judge, so long as the appointment is not revoked, the clerk or his deputy alone has power to discharge the clerical duties of the office, and a summons issued and signed by the judge is void, notwithstanding the disqualification of the

clerk to act on account of absence or sickness. McNevins v. McNevins, 28 Colo. 245, 64 P. 199 (1901).

A judge may elect to perform the duties of clerk of his court, and, when he does so elect, he is authorized to issue and sign all processes from his court. McNevins v. McNevins, 28 Colo. 245, 64 P. 199 (1901).

A summons not issued and signed either by the clerk or plaintiff's attorney is no summons. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897).

The service of an unsigned summons does not effectively bring defendants within the jurisdiction of the court. Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

An acceptance of service of a purported summons which was signed by neither the clerk nor plaintiff's attorney would be no acceptance of service of summons. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897).

Entry of appearance by defendant to an action waives objections to summons or service thereof. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897); Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Summons issued upon a defective, but amendable, complaint is not void. A complaint which is defective, but amendable, cannot be regarded as entirely void, nor can a summons be so regarded merely because it is issued upon such a complaint. And it is of no importance that a copy of the original complaint was attached to the summons as served upon the respondents, because they are bound to take notice of the rule relating to amendments, and, if they choose to act on the assumption either that the plaintiff would not seek an amendment or that the court would not permit one, they do so at their peril. Goodman v. City of Ft. Collins, 164 F. 970 (8th Cir. 1908).

IV. CONTENTS OF SUMMONS.

A. In General.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959).

Annotator's note. Since section (c) of this rule is similar to § 36 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The summons is a process by which parties are brought into court, so as to give a court jurisdiction over their persons. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The purpose of a summons is to notify the defendant that an action has been brought against him, by whom, the place and court in which the same is brought, the relief demanded, and the time within which he must appear and answer in order to escape a judgment by default. Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

The form of a summons is prescribed by law, and whatever that form may be, it must be observed at least substantially. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The provisions of this rule concern the essential content of a summons. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

Provision of law is mandatory. Where the law expressly directs that process shall be in a specified form and issued in a particular manner, such a provision is mandatory, and a failure on the part of the proper official to comply with the law in that respect will render such process void. Smith v. Aurich, 6 Colo. 388 (1883).

A summons must contain all that is required by this rule whether deemed needful or not. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

A summons which does not meet the requirements of the law is a nullity. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

If the summons is void, there is no jurisdiction over the parties. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The summons must be prejudicial to be void. It is manifest without argument that a defect in the summons which will be sufficient to constitute it void or erroneous must be of such a character as to mislead the defendant to his prejudice, and to prejudicially affect, or tend to so affect, some substantial right. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1898).

There is a wide difference between a total failure and an inaccuracy or incompleteness of a required statement, especially so where the inaccuracy does not prejudicially affect a party nor tend in any manner to his injury. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1898).

If all of the material objects are clearly accomplished by the process, although other language be used than that of the rule, it would be unreasonable to say that the defendant might be heard to complain. Kimball v. Castagnio, 8 Colo. 525, 9 P. 488 (1885).

If copy served on defendant is sufficient, deficiencies in certified copy are immaterial. Where a certified copy of a summons obtained from the clerk of the court below, and purporting to have been served on defendant, is deficient, but the copy of the summons certified to the court in the transcript of the record as served on the defendant does not show such deficiency, an objection that the summons served in the action is deficient will not be considered. Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 P. 537 (1888).

A reference to the complaint for particulars does not aid a defective summons. Atchison, T. & S. F. R. R. v. Nichols, 8 Colo. 188, 6 P. 512 (1884); Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

B. Naming of Parties.

Rules make no exception to naming requirement. The rules of civil procedure make no exception in ''in rem'' actions, as distinguished from ''in personam'' actions, to the requirement that defendants be named if their names are known or be designated as ''unknown'' when such is the case. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

The words "et al." do not satisfy requirements that parties shall be named. Smith v. Aurich, 6 Colo. 388 (1882).

An abbreviation of person's name may suffice to identify party. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1899).

The omission of defendant's middle initial in a summons is immaterial, since in legal contemplation such initial constitutes no part of a person's name. Clark v. Nat'l Adjusters, Inc., 140 Colo. 593, 348 P.2d 370 (1959).

Naming of defendants insufficient. The designations, ''owner'' and ''operator'', in the caption of the case, without naming them, when those persons were known to the district attorney, are not in compliance with the requirements of the rules of civil procedure that a party defendant shall be named unless his name is unknown. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

C. Nature of Action.

Early provision required summons to state "the cause and general nature of the action". Barndollar v. Patton, 5 Colo. 46 (1879) (decided under repealed Civil Code 1887, § 34).

By a subsequent proviso it became no longer necessary. Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894); Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1899).

Even under the early provision, statement of nature of action was not necessary if copy of complaint was served. Swem v. Newell, 19 Colo. 397, 35 P. 734 (1894).

D. Relief Demanded.

Summons which fails to comply with the provision of this rule, which provides that it shall briefly state the sum of money or other relief demanded in the action, is fatally defective, and a motion to quash should be sustained. Farris v. Walter, 2 Colo. App. 450, 31 P. 231 (1892).

A summons in a suit for contribution which states that the action is brought to recover judgment for such amount as should be found to be due from each defendant is not vulnerable to a motion to quash on the ground that it does not state the amount of money demanded. Taylor v. Hake, 92 Colo. 330, 20 P.2d 546 (1933).

Prayer for relief can be aided by statements in complaint where copy thereof is served with summons. Sage Inv. Co. v. Haley, 59 Colo. 504, 149 P. 437 (1915).

Under early proviso, reference to this pleading in no way aided a defective description in summons. Atchison, T. & S. F. R. R. v. Nichols, 8 Colo. 188, 6 P. 512 (1884) (decided under repealed Civil Code 1887, § 34).

This rule does not require that a copy of the complaint must be served with the summons. Smith v. Aurich, 6 Colo. 388 (1882); Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Summons in an action based on tort for false representations should show that the action is to recover damages for obtaining money from plaintiff by false and fraudulent representations or by deceit. Erisman v. McCarty, 77 Colo. 289, 236 P. 777 (1925).

Action shown to be on contract. A summons stating that the action is for the recovery of money and interest thereon as well as attorney fees, according to the terms of each, shows that the action is on contract. Erisman v. McCarty, 77 Colo. 289, 236 P. 777 (1925).

The phrase, "in consequence of certain acts and doings of said defendants", is too indefinite to be capable of itself of imparting any information whatever, as to what the defendant is called upon to answer, nor can an expression so void of advice be aided by reference to the complaint. Smith v. Aurich, 6 Colo. 388 (1882).

The relief demanded does not limit the plaintiff in respect to the remedy which he may have; the court will disregard the prayer and rely upon the facts alleged and proved as the basis of its remedial action. Nevin v. Lulu & White Silver Mining Co., 10 Colo. 357, 15 P. 611 (1887); Powell v. Nat'l Bank, 19 Colo. App. 57, 74 P. 536 (1903).

Principle that clerk must look to summons alone for amount may apply only to entry of judgment. Where there is no imperative reason insofar as service and notice and the entry of default are concerned why the summons should state the sum of money demanded, the contention that the clerk must look to the summons alone for the amount demanded can be applied only to the lawful power of the clerk to enter the judgment, and when the clerk does not enter the judgment, but only enters the default, this contention fails for lack of application. Griffing v. Smith, 26 Colo. App. 220, 142 P. 202 (1914).

Applied in Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

V. BY WHOM SERVED.

Law reviews. For article, ''Constitutional Law'', see 32 Dicta 397 (1955). For article, ''International Service of Process Under the Hague Convention and Colorado Law'', see 41 Colo. Law. 79 (November 2012).

Annotator's note. Since section (d) of this rule is similar to § 39 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The words "or by any person not a party to the action" are intended to mean any other person competent to make the service, which, of necessity, excludes the attorneys in the case, they being incompetent. Nelson v. Chittenden, 53 Colo. 30, 123 P. 656 (1912).

The service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity. Toenniges v. Drake, 7 Colo. 471, 4 P. 790 (1884).

Service of process by an employee of counsel who is not counsel or associate counsel is proper service and does not violate the provisions of this rule requiring service to be made by any person not a party to the action. People in Interest of T.G., 849 P.2d 843 (Colo. App. 1992).

Server is not required to go outside county in which action is pending. The sheriff, or person not a party to the action, to whom the summons in a civil action is delivered for service is not in his search for the defendant required to go outside the county in which the action brought is pending. The return thereon by such officer or person that defendant cannot after diligent search be found therein constitutes a proper and sufficient basis for publication of summons. Gamewell v. Strumpler, 84 Colo. 459, 271 P. 180 (1928).

The sheriff loses his official character when he passes out of his own county, so that in serving a summons in another county he acts merely as an individual, and such service must be shown by his affidavit. His mere return, unsworn, is no evidence of the service, and judgment rendered upon such return of service, not otherwise shown, is void. Munson v. Pawnee Cattle Co., 53 Colo. 337, 126 P. 275 (1912).

Service as authorized by international agreement is not the exclusive means of serving a defendant located in a foreign country under section (d). This provision only applies to service that occurs in a foreign country and does not prohibit another form of service within the United States if otherwise authorized. Substituted service is a valid alternative to service abroad. Willhite v. Rodriguez-Cera, 2012 CO 29, 274 P.3d 1233.

VI. PERSONAL SERVICE IN STATE.

A. In General.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For note, ''Service of Process in Colorado: A Proposed Revision of Rule Four'', see 41 U. Colo. L. Rev. 569 (1969).

Annotator's note. Since section (e) of this rule is similar to § 40 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This rule requires that a "copy" of the summons be served, not a duplicate original. Hocks v. Farmers Union Co-op. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

The rule is satisfied where a transcript of the original summons, bearing the names of the clerk and counsel for the plaintiff in typewriting is served; actual signatures were not necessary. Hocks v. Farmers Union Co-op. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

Voluntary appearance of a party is equivalent to personal service of process. Munson v. Luxford, 95 Colo. 12, 34 P.2d 91 (1935).

In motions to quash the service of process, the plaintiffs in such actions have the burden, after challenge, of establishing by competent evidence all facts essential to jurisdiction. Harvel v. District Court, 166 Colo. 520, 444 P.2d 629 (1968).

Clear and convincing proof by defendant is required. If the return on a summons is in proper form and shows service in accordance with the rule, the burden is upon defendant to overthrow the return by clear and convincing proof. Gibbs v. Ison, 76 Colo. 240, 230 P. 784 (1924).

Mere failure to obtain proper service does not warrant dismissal of the cause of action. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

A cause of action filed may remain so indefinitely pending service of process upon the parties. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

Counsel impliedly authorized to accept service of process. Where an attorney is hired to commence a lawsuit, he is authorized to accept service of process in a closely related judicial proceeding. Southerlin v. Automotive Elec. Corp., 773 P.2d 599 (Colo. App. 1988).

B. Upon Natural Persons.

Law reviews. For article, ''In Re: The Mourners'', see 6 Dicta 7 (April 1929).

A registered agent may be served in the same manner as a "natural person" under this rule. Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Service of process on defendant's registered agent was proper where delivered to agent's assistant at defendant's workplace. Agent's failure to receive process because of his own carelessness and neglect does not invalidate its proper service. Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

This rule requires that the copy of the summons and complaint be ''delivered'' to the proper person. Martin v. District Court, 150 Colo. 577, 375 P.2d 105 (1962).

Clearly, by its own terms, the rule does not require that this ''delivery'' be accompanied by a reading aloud of the documents so served, or by explaining what they are, or by verbally advising the person sought to be served as to what he or she should do with the papers. Martin v. District Court, 150 Colo. 577, 375 P.2d 105 (1962); Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

The term "usual place of abode" has generally been construed to mean the place where that person is actually living at the time service is attempted. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967); Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

It is not synonymous with "domicile". Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967); Sec. State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

Upon one's induction into the armed forces, his parent's home ceases to be his place of abode, and it does not matter in this regard that some of his clothing and personal belongings remain there or that he intends to return to his mother's home, wherever it may be, as soon as his military service is terminated. While filial love binds him to his parents wherever they may be, and their home is his for lack of another, it is no longer his ''actual place of abode'' within the intendment of the rule. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

The term "family" includes husband's adult daughter who was visiting him at the time of service. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Service of summons upon an infant over the age of 14 years, but not upon the guardian, no guardian ''ad litem'' being appointed, but the record reciting that the infant defendant appeared by his next friend as well as by attorney was sufficient service and the appearance was authorized. Filmore v. Russell, 6 Colo. 171 (1881).

C. Upon Unincorporated Associations.

Annotator's note. Since section (e)(4) of this rule is similar to that section of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The general rule at common law was that where the obligation was joint only, all the joint obligors must be made parties defendant and must be sued jointly. Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

The purpose of this rule is to change the common-law rule and provide a procedure whereby a partnership could be sued upon a partnership obligation, service made upon one or more but not all of the partners, and a judgment rendered binding the partnership and its property as well as the individual property of the partners served as partners. Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

This rule only provides a method of suing a partnership in addition to the remedy already existing. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

This rule is cumulative merely and does not affect the right to sue all the members of a firm by their several individual names and obtain a joint judgment against them as partners. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

It makes the service of summons upon one partner sufficient to bring the partnership into court and bind its property by the judgment. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

Service of summons includes serving member of family over 18 at residence. Service of summons upon a member of a partnership by leaving a copy of the summons and complaint at his usual place of residence with a member of his family over 15 (now 18) years of age is sufficient service on a partnership under this rule. Barnes v. Colo. Springs & C. C. D. Ry., 42 Colo. 461, 94 P. 570 (1908).

No personal judgment can be obtained against the partners not served; as to them, the judgment rendered can bind only their interests in the partnership property. The judgment should be against the partnership, and in a proper manner, the individual property of the member or members served might be reached for the purpose of satisfying it. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901); Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

A judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Where in an action upon a partnership debt only one of two partners was served with summons and a judgment was entered against the individual partner served, but no judgment was entered against the partnership and the other partner was afterwards brought in by ''scire facias'' and a judgment was entered against said partner as for an individual debt, then, in the absence of a judgment against the firm, it was error to render judgment against the other partner for the individual debt. Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901).

A judgment on copartnership promissory notes merged the notes into the judgment, although only one of the partners was served with summons or appeared in the action, and suit could not thereafter be maintained on the notes against the partners not served. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935); Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

Court has jurisdiction of a partner who is served for purposes of proceeding to final judgment against him. A judgment having been entered against a partnership and execution thereon having been returned unsatisfied under the provisions of this rule, the court has and continues to have jurisdiction of a partner who had been served with summons for the purpose of proceeding to final judgment against him. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Service upon a partner in a partnership that, in turn, is a partner in a second partnership does not provide notice to the second partnership with sufficient notice of suit against it. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994), aff'd, 907 P.2d 79 (Colo. 1995).

Mere knowledge of the general partner of a partnership, which, in turn, is a partner in a second partnership, that a legal proceeding is pending is not a substitute for service upon the proper entity. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994), aff'd, 907 P.2d 79 (Colo. 1995).

An amendment adding name of another partner is not a change of the cause of action. Where an action is brought against a partnership under the proper partnership name and against one partner who is served with summons, an amendment setting forth the name of another partner and making him a party to the action is not a change of the cause of action by changing the parties to the contract sued on where the partnership named in the amendment and the matter sued on are the same as those named in the original. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

An action may be maintained against a subordinate or branch organization or association upon a mutual benefit insurance policy where the policy is the obligation of the subordinate or branch association, although the association is under the control of, and the certificate is under the seal of, a supreme lodge. On such a policy an action is properly brought against them under its associate name. Endowment Rank of K. P. v. Powell, 25 Colo. 154, 53 P. 285 (1898).

Ruling denying motion to quash service is appealable order. Where the defendant appears specially and moves to quash the service of summons upon the ground that the service under section (e)(4) of this rule is ineffective and void, then, when the trial court overrules this motion, this ruling denying the defendants' motion to quash the service of summons is an appealable order. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

D. Upon Corporations.

Determining corporate presence within the state is resolved by: (1) Leaving the matter in the sound discretion of a trial court; (2) distinguishing between those cases where merely the internal affairs of a corporation are involved and those cases where the corporation has had transactions with third persons; and (3) considering the equities of the case. Hibbard, Spencer, Bartlett & Co. v. District Court, 138 Colo. 270, 332 P.2d 208 (1958).

The question of what constitutes doing business is a fact to be determined as any other fact. Hibbard, Spencer, Bartlett & Co. v. District Court, 138 Colo. 270, 332 P.2d 208 (1958).

The contracting of a debt is a sufficient doing of business within this state to render a corporation amenable to the courts of this state if jurisdiction could be obtained by service of process as provided in this rule. Colo. Iron-Works v. Sierra Grande Mining Co., 15 Colo. 499, 25 P. 325 (1890).

The Colorado supreme court has not condemned the manner of service of process under this rule as being unfair or as failing to give notice. Focht v. Southwestern Skyways, Inc., 220 F. Supp. 441 (D. Colo. 1963), aff'd, 336 F.2d 603 (10th Cir. 1964).

To bind a corporation, the service of process must be upon the identical agent provided by the rule. Great W. Mining Co. v.

Woodmas of Alston Mining Co., 12 Colo. 46, 20 P. 771 (1888).

Section (e)(1) requires either personal service or substituted service at the party's usual place of business, with the party's stenographer, bookkeeper, or chief clerk. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Service upon the vice-president of a corporation is sufficient even though the return does not show that the president could not be found in the county. Comet Consol. Mining Co. v. Frost, 15 Colo. 310, 25 P. 506 (1890).

Determination of whether a person is a general agent of a corporation for service of process requires an analysis of that person's duties, responsibilities, and authority. Denman v. Great Western Ry. Co., 811 P.2d 415 (Colo. App. 1990).

Delivery of suit papers to corporation's registered agent may be accomplished in the same manner as service on a "natural person" under section (e)(1). Thus, delivery of such papers to a registered agent's ''stenographer, bookkeeper, or chief clerk'' constitutes delivery to that agent. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986); Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Secretary's corporate employer which was the sole shareholder of defendant corporation and whose president was the defendant corporation's registered agent held to be registered agent's ''stenographer'' under rule authorizing service of process on natural person's stenographer. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Service held proper where secretary was performing service directly for registered agent at the same address that he had listed as defendant's corporation's registered office since it was reasonable to conclude that the secretary would have given registered agent notice of service. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Service of process on defendant was proper where two copies of summons were served on an agent representing both defendants in the case and the summons did not specifically indicate which of the two defendants was being served. A party assumes the risk that errors in transmittal of service of process by its registered agent, who also receives service of process for numerous other entities, will bind the principal. Brown Grain & Livestock, Inc. v. Union Pac. Res. Co., 878 F.2d 157 (Colo. App. 1994).

Nonresident officer not on business may be served in state. Under this rule service is legally sufficient when made on an officer of a corporation whose residence is in another state and who is at the time of service temporarily in this state on business not connected with the corporation; the fact that such officer invited such service would be pertinent in determining the validity thereof. Venner v. Denver Union Water Co., 40 Colo. 212, 90 P. 623 (1907).

Service may properly be made upon agent of receivers who have displaced ordinary officers. The receivers of a foreign corporation, who by their appointment as such displace the ordinary officers of a corporation, are to be treated as foreign receivers, and if the return of the sheriff shows a service that would have been sufficient upon the corporation under its ordinary management, it must be equally sufficient if made upon an agent of the receivers when the affairs of the corporation are under the management of the latter. Ganebin v. Phelan, 5 Colo. 83 (1879).

Under this rule, service is proper upon the agent of a foreign corporation if made within the state. White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966).

Corporation was properly served when the individual registered agent was properly served and thus the trial court had in personam jurisdiction. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Service shall be made upon agent in county where action is brought. In a suit against a foreign corporation, service must be made upon it by delivering a copy of the summons to its agent found within the county where the action is brought. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

It is only in such agent not found within the county that substituted service is valid. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

Service upon stockholder is a nullity unless agent is not found. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

A person engaged in settling an insurance loss in state is an agent. Where a foreign insurance corporation employs an adjusting company to settle a loss sustained in Colorado and an employee of the latter company is given the insurance company's files and drafts for payment of any sum agreed upon in settlement of the claim and invested with full power to make the adjustment, then, in these circumstances, such an employee of the adjustment company is the agent of the insurance company, and service of process on him is service on the latter company. Union Mut. Life Co. v. District Court, 97 Colo. 108, 47 P.2d 401 (1935).

In an action against a corporation upon a claim for services by an agent assigned by such agent to plaintiff, service of summons upon the agent who assigned the claim is not a sufficient service on the corporation. White House Mt. Gold Mining Co. v. Powell, 30 Colo. 397, 70 P. 679 (1902).

Service may be had upon stockholder. It is only in the event that no agent is found in the county that service may be had upon a stockholder. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

VII. PERSONAL SERVICE OUTSIDE THE STATE.

A. In General.

Law reviews. For article, ''Some Footnotes to the 1945 Statutes'', see 22 Dicta 130 (1945). For article, ''Constitutional Law'', see 32 Dicta 397 (1955). For article, ''Another Decade of Colorado Conflicts'', see 33 Rocky Mt. L. Rev. 139 (1961). For article, ''Colorado's Short-Arm Jurisdiction'', see 37 U. Colo. L. Rev. 309 (1965). For article, ''Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform'', see 38 U. Colo. L. Rev. 137 (1966).

B. Natural Persons.

Law reviews. For article, ''Conflict of Laws, Constitutional Law, Elections'', see 30 Dicta 449 (1953). For article, ''Civil Remedies and Civil Procedure'', see 30 Dicta 465 (1953).

This rule relating to personal service outside the state is confined to the question of who is, or who is not, a resident of the state of Colorado. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

Burden of proof is on plaintiff. When the question of Colorado residence is raised and a denial thereof is prima facie made, the burden of establishing, or proving, that defendants are in fact residents of Colorado is on plaintiffs. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

"Residence" and "domicile" are commonly taken as being synonymous, notwithstanding that in precise usage they are not convertible terms. Rust v. Meredith Publ.Co., 122 F. Supp. 879 (D. Colo. 1954).

"Place of abode" is not necessarily synonymous with "domicile". The term ''usual place of abode'' has generally been construed to mean the place where that person is actually living at the time service is attempted; it is not necessarily synonymous with ''domicile''. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

Residence is determined by intention of parties supported by acts. Domicile, or residence as used in this rule, in a legal sense, is determined by the intention of the parties. But while intention seems to be the controlling element, it is not always conclusive unless the intention is fortified by some act or acts in support thereof. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

The issue of domicile is a compound question of fact and intention. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

A change of voting place surely is compelling evidence of the intention of making a change of residence. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

Residence may commence in another state before a definite county or precinct is fixed for a permanent residence. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

C. Other Than Natural Persons.

A corporation organized under the laws of one state is a resident of that state under whose laws it was created and cannot be a resident of any other state. Rust v. Meredith Publ. Co., 122 F. Supp. 879 (D. Colo. 1954).

Even if a corporation has permission to carry on a business in another state upon compliance with the laws of the other state, such permission and compliance does not make it a resident of such other state. Rust v. Meredith Publ. Co., 122 F. Supp. 879 (D. Colo. 1954).

D. Status or In Rem.

Under this rule, service is good if it can be said that the action is one affecting a specific ''status'' or is a proceeding ''in rem''. Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

Colorado recognizes the concept "in rem" or "quasi in rem" jurisdiction acquired through attachment or garnishment of the defendant's property within the state by providing for service of process on owners of specific property without regard to residence or domicile. A judgment which is rendered in such a case operates solely upon the res attached. George v. Lewis, 204 F. Supp. 380 (D. Colo. 1962).

Service outside state for divorce is valid. Personal service outside the state when made upon a defendant in an action for divorce is valid, since an action for divorce unquestionably is an action ''in rem''. Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

The rule is not applicable to proceedings for annulment in that matrimonial ''status'' is not the subject. Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

VIII. OTHER SERVICE.

A. In General.

Law reviews. For article, ''Again — How Many Times?'', see 21 Dicta 62 (1944).

Annotator's note. Since section (g) of this rule is similar to § 45 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases

construing that section have been included in the annotations to this rule.

Where no judgment "in personam" is sought by plaintiffs against a nonresident defendant, the service of summons by publication is proper. Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952).

In cases affecting specific property or in other proceedings in rem, section (g) specifically authorizes service by publication upon a nonresident. In re Ramsey, 34 Colo. App. 338, 526 P.2d 319 (1974).

Proceedings by wife to charge husband's property with alimony is a proceeding "in rem". Where the plaintiff seeks to charge her husband's property with her alimony, and to set aside conveyances made in fraud of her rights, the suit is a proceeding ''in rem'' within the meaning of this rule. Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885 (1895).

A creditor's bill is a proceeding in rem, within the meaning of this rule. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

Actions "in the nature of actions in rem" may be supported by constructive service as fully as those truly ''in rem''. Kern v. Wilson, 91 Colo. 355, 14 P.2d 1014 (1932).

Service by publication of summons in actions "in rem" is not limited to cases involving real estate, but may apply to those involving personal property as well. Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952).

Where plaintiff fails to initiate a traditional in rem action or a quasi in rem action in a negligence suit, service by publication was improper. ReMine ex rel. Liley v. District Court, 709 P.2d 1379 (Colo. 1985).

Substituted service is not available outside the state. Unlike residents, nonresidents must be served personally under the plain language of section (f)(1). United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Substituted service under section (f) is a valid alternative to service abroad. While this provision requires documents to be mailed abroad, the international agreement on personal service in the foreign country does not apply because the transmittal of documents abroad is not required to effectuate service under this provision. Willhite v. Rodriguez-Cera, 2012 CO 29, 274 P.3d 1233.

B. By Mail.

The mandatory requirements of this rule include a verified motion by either the plaintiff or counsel in his behalf for an order for service by mail, a hearing ''ex parte'', and entry of an order of court directing the clerk to send a copy of process by mail to known out-of-state defendants. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

Where a plaintiff does not follow this rule and omits not one but many mandatory steps set out therein, it is error to permit a judgment to stand. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

If summons is properly addressed but not received, it will be presumed that postage was not prepaid. Where it is shown that a copy of the summons in a cause brought against a nonresident defendant was properly addressed and mailed to the defendant whose place of residence was well known, where he had resided for years, and where he was accustomed to receive his mail-matter regularly, but that the same was not received by him, it will be presumed, in the absence of proof to the contrary, that the sender omitted to prepay the postage. Morton v. Morton, 16 Colo. 358, 27 P. 718 (1891).

IX. PUBLICATION.

A. In General.

Law reviews. For article, ''A Tax Title Quieted'', see 6 Dicta 9 (Nov. 1928). For article, ''How Many Times?'', see 19 Dicta 231 (1942). For article, ''Again — How Many Times?'', see 21 Dicta 62 (1944). For article, ''Motion for Publication of Summons in Quiet Title Proceedings'', see 26 Dicta 182 (1949).

Annotator's note. Since section (h) of this rule is similar to § 45 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The law requires that personal service shall be had whenever it is obtainable. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

When some evidence indicates the whereabouts of the absent party, any form of substituted service must have a reasonable chance of giving that party actual notice of the proceeding. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Publication must be for one of enumerated cases. To render a publication of summons effective for any purpose, it must be made in one of the enumerated cases. Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885 (1895).

The ground for such service must exist, that is, that the defendant cannot be personally served within the state. Hanshue v. Charles B. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

In cases affecting specific property or in other proceedings in rem, sections (g) and (h) specifically authorize service by publication

upon a nonresident. In re Ramsey, 34 Colo. App. 338, 526 P.2d 319 (1974).

Service by publication in the state where property is located is not always constitutionally adequate in quasi in rem actions. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Section (h) controls number of publications for child custody jurisdiction act. Since § 14-13-106 (1)(d) does not specify the number of times that publication is required to effect notice under the Uniform Child Custody Jurisdiction Act, section (h) of this rule controls. In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979).

Service by publication is last resort. In case service may not be had either personally or by mailing or other substituted service, then service by publication is permissible as a final and last resort. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Constructive service by publication is a right given by this rule. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1919).

Every material requirement in relation to service by publication must be strictly complied with to give the court jurisdiction. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 P. 187 (1892); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1919); Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. 1995).

Constructive service is in derogation of the common law, making it imperative that there must be a strict compliance with every requirement of this rule; failure in this respect is fatal. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Compliance with every condition of this rule must affirmatively appear from the record. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

But order for publication needs not precede the beginning of publication. Where plaintiff expressly advised the court of all relevant facts and circumstances, including the fact that she had already begun publication, no prejudice resulted and neither the service nor the judgment was invalid. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Nothing excuses omissions or insufficient statements. Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Sylph Mining & Milling Co. v. Williams, 4 Colo. App. 345, 36 P. 80 (1894); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Courts are jealous of abuses in the application thereof. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof; hence, they tolerate the omission of no material step required by law in connection therewith. Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Where a plaintiff does not follow this rule and omits not one but many mandatory steps set out therein, it is error to permit a judgment to stand. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

Failure to comply with due diligence requirements voids judgment. Where plaintiff in a quiet title action failed to exercise due diligence in determining the whereabouts of the record owners of property before resorting to service by publication, the judgment obtained against the record owners was void. Owens v. Tergeson, 2015 COA 164, 363 P.3d 826.

This necessity to strictly follow the rule has long been established. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 P. 187 (1892).

If rule is not complied with, the service may be collaterally attacked. In obtaining constructive service of process by publication, a compliance with the method pointed out by this rule must be observed, and if the record being offered in evidence shows affirmatively that its provisions relating to service by publication were not complied with, it may be attacked in a collateral proceeding. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910).

The recital in a judgment that service was complied with does not change this rule. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910).

The motion and affidavit upon which the order for constructive service is entered takes precedence over recitals in a judgment. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

The authorities are in conflict as to whether the constructive service may be presumed regular where record is silent. Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Rule seems to be that record must show. Where reliance is placed wholly upon service

by publication, the rule seems to be that the record must affirmatively show all the essential jurisdictional facts. This rule is not entirely undisputed, but it is sanctioned by the weight of authority and is founded upon excellent reason. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885).

If record is not silent no presumption can be indulged in. Where the record is not silent on this subject and where it affirmatively appears therein that the court did not have jurisdiction of the person, no such presumption can be indulged in. Clayton v. Clayton, 4 Colo. 410 (1878); Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Errors in the service of summons by publication may be waived by the appearance and answer of defendant to the merits. New York & B. M. Co. v. Gill, 7 Colo. 100, 2 P. 5 (1883).

Applied in George v. Lewis, 228 F. Supp. 725 (D. Colo. 1964).

B. On Verified Motion.

Under this rule a verified motion must state the facts authorizing the service and show the efforts, if any, that have been made to make personal service within the state, and it must name the known defendants who are outside the state and their last known addresses, or that the addresses are unknown. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

In the motion and affidavit, the applicant must be forthright and explicit in setting forth all of the pertinent facts in order that the court may have before it the complete picture to enable correct evaluation and determination whether service by publication is justified or required under the circumstances. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

The validity of constructive service is dependent upon the good faith of the plaintiff and the accuracy of the statements contained in his verified motion upon which the order for publication is based. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

If plaintiff in any way misrepresents the facts, either actively or merely by failure to reveal them, then it follows as a matter of course that an order directing constructive service of process by publication is invalid. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Anything short of the full disclosure of all known pertinent facts is a fraud upon the court and renders void any decree thereafter entered. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

To simply go through the form of legalism without a fair disclosure of existing known facts is of no avail. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Where the plaintiff knows the address of, and how to reach, the defendant in another jurisdiction so as to permit personal service of summons upon him, but instead resorts to publication in a newspaper defendant would be unlikely to see, such conduct is repugnant to equity and constitutes fraud nullifying a decree which is obtained by reason of it. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954).

Where it appears from the affidavit for publication that the affiant, after due diligence, is unable to learn the whereabouts, residence, or post-office address of a defendant, coupled with further statements that he either resides out of the state, or has departed therefrom without the intention of returning, or is concealing himself to avoid the service of process, it logically follows that the defendant is either a nonresident of the state, has departed from the state without the intention of returning, or is concealing himself to avoid the service of process. Hanshue v. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

To obtain an order for service by publication an affidavit to that end must show, among other things, that the defendant resides out of the state, or that he has departed from the state without intention of returning, or that he is concealing himself to avoid service of process; it must also give his post-office address if known, or if unknown show that fact. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Verified motion for service by publication held sufficient. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Where a verified motion filed for publication of a summons contains no statement that defendant is a nonresident of the state, that he has departed the state without intention of returning, or that he is concealing himself to avoid service of process, and it is recited in the motion that defendant's whereabouts are unknown, but there is no statement that he could not ''be served by personal service in the state'', then, in the absence of this mandatory requirement, the motion is fatally defective, and the court is without jurisdiction to proceed. Sine v. Stout, 119 Colo. 254, 203 P.2d 495 (1949).

Constructive service of summons founded upon an affidavit which fails to comply with this rule is without effect. Empire Ranch & Cattle Co. v. Gibson, 22 Colo. App. 617, 126 P. 1103 (1912).

Such an affidavit is essential. An affidavit by a person authorized by law to make the same and containing the statements required by this rule is an essential prerequisite to give the court jurisdiction to proceed. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Millage v. Richards, 52 Colo. 512, 122 P. 788 (1912).

Since this rule requires an affidavit to matters involving legal opinion and conclusions of law and fact, it contemplates that such an affidavit will be made upon the only basis on which such opinions and conclusions can be reached. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

Affiant's knowledge of matters stated in his affidavit must of necessity frequently rest upon information derived from others, and where this is so it is generally sufficient to aver upon information and belief that such matters are true; in such cases belief is to be considered an absolute term, and perjury may be assigned on such affidavit, if false. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

The chief test of the sufficiency of the affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

Where the averment made applies to many defendants, both individual and corporate, taken together with the failure to give the post-office addresses of any of the defendants or to state that they are unknown, strongly suggests an effort to conceal all, rather than to furnish any, information by which notice of the suit would possibly reach any of the defendants. Gibson v. Wagner, 25 Colo. App. 129, 136 P. 93 (1913).

To state that the residence is unknown is not in strict compliance with this rule which requires an affidavit for publication of summons to state that the post-office address is unknown. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Where an affidavit for the publication of the summons states that certain defendants named, ''either reside out of the state or have departed therefrom, or concealed themselves to avoid process, and that their post-office address is unknown to affiant'' is a compliance with this rule. Hanshue v. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

Where the affidavit sets forth that the officers of a company "reside out of the state", the affidavit is sufficient. Jotter v. Marvin Inv. Co., 67 Colo. 555, 189 P. 22 (1920).

C. The Order.

The object of the publication of summons is to give notice to the defendant of a suit pending and of its purpose. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

Where the judgment is found upon substituted service of summons the defendant's name must be correctly given in the notice, although the doctrine of ''idem sonans'' applies to records, such as judgments. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

The failure of the publication notice to contain the forename or Christian name of the party is ordinarily held to prevent a court from obtaining jurisdiction over him. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Initial letters only are sufficient. Where the papers do not give the full Christian names of all the parties, but give the initial letters thereof only, this is sufficient. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

It must be evident to every person that a published notice, using the name by which the defendant is commonly known in the community, will as readily attract his attention as if his real name were used, particularly where the initials are the same, and that the use of the name as commonly known will much more readily and probably attract the attention of his acquaintances and friends by whom information might be communicated to him than if the publication had been by his real name by which he was not commonly known. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

Evidence of identity must be made. Upon mere publication of the summons in which one is named as defendant, those claiming under a similar name are not affected unless there is evidence of the identity in fact of former name with the latter one. Bloomer v. Cristler, 22 Colo. App. 238, 123 P. 966 (1912).

D. Period of Time.

A delay of five months between the return of the original summons by the sheriff and the making of the order of publication does not invalidate the order of publication nor render the service void. Richardson v. Wortman, 34 Colo. 374, 83 P. 381 (1905).

Publication must be for four weeks. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

The clerk must within 15 days after the order of publication mail a copy of the process to each of the persons whose addresses are known. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

Service is complete on last day of publication. By presumption of law a defendant who is served with summons by publication is charged with knowledge that service will be complete on the day of the last publication. Netland v.

Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

Default judgment entered prior to time allowed is error. After constructive service by publication, a judgment by default entered before the expiration of the time allowed to plead or answer is premature, and in a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. Netland v. Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

X. MANNER OF PROOF.

Annotator's note. Since section (i) of this rule is similar to § 49 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The return serves no purpose except to show to the court that there has been service and to make a record thereof, so that the court's jurisdiction will appear forever. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

It is the service of summons that confers jurisdiction over the person of a defendant, not the return. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

The return of service is not aided by presumption. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

A sheriff's return of service is prima facie evidence of the facts recited therein. Gibbs v. Ison, 76 Colo. 240, 230 P. 784 (1924); Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

The prima facie evidence represented by a return of service must be overcome by clear and convincing proof. Stegall v. Stegall, 756 P.2d 384 (Colo. App. 1987).

Showing may be sufficient to overcome prima facie showing. Where there is a showing, even though not as detailed as may be desirable, which nonetheless is sufficient as a matter of law to overcome the prima facie showing made by a sheriff's return, the service must therefore be set aside. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

An insufficient return should be amended. It is the duty of a person serving a summons to amend his return, by leave of court, as soon as he knows that it is erroneous or insufficient. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

An erroneous return does not detract from a valid service. Clark v. Nat'l Adjusters, Inc., 140 Colo. 593, 348 P.2d 370 (1959).

Service of summons by acknowledgment is sufficient and gives the court full jurisdiction. Wilson v. Carroll, 80 Colo. 234, 250 P. 555 (1926).

It is the voluntary return that constitutes valid service. It is not alone the delivery of the summons to defendant, but the voluntary return thereof to plaintiff with her written acknowledgment thereon which constitutes valid and sufficient service. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

It may be voluntary though accompanied by bitter reproaches. That the writings on the summons constituting an acceptance of service are accompanied by bitter reproaches and severe denunciations of plaintiff by defendant does not change the fact that he received copies of the summons and voluntarily acknowledged and returned the same to plaintiff with full knowledge of the nature and purpose of the action which the plaintiff had brought against him. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Even if defendant says in one part of the indorsement that he did not know the meaning of the summons, it is still good where his whole language taken together clearly shows that he did know and that he returned them to plaintiff that he might secure whatever earthly law might do for him. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Where no appeal is taken from a trial judge's order in which he ruled adversely on a preliminary motion questioning under this rule jurisdiction, the right has been waived. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

In termination of parental rights case, omission of the process server's verified signature is insufficient to cause prejudice to father's case where father acknowledged he received the notices and petitions. Allowing an amendment to cure the defect serves the best interests of the children. In re Petition of Taylor, 134 P.3d 579 (Colo. App. 2006).

XI. AMENDMENT.

A summons is subject to amendment by the court. Erdman v. Hardesty, 14 Colo. App. 395, 60 P. 360 (1900) (decided under § 41 of the former code of civil procedure, which was replaced by the rules of civil procedure in 1941).

Originals not to be treated as sacrosanct. As with most pleadings and writings in the nature of pleadings, the purpose of justice is best served not by treating originals as sacrosanct, but rather by permitting the parties to ensure that the issues, as ultimately framed, represent the parties' true positions. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

XII. TIME LIMIT FOR SERVICE.

Section (m) requires notice before dismissal, but does not require notice after expira-

tion of the service deadline. The sixty-three-day deadline is a condition precedent only to dismissal or a new deadline. Taylor v. HCA-Healthone LLC, 2018 COA 29, 417 P.3d 943.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Making Service: (1) Service under C.R.C.P. 5(a) on a party represented by an attorney is made upon the attorney unless the court orders personal service upon the party. A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any out-of-state attorney practicing in any courts of this state.

(2) Service under C.R.C.P. 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone 18 years of age or older residing there;

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing;

(C) If the person served has no known address, leaving a copy with the clerk of the court; or

(D) Delivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number or an email address in the filing effects consent in writing for such delivery. Parties who have subscribed to E-Filing, pursuant to C.R.C.P. 121 Section 1-26 § 1.(d), have agreed to receive E-Service. Service by other electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service by other electronic means or overnight courier under C.R.C.P. 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Service: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing Certificate of Service. All papers after the initial pleading required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule C.R.C.P. 26(a)(1) or (2) and the following discovery requests and responses shall not be filed until they are used in the proceeding or the court orders otherwise: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

(e) Filing with Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except

that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A paper filed by E-Filing in compliance with C.R.C.P. 121 Section 1-26 constitutes a written paper for the purpose of this Rule. The clerk shall not refuse to accept any paper presented for filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(f) Inmate Filing and Service. Except where personal service is required, a pleading or paper filed or served by an inmate confined to an institution is timely filed or served if deposited in the institution's internal mailing system on or before the last day for filing or serving. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (b) amended and effective September 6, 1990; (b), (d), and (e) amended and effective January 1, 1993; entire rule amended and adopted May 17, 2001, effective July 1, 2001; (b), (d), and (e) amended and adopted October 20, 2005, effective January 1, 2006; (b)(2)(D) amended and effective June 21, 2012.

Cross references: For service of process, see C.R.C.P. 4; for parties, see C.R.C.P. 17 to 25.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing'', see 35 Colo. Law. 21 (May 2006).

Although this rule does not specifically refer to an "offer of settlement", it includes any "similar paper", which would include an "offer of settlement" pursuant to § 13-17-202. Serving an offer via facsimile, therefore, was proper under this rule. Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

Applied in Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978); Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

II. SERVICE: WHEN REQUIRED.

A judgment of dismissal with prejudice entered without notice is void and subject to direct or collateral attack. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959); Radinsky v. Kripke, 143 Colo. 454, 354 P.2d 500 (1960).

It is the substance, not the form, of a request to the court which controls the necessity for proper notice. Phillips v. Phillips, 155 Colo. 538, 400 P.2d 450 (1964); Cont'l Oil Co. v. Benham, 163 Colo. 255, 430 P.2d 90 (1967).

Where the issues of fact tendered by a motion "ex parte" in effect and in substance constitute a new and additional claim for relief against defendants in default, they are therefore entitled to service of notice of filing such a motion which effectively and substantially is a pleading asserting a new and additional claim in accordance with section (a) of this rule. Cont'l Oil Co. v. Benham, 163 Colo. 255, 430 P.2d 90 (1967).

Failure to serve any cross claim is not an inexcusable failure to comply with section (a) of this rule which relates to the service of pleadings and does not constitute inexcusable neglect where there is ample time prior to the date set for trial for the filing of any answer to the cross-complaint and counterclaim and where it is not apparent how the substantial rights of any litigant can in any manner be prejudiced by permitting such. Gould & Preisner, Inc. v. District Court, 149 Colo. 484, 369 P.2d 554 (1962).

This rule is without pertinence where one has made an appearance. Section (a) of this rule is without pertinence where C.R.C.P. 55(b)(2), as an express exception, requires the giving of notice of application for judgment to one who has appeared, even though he may be in default at the time. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

Since defendant's right to plead in an action continues after the date beyond which plaintiff can set the cause for trial, he is, although in default in such an action, entitled to notice of amendment of complaint affecting the jurisdiction of the court, in order to plead as contemplated by C.R.C.P. 15(a), section (a) of this rule notwithstanding. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943).

Where parties waive time requirements for responsive pleadings but stipulation is silent on notice provisions, service requirements of this rule apply. Bernhagen v. Burton, 694 P.2d 880 (Colo. App. 1984).

Failure to serve prompt notice is harmless error and does not affect validity of order, where the party against whom a parental rights termination motion was filed had been aware for months that a termination was scheduled, and where service was made 22 days before the hearing. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

III. SERVICE: HOW MADE.

Law reviews. For article, ''One Year Review of Domestic Relations'', see 37 Dicta 55 (1960). For comment on Zika v. Eckel appearing below, see 35 U. Colo. L. Rev. 283 (1963).

Under this rule a party whose appearance is of record should be served personally or through his counsel. Zerobnick v. City & County of Denver, 139 Colo. 139, 337 P.2d 11 (1959).

Proper service on attorney binds client. During the course of a proceeding, service of papers on the attorney of record, where service upon the attorney is proper, binds the client until the attorney is discharged or substituted out of the case in a manner provided by law. Pearson v. Pearson, 141 Colo. 336, 347 P.2d 779 (1959).

Service by mail upon the attorney of record in an administrative hearing is sufficient. North Glenn Sub. Co. v. District Court, 187 Colo. 409, 532 P.2d 332 (1975).

Service must be at address in pleading. The requirement that an attorney is required to specify his office address when he enters an appearance, together with the requirements of this rule, makes it apparent that service must be upon an attorney at the address listed in the pleading. People v. Buscarello, 706 P.2d 805 (Colo. App. 1985).

It is not sufficient to mail notice to a different office of the district attorney than that specified in the pleadings. People v. Buscarello, 706 P.2d 805 (Colo. App. 1985).

Where a second amended complaint did not assert any claims for relief against defendants which were not included in the first amended complaint, and the second amended complaint was served upon the defendant's attorney of record who had appeared for them on their motion to quash service of process after service of the first amended complaint, the trial court did not err in entering default judgments against them, inasmuch as it was unnecessary to serve the second amended complaint personally, since section (b)(1) of this rule provides that service upon a party represented by an attorney shall be made upon the attorney. McHenry F. S., Inc. v. Clausen, 30 Colo. App. 253, 491 P.2d 592 (1971).

Notice to one's attorney to take a deposition is in all respects sufficient and complete. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

Party is not entitled to subpoena or mileage allowance. When a party is noticed to appear for the taking of his deposition, he is not entitled to a subpoena nor to a per diem allowance or mileage. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

Attorneys who have once entered an appearance for a litigant and are thereafter discharged are not agents of a litigant for service of notice, even though they were required to remain attorneys of record when the trial court refuses to permit the withdrawal of their appearance, for the court cannot create or continue the relationship of attorney and client by denying the request of discharged lawyers to withdraw their appearance. Phillips v. Phillips, 155 Colo. 538, 400 P.2d 450 (1964).

Service of trial notice on counsel who has been discharged months previously is ineffectual for any purpose. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959).

The court may order service upon a party himself, even though he is represented by an attorney, in cases where the court deems such service necessary. Zika v. Eckel, 150 Colo. 302, 372 P.2d 165 (1962).

Where absence and neglect of attorney for defendant is well known to all parties, it is incumbent upon the court to direct service of notice of trial setting upon defendant personally. Zika v. Eckel, 150 Colo. 302, 372 P.2d 165 (1962).

Applied in In re Cooper, 113 P.3d 1263 (Colo. App. 2005).

IV. FILING WITH COURT.

Filing is a ministerial task which a judge may undertake. Stroh v. Johnson, 194 Colo. 411, 572 P.2d 840 (1978).

The fact that a judge is not currently assigned to a particular case does not impair his power, as an officer of the court, to accept papers for the purpose of filing them in that court. Stroh v. Johnson, 194 Colo. 411, 572 P.2d 840 (1978).

Where the judge fails to strictly adhere to this rule, defendant cannot take advantage of such if plaintiff's counsel acted in accordance with section (e) of this rule when the judge permitted the motion to be filed with him. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

If correctional facility where plaintiff was incarcerated had no system for legal mail, plaintiff's complaint was timely filed and must

be reinstated because it was deposited with the facility's internal mail system on or before the filing deadline, even though the trial court received the complaint after the deadline. If the correctional facility did have a legal mail system and plaintiff failed to deposit the complaint with the system on or before the filing deadline, then the trial court correctly dismissed the complaint as untimely. Wallin v. Cosner, 210 P.3d 479 (Colo. App. 2009).

Rule 6. Time

(a) Computation. (1) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted, including holidays, Saturdays or Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(2) As used in this Rule, ''Legal holiday'' includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 60(b) and may extend the time for taking any action under Rule 59 only as allowed by that rule.

(c) Unaffected by Expiration of Term. Repealed.

(d) For Motions — Affidavits. Repealed.

(e) Additional Time After Service Under C.R.C.P. 5(b)(2)(B), (C), or (D). Repealed.

Source: (e) amended and effective September 6, 1990; (a) amended and effective October 22, 1992; (a) and (e) amended and adopted October 20, 2005, effective January 1, 2006; (a) and (e) amended and effective and (e) committee comment added and effective June 28, 2007; (a) corrected and effective November 5, 2007; (a) amended, (c) to (e) repealed, and (e) committee comment deleted and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012; (b) amended and comments amended and effective January 10, 2019.

Cross references: For times courts open during terms of court, see C.R.C.P. 77(a); for motions for post-trial relief, see C.R.C.P. 59; for relief from judgment, order, or proceedings for mistakes, inadvertence, surprise, excusable neglect, and fraud, etc., see C.R.C.P. 60(b); for process, see C.R.C.P. 4; for service and filing of pleadings and other papers, see C.R.C.P. 5; for time for filing opposing affidavits for a new trial, see C.R.C.P. 59(d).

COMMENTS

2012

[1] After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have

been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

[2] Time computation is sometimes ''forward,'' meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting ''backward'' means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/otime interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/otime interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Pre-Trial in Colorado in Words and at Work'', see 27 Dicta 157 (1950). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Commitment Procedures in Colorado'', see 29 Dicta 273 (1952). For article, ''2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing'', see 35 Colo. Law. 21 (May 2006). For article, '''Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines'', see 41 Colo. Law. 33 (January 2012).

The provisions of section (e) authorize the addition of three days to the prescribed period for taking certain actions following service by mail. However, the time for filing a C.R.C.P. 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered. As a result, section (e) is not applicable to the filing of C.R.C.P. 59 motions. Wilson v. Fireman's Fund Ins. Co., 931 P.2d 523 (Colo. App. 1996).

The provision of section (e) authorizing the addition of three days for service by e-filing does not apply to statutorily proscribed time periods. This rule does not extend the time period for accepting an offer of settlement under § 13-17-202. Montoya v. Connolly's Towing, Inc., 216 P.3d 98 (Colo. App. 2008).

Section (e) does not modify statutory time period for petitions to review workers' compensation orders. Speier v. Indus. Claim Appeals Office, 181 P.3d 1173 (Colo. App. 2008).

Applied in Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslins Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975); SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975); Reiger v. Reiger, 39 Colo. App. 471, 566 P.2d 722 (1977); People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Nat'l Account Sys. v. District Court, 634 P.2d 48 (Colo. 1981); Kofoed v. Blecker, 644 P.2d 74 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Blecker v. Kofoed, 672 P.2d 526 (Colo. 1983); Garcia v. Title Ins. Co. of Minnesota, 712 P.2d 1114 (Colo. App. 1985).

II. COMPUTATION.

Day of the act or event from which period runs not to be included in computation. In computing any period of time prescribed or allowed by statute, the day of the act or event from which the designated period of time begins to run is not to be included, but the last day of the period is to be included. Cade v. Regensberger, 804 P.2d 238 (Colo. App. 1990).

Where a complaint is filed on Saturday, and an adjudication had on the following Thursday, such adjudication is invalid for failure to comply with the statutory requirement of five days' notice of the commencement of the proceedings, Saturday being the filing date and therefore eliminated, and Sunday being excluded under this rule, since, the adjudication was held one day less than the minimum requirement of notice. Okerberg v. People, 119 Colo. 529, 205 P.2d 224 (1949).

A motion for a new trial filed on Monday, the eleventh day after the entry of judgment, is timely. Bursack v. Moore, 165 Colo. 414, 439 P.2d 993 (1968).

In computing the time for serving subpoenas, computation shall not include the day of the act or intermediate Saturdays, Sundays, and legal holidays. Thus, subpoenas which were served on Friday morning, directing the

witnesses to appear on Monday morning, were not served 48 hours before the time the witnesses were to appear and were properly quashed. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

The procedural computation of time for Colorado state courts' civil proceedings specified in section (a)(1) does not govern the computation of time periods provided in § 13-80-102. Williams v. Crop Prod. Servs., Inc., 2015 COA 64, 361 P.3d 1075.

Applied in N.E., Inc. v. Iliff & Monaco Assocs., 890 P.2d 146 (Colo. App. 1994).

III. ENLARGEMENT.

A. In General.

By its own clear terms, section (b) of this rule does not apply to a time period specified by the Colorado appellate rules. The phrase "these rules" plainly refers to the Colorado rules of civil procedure, of which this rule is a part. Farm Deals, LLLP v. State, 2012 COA 6, 300 P.3d 921.

Section (b) does not apply to the statutory deadline for payment of jury fees. If a statute sets forth a particular deadline or procedure, court-promulgated rules do not apply. Premier Members Fed. Credit Union v. Block, 2013 COA 128, 312 P.3d 276.

The trial court has broad latitude under section (b)(2) in permitting enlargement of time within which to file responsive pleadings. People v. McBeath, 709 P.2d 38 (Colo. App. 1985).

The time limits set by the court cannot be extended by a stipulation of the parties to a motion requesting an extension, unless the court approves. Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

The granting of an extension of the period allowed for the filing of a reporter's transcription with the clerk rests within the sound discretion of the trial court. Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952).

The action taken will not be disturbed on review in the absence of a clear showing of abuse of that discretion. Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952); Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

Where a reporter's transcript is lodged with the clerk late after the entry of judgment, no application having been made for extension of time pursuant to section (b) of this rule, the reporter's transcript will be ordered stricken from the record on appeal. Hildenbrandt v. Hall, 129 Colo. 16, 269 P.2d 708 (1954).

Where it is clearly manifest that no attempt was made to comply with the provisions concerning the filing of reporter's transcripts, nor was any relief sought from their more or less strict requirements through resort to the simple procedure provided by section (b) of this rule, it is the disagreeable duty of an appellate court to be obliged to adhere to established precedent that the reporter's transcript be stricken from the record on appeal. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

Where a case is before an appellate court on appeal, a motion for enlargement of time for filing a transcript of record should be made to the appellate court, not the trial court. Moreau v. Buchholz, 124 Colo. 302, 236 P.2d 540 (1951).

Removal to federal court made within extended time is timely. When the time for answer after service of summons has been extended by a state court, a motion for removal to a federal court made within the extended time is timely made. Oldland v. Gray, 179 F.2d 408 (10th Cir.), cert denied, 339 U.S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (1950).

When no motion to extend is made pursuant to this rule, it may be stricken. When one files no motion to extend, nor does the trial court on its own motion extend a period before its expiration, and after the time expires, defendant files no motion alleging excusable neglect in failing to comply with the time limitation set by the court, there is no basis for the court to deny a motion to strike the motion in view of the provisions of section (b) of this rule. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Deposit of motion in mail on last day of extension not a sufficient filing. Where, under this rule, a 15-day period was allowed a proponent of a will to make a motion and on the fifteenth day the original motion was deposited in the United States mail for delivery to the court, such delivery was not a sufficient filing, since the deposit of the motion with the clerk, with intent that he retain it, he being in any sufficient manner notified of this purpose, is the essential thing to constitute a filing. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Amendment to timely filed objection permitted. There is no prohibition against filing an amendment to a timely filed objection to a master's report before a hearing on that objection has occurred. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982).

For history of section (b), see In re Van Camp, 632 P.2d 1062 (Colo. App. 1981).

Applied in Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957); Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

B. Before Expiration.

Under section (b)(1) of this rule, enlargements of time are so readily obtainable where

application is made therefor within apt time that there is rarely an occasion where failure to do so would appear to be excusable. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

C. After Expiration.

Extensions of time are a nullity where they are not obtained in the manner prescribed in section (b)(2) of this rule. Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

The court's failure to act on a motion to enlarge time period before the time has expired does not automatically extend an existing deadline. Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

Court's permission on motion with cause shown is necessary. Authority, under this rule, for a court to permit a paper to be filed upon cause shown and on motion therefor, in the case of excusable neglect, is certainly not authority for such filing without permission of the court, without cause shown, and without motion therefor. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

The trial court has broad latitude under the provisions of section (b)(2) of this rule. Farmer v. Norm ''Fair Trade'' Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

A court of review will assume that an extension was properly made, in the absence of proper objections to the order of the court. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

A trial court may, for good cause, allow an extension of time to file an answer, even though the original time limit has passed. Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

Under the language of this rule, the right to file an answer brief is lost where no request for extension of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Exception not expanded to reliance on postal employee's assurance of timely delivery. The exception to the requirement of strict compliance with the time limits for filing new trial motions will not be expanded to include late filings resulting from counsel's reliance on a postal employee's assurance of timely delivery, because such expansion would be inconsistent with the language of section (b) and with the policy of giving finality to judgments after a reasonable time has been allowed to seek appellate review. Schuster v. Zwicker, 659 P.2d 687 (Colo. 1983).

"Excusable neglect" occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973); Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

If statutory section expressly permits a court to accept nonparty designations filed outside the 90-day period when it determines that a "longer period is necessary", the provisions of section (b)(2) concerning demonstration of ''excusable neglect'' do not apply. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

In general, most such situations involve unforeseen occurrences. It is impossible to describe the myriad situations showing excusable neglect, but, in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973).

Failure to act due to carelessness and negligence is not excusable neglect. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973).

Section (b) of this rule provides that a court may not extend the time for taking any action under C.R.C.P. 50(b) (provisions now in C.R.C.P. 59); therefore, filing a motion for judgment notwithstanding the verdict within 10 days after receipt of verdict is mandatory, and unless such motion is filed within the time prescribed the court has no power to pass on it. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

An order for the enlargement of the time within which a motion for a direct verdict after verdict can be filed is abortive in view of the specific provisions of section (b) of this rule prohibiting such enlargement. Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

A trial court cannot enlarge the time for the filing of a motion for new trial after the expiration of the specified period permitted by the rules. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

Rule is controlling over C.R.C.P. 60(b), as to whether a trial court may extend the period of time for filing a motion for new trial under C.R.C.P. 59(b) (now C.R.C.P. 59(d)), after the original filing period has expired. Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984).

District court is without discretionary

power to deny a motion for default judgment where the opposing party, not an agency of the state, fails to comply with a court order requiring a certain act be done within a specified time and, after expiration of that time, fails to establish such failure to act was a result of excusable neglect. Sauer v. Heckers, 34 Colo. App. 217, 524 P.2d 1387 (1974).

A trial court is in error in extending the period of redemption after the redemption period had already expired; redemption is a purely statutory matter, and there is no rule that would allow the court to enlarge it. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Applied in Business & Prod. Promotion, Inc. v. East Tincup, Inc., 154 Colo. 268, 389 P.2d 851 (1964).

IV. UNAFFECTED BY EXPIRATION OF TERM.

Law reviews. For comment on Green v. Hoffman appearing below, see 24 Rocky Mt. L. Rev. 376 (1952).

Section (c) of this rule held inapplicable where section (b) excludes matters under C.R.C.P. 59(e). Green v. Hoffman, 126 Colo. 104, 251 P.2d 933 (1952).

CHAPTER 2

Pleadings and Motions

ANALYSIS BY RULE

CHAPTER 2

PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed: Form of Motions

(a) Pleadings. There shall be a complaint and answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; a third-party answer, if a third-party complaint is served; and there may be a reply to an affirmative defense. No other pleading shall be allowed, except upon order of court.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) These rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(d) Agreed Case, Procedure. Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules.

Cross references: For counterclaims and cross claims, see C.R.C.P. 13; for third-party practice, see C.R.C.P. 14.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comments on nomenclature by rules committee, see 22 Dicta 154 (1945). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For note, ''Comments on Last Clear Chance — Procedure and Substance'', see 32 Dicta 275 (1955). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957).

Applied in Davison v. Bd. of County Comm'rs, 41 Colo. App. 344, 585 P.2d 315 (1978); People ex rel. Losavio v. Gentry, 199 Colo. 212, 606 P.2d 57 (1980); In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980); In re Stroud, 631 P.2d 168 (Colo. 1981).

II. PLEADINGS.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For standard pleading samples to be used in quiet title litigation, see 50 Dicta 39 (1953).

Strictly speaking, one no longer proceeds by complaint, but rather by claim for relief. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

Where no reply is ordered and defendants desire to rely on an affirmative defense, they must set forth the affirmative defense in the answer. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

A reply to an affirmative defense is merely permissive. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Where no reply is required, defendants are put on notice that any matter in avoidance of their defense will be deemed in issue before the court. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

An alternative direction to reply or elect to stand is not an unequivocal order to reply within the meaning of the final sentence of section (a) of this rule. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Where no counterclaim is advanced, plaintiff has no duty to reply. Where neither the pleadings of defendants nor the answers of interveners advanced a counterclaim, plaintiff, under section (a) of this rule, had no primary duty to reply to either. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Where defendant set up an agreement in its answer which was tantamount to a counterclaim, plaintiff was not required to plead the defenses asserted thereto. Colo. Woman's Coll. v. Bradford-Robinson Printing Co., 114 Colo. 237, 157 P.2d 612 (1945).

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

There is nothing inherently improper about asserting a counterclaim in a reply to a counterclaim. T. L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

Summons held to be writ, not a pleading. Where a summons informed the defendant that he had been sued by the plaintiffs for damages as a result of an automobile collision and did not purport to set forth the claim for relief upon which the action or proceedings was based, it was merely a writ, and not a pleading, which, pursuant to C.R.C.P. 3(a), must follow within 10 days after the service of summons. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

III. MOTIONS AND OTHER PAPERS.

Law reviews. For article, ''In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases'', see 9 Dicta 190 (1932). For article, ''Expediting Court Procedure'', see 10 Dicta 113 (1933).

Section (b)(1) of this rule is mandatory. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Oral motion cannot be properly considered by trial court. Where a husband failed to pay temporary alimony awarded his wife, the wife filed a motion for citation requiring him to show cause why he should not be punished for contempt for such failure, and in the hearing on the citation an order suspending the monthly payments of alimony was made on oral motion, it was held that the oral motion under the circumstances could not properly be considered by the trial court. Wright v. Wright, 122 Colo. 179, 220 P.2d 881 (1950).

Approved oral motions are nullities where rule is not complied with. Where upon oral motion and without notice, plaintiff obtained ex parte a nunc pro tunc order extending his time to lodge the reporter's transcript, and also obtained a further extension of time ex parte, but not nunc pro tunc, by again oral motion and without notice, it was held that the ''purported'' extensions of time were in each instance a nullity because neither was obtained in the manner prescribed in C.R.C.P. 6 (b)(2) and section (b)(1) of this rule. Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

Motions made incidental to a hearing need not be reduced to writing. Motions made at a hearing that are obviously incidental to the hearing itself, such as motions to exclude evidence, for a directed verdict, or for a mistrial, etc., are motions which are recorded in the minutes of a hearing or trial, and it is for this reason that such motions need not be reduced to writing and notice thereof given. Wright v. Wright, 122 Colo. 179, 220 P.2d 881 (1950).

Rule 11 sanctions are applicable to motions and other papers pursuant to Rule 7 (b)(2). Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Default judgment motion must be in writing setting forth grounds therefor. A party fails to follow C.R.C.P. 55 (f) as to default judgments on substituted service where he does not apply for the judgment by written motion setting forth with particularity the grounds in support of the motion and the relief sought as required by section (b)(1) of this rule. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Statement in motion held insufficient to inform court. Where motion to dismiss complaint stated that ''the said complaint is not in accordance to the 1935 Colorado Statutes Annotated, and was filed in violation thereof, and contrary to the said statutes in such case made and provided'', the statement was insufficient to inform the court concerning the nature of the grounds upon which the dismissal was sought. Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P.2d 336 (1951).

Notice requirement where motion to reinstate jail sentence is treated as civil proceeding. Where a motion to reinstate a jail sentence imposed following conviction of vagrancy under a city ordinance, and the case is treated as a civil proceeding, it is incumbent upon a city to serve a copy of such motion or a written notice of hearing thereon upon the defendant personally or through his counsel, and where counsel

has withdrawn, such notice must be served upon the defendant personally under section (b)(1) of this rule. Zerobnick v. City & County of Denver, 139 Colo. 139, 337 P.2d 11 (1959).

IV. DEMURRERS, PLEAS, ETC. ABOLISHED.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945).

Under this rule, a demurrer to a complaint would be considered a motion to dismiss. Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943).

V. AGREED CASE.

Annotator's note. Since section (d) of this rule is similar to § 310 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Affidavit required by this rule must be filed. Considering a cause as a proceeding brought on an agreed statement is error where there is no compliance with the filing of the affidavit required by section (d) of this rule. Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956).

Relief sought must be expressed in agreement. Where parties waive process and pleading and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

If there is no agreement, a court is not empowered to do anything. Under section (d) of this rule, the court acquires jurisdiction of the parties and of the subject matter by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do anything whatever. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

Parties cannot merely demand information as to their rights. If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, the courts will become schools of instruction with little time to attend to their proper and legitimate duties. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

Inadvertent omission of facts from statement may be relieved against. A stipulation in a case by both parties made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises and injurious to their client, may be relieved against. Welsh v. Noyes, 10 Colo. 133, 14 P. 317 (1890).

To strike out a portion of a stipulation on the suggestion of one party is error if such part is material; rather, the entire stipulation should be canceled. Welsh v. Noyes, 10 Colo. 133, 14 P. 317 (1890).

A party may amend ad damnum in agreed statement. Autrey v. Bowen, 7 Colo. App. 408, 43 P. 908 (1884).

In a case heard on an agreed statement of facts, it is not necessary to move for a new trial. Clayton v. Smith, 1 Colo. 95 (1868).

An agreed statement of facts in an action already pending is not an agreed case. Wagner-Stockbridge Mercantile & Drug Co. v. Goddard, 33 Colo. 387, 80 P. 1038 (1905); Truesdale v. Bd. of Comm'rs, 44 Colo. 416, 99 P. 63 (1908).

Motion instituting suit held not to comply with requirements for agreed statement. Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956).

Applied in Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for a relief whether an original claim, counterclaim, cross-claim, or a third-party claim, shall contain: (1) If the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which the pleader claims to be entitled. No dollar amount shall be stated in the prayer or demand for relief. Relief in the alternative or of several different types may be demanded. Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17A, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments of the adverse party.

If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. Averments in a pleading to which a responsive pleading is permitted but not required shall be taken as denied or avoided if no responsive pleading is filed.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. When a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Source: Entire rule amended and adopted November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004.

Cross references: For amended and supplemental pleadings, see C.R.C.P 15; for one form of action, see C.R.C.P. 2; for commencement of action, see C.R.C.P. 3; for counterclaims and cross claims, see C.R.C.P. 13; for the signing of pleadings, see C.R.C.P. 11; for presentation of defenses and objections by pleading or motion, see C.R.C.P. 12.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comments on nomenclature by rules committee, see 22 Dicta 154 (1945). For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''Unique Construction Defect Damages Mitigation Issues'', see 44 Colo. Law. 33 (February 2015).

Applied in Gore Trading Co. v. Alice, 35 Colo. App. 97, 529 P.2d 324 (1974); Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838 (1975); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Griffin v. Pate, 644 P.2d 51 (Colo. App. 1981); Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. App. 1981); In re Boyd, 643 P.2d 804 (Colo. App. 1982); Memorial Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc., 661 P.2d 296 (Colo. App. 1982); People v. Steinberg, 672 P.2d 543 (Colo. App. 1983); Riva Ridge Apts. v. Robert G. Fisher Co., 745 P.2d 1034 (Colo. App. 1987).

II. CLAIMS FOR RELIEF.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For article, ''The End of Uncertainty: The Colorado Supreme Court Adopts the Plausibility Pleading Standard'', see 46 Colo. Law. 27 (Feb. 2017).

This rule provides that plaintiff's complaint shall set forth a "claim for relief". Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

Complaint shall contain a short and plain statement. This rule provides that a complaint shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956).

This rule contemplates notice to the opposing party concerning that which he is expected to defend. Bryant v. Hand, 158 Colo. 56, 404 P.2d 521 (1965).

The theory of pleading is to give an adversary notice of what is to be expected at trial. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

A complaint must advise defendant of relief sought and grounds thereof. A complaint under the rules of civil procedure to be sufficient as a claim against a motion to dismiss is required to advise defendant of the nature of the relief sought against him and the grounds thereof. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

Under this rule the essential element of a complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief''. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Plaintiff is not required to set out "a cause of action" under the rules of civil procedure. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Theories of action are no longer significant. Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969).

The rules of civil procedure were intended to deemphasize the theory of a "cause of action" and to place the emphasis upon the facts giving rise to the asserted claim. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

One does not stand or fall on a "theory" or "cause of action", as obtained under the practice prior to adoption of the rules. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

The basic theory of plaintiff's pleading under the present rule is that the transaction or occurrence is the subject matter of a claim, rather than the legal rights arising therefrom. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

A generalized summary of the case that affords fair notice is all that is required. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Since the purpose of a complaint under the rules of civil procedure is to afford the defendant reasonable notice of the general nature of the matter presented. Vance v. St. Charles Mesa Water Ass'n, 170 Colo. 313, 460 P.2d 782 (1969); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

The purpose of this rule is not to require the pleader to set forth the facts with particularity, but merely to apprize the adverse party of the nature of his claim. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950); Rasmussen v. Freehling, 159 Colo. 414, 412 P.2d 217 (1966); Discovery Land & Dev.

Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101; D'Amico v. Smith, 42 Colo. App. 369, 600 P.2d 84 (1979).

The chief function of a complaint is to give notice. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968); Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969); Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

But a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Case law interpreting the state rules of civil procedure reflects first and foremost a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the United States supreme court's interpretation of corresponding federal rules. It is thus appropriate for the state to adopt for state complaints the new plausible-on-its-face standard for federal complaints adopted by the United States supreme court in lieu of the prior federal and state standard that deemed a complaint sufficient unless it appears beyond doubt on the face of the complaint that the plaintiff can prove no set of facts in support of the claims alleged. Warne v. Hall, 2016 CO 50, 373 P.3d 588.

Failure to specify in a complaint the precise statute on which claim is based does not prevent plaintiff from seeking attorney fees. Plaintiff is only required to put defendant on notice that damages and reasonable attorney fees are being sought for defendant's failure to pay severance as provided in employment agreement. Fang v. Showa Entetsu Co., 91 P.3d 419 (Colo. App. 2003).

Plaintiff is entitled to receive relief regardless of claim in demand. While a demand for judgment is necessary, if the plaintiff is entitled to any relief under his stated claim, such relief may be granted, regardless of the specific relief contained in the demand for judgment. DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Precatory language no bar to treatment of document as complaint. Where a document is signed ''plaintiff'' and submitted along with a petition and unsigned order to waive the docket fee, the use of precatory language does not prevent the document from being a complaint. DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Under this rule pleadings need only serve notice of the claim asserted and need not express a complete recitation of all the facts which support the cause of action. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974); Eliminator, Inc. v. 4700 Holly Corp., 681 P.2d 536 (Colo. App. 1984); Bain v. Town of Avon, 820 P.2d 1133 (Colo. App. 1991).

If sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961); Vance v. St. Charles Mesa Water Ass'n, 170 Colo. 313, 460 P.2d 782 (1969).

Substance rather than appellation controls. The substance of the claim rather than the appellation applied to the pleading by the litigant is what controls. Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

If from the allegations of a complaint the plaintiff is entitled to relief under any theory, it is sufficient to state a claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

If, under the facts, the substantive law provides relief upon any "theory", the cause should proceed to judgment. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Under this rule a complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief. Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Shapiro and Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992); Elliott v. Colo. Dept. of Corr., 865 P.2d 859 (Colo. App. 1993).

A complaint is sufficient if the pleader clearly identifies the transaction which forms the basis of his claim. Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968).

A complaint need not express all facts that support the claim but need only serve notice of the claim asserted. Grizzell v. Hartman Enters., Inc., 68 P.3d 551 (Colo. App. 2003).

Plaintiff need not anticipate the assertion of the statute of limitations and negate its effect in his complaint, for the defendants may waive such defense. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

An amended complaint shall state a claim. A claim alleged in an amended complaint arising out of and connected with the occurrence pleaded in the original complaint shall state a claim entitling plaintiffs to relief. Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960).

A plaintiff is not required to file an amended complaint repeating allegations contained in claims later dismissed, when the claims are incorporated by reference in a claim

not dismissed. Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938 (Colo. 1984).

If a party states any claim and proves it by a preponderance of the evidence, he is entitled to relief, without regard to a specific theory or cause of action. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969).

Issues joined upon matters which are immaterial to a claim are surplusage and need not be proved. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

The prayer of a complaint is not the statement of the cause of action. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

A prayer is a necessary part of a claim for relief under this rule. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

The prayer of the complaint was not formerly an essential part of the pleading, and the cause of action was not to be determined therefrom, but resort thereto could be had not only to determine what the pleader intended by the complaint itself but what his adversary might be led to believe therefrom. Green v. Davis, 67 Colo. 52, 185 P. 369 (1919) (decided under repealed Code of Civil Procedure which was replaced by the Rules of Civil Procedure in 1941).

Under previous code, the form of the prayer seemed to be immaterial. Waterbury v. Fisher, 5 Colo. App. 362, 38 P. 846 (1894), aff'd, 23 Colo. 256, 47 P. 277 (1896); Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

If the allegations of the complaint state a cause of action or show one entitled to relief, it should be granted regardless of the remedy sought. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

If one misconceives his remedy, court will not be deprived of jurisdiction. If the allegations of the petition are such as to invoke both the jurisdiction of the court and to entitle the petitioner, on the face thereof, to some relief, the mere fact that one misconceives his remedy will not deprive the court of jurisdiction to act. In re Legislative Reapportionment, 150 Colo. 380, 374 P.2d 66 (1962).

The court will grant the relief entitled under the facts pleaded. If the plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer, for the court will grant him the relief to which he is entitled under the facts pleaded. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

A party cannot avoid facts or their legal significance by the form of his complaint; basic facts control. Maes v. Tuttoilmondo, 31 Colo. App. 248, 502 P.2d 427 (1972).

A complaint is not subject to a motion to dismiss if it shows that the pleader is entitled to some relief ''upon any theory of the law''. Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

A dismissal of the action is error. If any of the allegations of the complaint, as amended, give notice to the defendants of a claim for relief and there is some competent evidence produced at the trial upon which relief could be granted, a dismissal of the action is error. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

A motion to dismiss for failure to state a claim was improperly sustained where the complaint set out all the allegations necessary for an absolute divorce and the prayer was for a judicial separation, for the allegations plainly showed that plaintiff was entitled to relief, though not to the specific relief prayed. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

If a plaintiff declares his intention of seeking a particular form of relief and of refusing all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he seeks. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

When it appears on the face of the complaint, or is admitted, that the complaint does not state a claim upon which relief can be granted, the claim is barred, the court has no jurisdiction of the subject matter, and the court can, for that reason, grant a motion to dismiss on this ground. Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

Where the prayer is for ''interest and costs of suit'', it is sufficient to meet the requirements of § 13-21-101 entitling a plaintiff to interest on the verdict from the date of filing a complaint. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

A complaint stated a claim for relief for damages when it contained allegations of the relationship between bank and depositor and that the defendant bank had disbursed funds of the plaintiff depositor without the latter's authority and in violation of the agreement between them. Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943); Rivera v. Central Bank & Trust Co., 155 Colo. 383, 395 P.2d 11 (1964).

Claim stated where attached exhibit made part of complaint by reference. Where claims under mining agreements were at issue and a blank form of these agreements was set out in the complaint with no date stated, no allegation as to with whom made, no consideration stated, and no statements as to its terms, such did not render the complaint insufficient to state a

claim, since an exhibit attached to the complaint and by reference made a part thereof listed the claims allegedly owned, the names of the owners who executed the agreements, and the book and page where these executed agreements could be found on record. Gold Uranium Mining Co. v. Chain O'Mines Operators, 128 Colo. 399, 262 P.2d 927 (1953).

Suit by acquitted person for return of arrest record not dismissed for failure to state a claim. When a person has been acquitted of a crime and denied the return of the arrest record without justification, a suit by the person alleging violation of the right of privacy is not to be dismissed for failure to state a claim upon which relief could be granted. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

Complaint held not to be a "short and plain statement". A 15-page complaint containing some 100 separately numbered paragraphs seeking damages from one or all or any combination of some nine different defendants, together with a seven-page amendment, was not considered a ''short and plain statement of the claim showing that the pleader is entitled to relief'' as envisioned by this rule. Ripple & Howe, Inc. v. Fensten, 156 Colo. 322, 399 P.2d 97 (1965).

Complaint did not comply with section (a). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (a) of this rule. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Allegations sufficient to comply with rule. Snyder v. City Council, 35 Colo. App. 32, 531 P.2d 643 (1974).

Plaintiff was merely required to set forth a legally cognizable injury causing harm for which she was entitled to some relief to meet the requirements of this rule. Dotson v. Dell L. Bernstein, P.C., 207 P.3d 911 (Colo. App. 2009).

Applied in Buena Vista Bank & Trust Co. v. Lee, 191 Colo. 551, 554 P.2d 1109 (1976); McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977); Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980); A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc., 622 P.2d 113 (Colo. App. 1980); LaFond v. Basham, 683 P.2d 367 (Colo. App. 1984).

III. DEFENSES.

Law reviews. For note, ''Pleading a Claim Barred by Statute of Limitations by Way of Recoupment'', see 7 Rocky Mt. L. Rev. 204 (1935). For article, ''The Law of Libel in Colorado'', see 28 Dicta 121 (1951).

This rule provides that a defendant's answer to plaintiff's claim for relief shall be denominated "defenses". Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

General plea denying existence of plaintiff's cause of action is sufficient. The time within which a plaintiff must bring his action is of the very essence of his claim, and even a general plea denying existence of his cause of action is sufficient under section (b) of this rule. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

No general denial where not any foundation. This rule contemplates an answer that speaks the truth, and where none of the specific denials has any foundation in fact, a general denial should not be filed. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Defense of truth in libel suit may be raised by general denial rather than special denial. Where the complaint in a libel action alleged the published articles were ''false, defamatory, untrue and libelous'' and defendants by answer denied generally the allegation, this allegation of plaintiff and its denial by defendants presented the issue of the truth of the published articles, and under these circumstances, a special defense of truth was not required. Hadden v. Gateway W. Publishing Co., 130 Colo. 73, 273 P.2d 733 (1954).

The defense of suicide in accident policy action can be raised by general denial. In an action on an accident policy where the plaintiff alleges death of the insured as the result of an accident, the defense of suicide can be raised by a general denial, for the defendant-insurer's denial that insured met his death by accidental means is equivalent to an affirmative plea of suicide, which need not be specially pleaded. Murray v. Travelers Ins. Co., 143 Colo. 258, 352 P.2d 678 (1960).

Where no responsive pleading is filed in a case, there is no issue presented for determination. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

Where defense of fraud was stated with sufficient particularity and supported by affidavit in defendant's response to motion for partial summary judgment, it should have been incorporated in defendant's answer for the purpose of technical compliance with section (c), even though the defense is more properly asserted in an answer. Alien, Inc. v. Futterman, 924 P.2d 1063 (Colo. App. 1995).

IV. AFFIRMATIVE DEFENSES AND MITIGATING CIRCUMSTANCES.

A. In General.

Law reviews. As to the addition of the sentence: ''Any mitigating circumstances to reduce the amount of damage shall be affirmatively

pleaded'' in this rule, see ''The Federal Rules from the Standpoint of the Colorado Code'', 27 Dicta 170 (1950). For note, ''Comments on Last Clear Change — Procedure and Substance'', see 32 Dicta 275 (1955). For comment on Carpenter v. Hill appearing below, see 32 Dicta 393 (1955). For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For article, ''Austin v. Litvak, Colorado's Statute of Repose for Medical Malpractice Claims: An Uneasy Sleep'', see 62 Den. U. L. Rev. 825 (1985).

Section (c) entitles a party to have an affirmative defense considered by the trier of fact so long as it has been properly pleaded, evidence is presented at trial to support its consideration, and the party asserting it brings it to the court's attention. Watson v. Cal-Three, LLC, 254 P.3d 1189 (Colo. App. 2011).

It is fundamental that pleas in bar must be specially pleaded. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957).

Where a defense is neither pleaded nor raised at any stage of the proceedings in the trial court, it cannot be urged for the first time on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

Matters not presented to a trial court by pleading pursuant to this rule will not be considered by the supreme court on review. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

Rigidity of section (c) softened by C.R.C.P. 15(b). The apparent rigidity of section (c) of this rule, which states that a party shall affirmatively plead all matters constituting an avoidance or affirmative defense, is softened by C.R.C.P. 15(b), which provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974).

The trial court errs in considering such defenses where objected to. Where such defenses are first urged upon the court orally at the trial, not having been pled as required, the trial court errs in considering such defenses, especially over the objections of opposing counsel. Maxey v. Jefferson County Sch. Dist. No. R-1, 158 Colo. 583, 408 P.2d 970 (1965).

Where no objection is made to evidence introduced in regard to an affirmative defense which has not been specifically set forth in the pleadings as required by section (c) of this rule, such issue may be treated as raised in the pleadings under C.R.C.P. 15(b). Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

Issue not specifically alleged as affirmative defense may be tried by express or implied consent. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969) (consent not found).

Such issue must be "intentionally and actually tried". Where there is express or implied consent to try issues not raised by the pleadings, such issues may be tried in all respects as if they had been so raised, pursuant to C.R.C.P. 15(b); however, the record must show an ''express or implied consent'' to try an issue of fact which section (c) of this rule requires to be specifically alleged as an affirmative defense and the issue must be ''intentionally and actually tried'', it not being enough that some evidence is received germane to the issue sought to be raised. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

This rule provides for various affirmative defenses in civil actions. Indus. Comm'n v. Ewing, 160 Colo. 503, 418 P.2d 296 (1966).

This rule also provides that mitigating circumstances to reduce the amount of damages shall be affirmatively pleaded. Indus. Comm'n v. Ewing, 160 Colo. 503, 418 P.2d 296 (1966).

Burden of proving mitigation on defendants. Mitigation or failure to mitigate is an affirmative defense to be pleaded by the defendants, and the burden of proving the same is also on them. Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).

It is not a plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated. Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).

Under this rule, affirmative defense may not be raised by motion but only by answer, the plaintiff thereafter having an opportunity to raise and try all issues relating to such defenses. Markoff v. Barenberg, 149 Colo. 311, 368 P.2d 964 (1962).

A response to an affirmative defense is not required under this rule. Where the issue of the constitutionality of a statute cited in an affirmative defense was raised and adequately briefed in the trial court, it could be addressed on appeal. Raptor Educ. Found., Inc. v. State, 2012 COA 219, 296 P.3d 352.

Where the inclusion of the affirmative defense of release in a summary judgment motion was treated as being incorporated in the defendant's answer for the purpose of technical compliance with section (c) of this rule, the supreme court held that the plaintiffs were not prejudiced in any way because the affirmative defense of release had not been included in the defendant's answer. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Where defendant did not include the affirmative defense of acknowledgment in her answer, but included the defense in her motion for judgment on the pleadings and again in her response to plaintiff's motion for summary judgment, defendant alleged acknowledgment in the motions

and sufficiently raised the defense such that the court could treat the answer as amended in compliance with rule 8(c). Drake v. Tyner, 914 P.2d 519 (Colo. App. 1996).

If affirmative defense is asserted in a motion for summary judgment and responded to without objection, it is deemed incorporated into the answer. Horodyskyj v. Karanian, 5 P.3d 332 (Colo. App. 1999), rev'd on other grounds, 32 P.3d 470 (Colo. 2001).

Inclusion of affirmative defense in motion deemed incorporated in defendant's answer. When the events providing the basis of a defendant's summary judgment motion occur subsequent to the complaint and answer and are fully set forth in the motion, the inclusion of the affirmative defense in the motion is deemed incorporated in defendant's answer. Bilar, Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977).

Even if notice requirement, in suit against city, was affirmative defense, it was deemed to be incorporated in city's answer to suit by its inclusion in city's summary judgment motion, and thus city did not waive notice requirement. Mtn. Gravel & Const. v. Cortez, 721 P.2d 698 (Colo. App. 1986).

Failure to plead an affirmative defense as required by section (c), and failure to present any evidence or argument on the matter in the district court, preclude the reviewing court from reviewing the issue. Crocker v. Colo. Dept. of Rev., 652 P.2d 1067 (Colo. 1982).

A party waives all defenses and objections which he does not present in his answer. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Improper assertion of affirmative defense must be objected to, or it is waived. By arguing the merits of defendant's motion for summary judgment without raising objection in the trial court as to the assertion of the affirmative defense of release initially therein, plaintiffs waived any valid objection they may have had to this procedure. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Affirmative defenses may be considered on motion for summary judgment. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981); Bain v. Town of Avon, 820 P.2d 1133 (Colo. App. 1991).

B. Statute of Limitations and Laches.

A statute of limitations is an affirmative defense and hence must be affirmatively pleaded. Knighton v. Howse, 167 Colo. 530, 448 P.2d 641 (1968).

A statute of limitations defense, being affirmative in nature, must be raised by responsive pleading. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Limitations of time are matters which cannot be raised by a motion to dismiss. Where an independent action to obtain relief from a judgment is resorted to, the limitations of time are those of laches and the statute of limitations, matters which cannot be raised by a motion to dismiss under this rule. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Generally a statute of limitations defense should be raised in the answer to the complaint rather than in a motion to dismiss, but this position is not universally followed. Many courts hold that the defense of limitations may be raised by a motion to dismiss where the time alleged in the complaint shows that the action was not brought within the statutory period. The adoption of F.R.C.P. 9(f) allows averments in a complaint to be tested for sufficiency in regards to time. Thus, for example, a complaint which fails to specify time so that the statutory time may be computed may properly be dismissed pursuant to a motion pursuant to C.R.C.P. 12(b)(5). Wasinger v. Reid, 705 P.2d 533 (Colo. App. 1985); Reider v. Dawson, 856 P.2d 31 (Colo. App. 1992), aff'd, 872 P.2d 212 (Colo. 1994).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b), since, under section (c) of this rule, that is a defense which must be set forth affirmatively by answer. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

The statute of limitations cannot be the basis for dismissal on motion on the grounds that it appears from the complaint that the claim was not timely made for the reasons that in the absence of an affirmative defense based on the statute of limitations such defense is waived, and the assertion or waiver of the defense can only be determined from the answer. Furthermore, even if pleaded, the running of the statute of limitations may have been tolled, and plaintiff in his complaint is not required to anticipate the defense. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Under this rule, a plea in bar based upon the statute of limitations cannot be raised by motion to dismiss, it being a defense which may or may not be relied upon and, if relied upon, must be pleaded as an affirmative defense. Fletcher v. Colo. & Wyoming Ry., 141 Colo. 72, 347 P.2d 156 (1959).

A statute of limitations is a defense which is waived if not affirmatively pleaded. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968).

Defense of statute of limitations sufficiently raised. An allegation that a claim is barred by the statute of limitations of this state in such case made and provided is sufficient to raise the defense of limitations. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Limitations of time cannot be raised by a motion to strike. Laches and the statute of limitations cannot be raised by motion to dismiss or strike. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations and laches must be affirmatively pleaded in an answer. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Laches is an affirmative defense and must be pleaded. Buss v. McKee, 115 Colo. 159, 170 P.2d 268 (1946); Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Laches is form of estoppel and contemplates an unconscionable delay in asserting one's rights which works to the defendant's prejudice or injury in relation to the subject matter of the litigation. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Dismissal for failure to prosecute held not to be affirmative defense of laches. Columbine Valley Mut. Imp. & Maintenance Ass'n v. Bd. of County Comm'rs, 173 Colo. 321, 478 P.2d 312 (1970).

Prejudice necessary to claim laches may be couched in terms of detrimental change of position on the part of the defendant or it may be occasioned by loss of evidence, death of witnesses, or other circumstances arising during the period of delay which affect the defendant's ability to defend. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Evidence insufficient for level of prejudice contemplated by doctrine of laches. While failure to litigate the issue of personal liability in either of two earlier actions against a corporate entity may have been poor judicial economy, the expense and inconvenience of further litigation, without more, did not rise to the level of prejudice contemplated by the doctrine of laches, where the defendants (individual owners of a corporation) were not indispensable parties to the first action under C.R.C.P. 19, but rather permissive parties under C.R.C.P. 18. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

C. Res Judicata.

"Res judicata" is also an affirmative defense which must be affirmatively pled by way of answer. In re Crowley's Estate, 122 Colo. 244, 221 P.2d 378 (1950); Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Bakery Workers Local 240 v. Am. Bakery Workers Local 240, 165 Colo. 210, 437 P.2d 783 (1968).

The defense of res judicata is considered waived if it is not appropriately raised. In re Wright, 841 P.2d 358 (Colo. App. 1992); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Although term "res judicata" not explicitly used, it is not waived where arguments raised gave adequate notice that party was defending, in part, on the basis that the parties were bound by the earlier judgment. In re Wright, 841 P.2d 358 (Colo. App. 1992); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Res judicata bars relitigation not only of all issues actually decided, but of all issues that might have been decided. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

However, res judicata applies only when there exists identity of subject matter, cause of action, parties, and capacity in the person for whom or against whom the claim is made. Also, the decision in the prior case must have been rendered on the merits. People in Interest of G.K.H., 698 P.2d 1386 (Colo. App. 1984).

A voluntary dismissal pursuant to an invalid stipulation is not a decision to which the doctrine of res judicata applies to preclude a subsequent action in dependency or neglect. People in Interest of G.K.H., 698 P.2d 1386 (Colo. App. 1984).

Res judicata holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

The defense of res judicata does not apply when the initial forum, the bankruptcy court, lacked the authority to award the full measure of the relief sought in the subsequent litigation, post-petition debts. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Res judicata requires an identity of parties or their privies, as it would be unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

Mutuality is a necessary element of defensive claim preclusion or res judicata. Foster v. Plock, 2017 CO 39, 394 P.3d 1119.

To sustain the defense of "res judicata" under section (c) of this rule, facts in support of it must be affirmatively shown either by the evidence adduced at the trial or by way of uncontroverted facts properly presented in a motion for summary judgment, or by a motion to dismiss under C.R.C.P. 12(b) where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the

same as a motion for summary judgment under C.R.C.P. 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963); Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Where facts are presented in evidence which constitute a defense of "res judicata", the court is not required to consider them when this defense was not pleaded. Bakery Workers Local 240 v. Am. Bakery Workers Local 240, 165 Colo. 210, 437 P.2d 783 (1968).

The question of "res judicata" cannot be raised by motion to dismiss. Fletcher v. Colo. & Wyoming Ry., 141 Colo. 72, 347 P.2d 156 (1959); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Defendant may assert a claim preclusion defense for the first time in a motion to dismiss where plaintiff fails to show prejudice. Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc., 167 P.3d 175 (Colo. App. 2007).

It is error to sustain a motion to dismiss. Where prior adjudication is not affirmatively set up as a separate defense under this rule, but is presented by motion, it is error to sustain the motion. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

Party was not estopped from invoking doctrine of res judicata regarding small claims court judgment because of failure to raise doctrine in a pleading. The plaintiff could not seek to benefit from the small claims court judgment and simultaneously to prohibit defendant from using it. Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Mutuality element met where defendant in a second action was in privity with wife in the first action. Foster v. Plock, 2017 CO 39, 394 P.3d 1119.

D. Estoppel, Waiver, and Mistake.

Estoppel is an affirmative defense and must be set forth as a part of the pleadings. Kimmel v. Batty, 168 Colo. 431, 451 P.2d 751 (1969).

Collateral estoppel is in the nature of an affirmative defense which must be specifically pleaded in an answer. Banek v. Thomas, 733 P.2d 1171 (Colo. 1986).

The doctrine of collateral estoppel is designed to save judicial time and resources and relieve the burden on litigants of having to litigate claims more than once. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) The issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. Maryland Cas. Co. v. Messina, 874 P.2d 1058 (Colo. 1994); City and County of Denver v. Block 173 Assocs., 814 P.2d 824 (Colo. 1991); Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997); In re Estate of Bell, 4 P.3d 504 (Colo. App. 2000); Williamsen v. People, 735 P.2d 176 (Colo. 1987); Byrd v. People, 58 P.3d 50 (Colo. 2002).

An order temporarily denying relief is not a final judgment; rather it is an interlocutory order. Therefore, a temporary order does not create collateral estoppel. M & M Management Co. v. Indus. Claim Appeals Office, 979 P.2d 574 (Colo. App. 1998).

When a party has a full and fair opportunity to litigate an issue, the mere fact that the judgment was incorrect does not affect its conclusiveness. Under such circumstances, it is not unfair to apply collateral estoppel simply because the prior judgment may be wrong. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

A court may refuse to apply collateral estoppel when there are prior inconsistent judgments against the same party. A case is not a prior inconsistent judgment if that prior judgment involves a case in a different context and with different parties. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

If a trial court judgment is based on determinations of multiple issues, any of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to any of the issues standing alone. Any one of the five elements for a new trial could have been a reason for denying the new trial in a criminal case, and consequently, none of the elements is entitled to preclusive effect in an attorney malpractice case. Schultz v. Stanton, 198 P.3d 1253 (Colo. App. 2008), aff'd on other grounds, 222 P.3d 303 (Colo. 2010).

Immunity from suit is an affirmative defense. Brown v. Rosenbloom, 34 Colo. App. 109, 524 P.2d 626 (1974), aff'd, 188 Colo. 83, 532 P.2d 948 (1975).

Matters raised by a motion to dismiss which are in the nature of avoidance, discharge, and waiver are affirmative defenses which under this rule cannot be raised by motion but only by answer. Markoff v. Barenberg, 149 Colo. 311, 368 P.2d 964 (1962).

Waiver and abandonment are special defenses in the nature of confession and avoidance which must be specially pleaded. Seeger's Estate v. Puckett, 115 Colo. 185, 171 P.2d 415 (1946).

A waiver of an asserted right must be affirmatively pleaded if it is to be used as a

defense. Rudd v. Rogerson, 162 Colo. 103, 424 P.2d 776 (1967); Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

It is necessary for defendants to set forth a "lien waiver" if they desire to rely thereon under section (c) of this rule, as this is an affirmative defense. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

Burden of proving estoppel, waiver, and mistake on person raising. Person who raises the affirmative defenses of estoppel, waiver, and mistake has the burden to prove the truth of the proposition asserted. Adams County Dept. of Soc. Servs. v. Frederick, 44 Colo. App. 378, 613 P.2d 642 (1980).

Mutuality is no longer required for collateral estoppel to apply, and a non-party to a judgment may invoke collateral estoppel to bar relitigation of an issue. Collateral estoppel requires only that the party against whom collateral estoppel asserted was a party in the initial proceedings. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

As a general rule, collateral estoppel has no applicability to prior rulings in the same pending case. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Nonmutual defensive use of collateral estoppel is used by a defendant to bind a plaintiff to a prior judgment when that defendant was not a party to that judgment. A court's discretion to refuse to apply defensive nonmutual collateral estoppel is highly circumscribed. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Offensive nonmutual collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue the defendant previously litigated unsuccessfully in another action against another party. When the doctrine of collateral estoppel was expanded to include offensive collateral estoppel, its application was made discretionary with the trial court because it does not promote judicial economy in the same way as defensive nonmutual collateral estoppel and because it often will be unfair to defendants. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

In addition to foundational factors, court applying nonmutual offensive issue preclusion must consider: (1) Whether the party asserting issue preclusion could have joined in the first action, but instead took a "wait and see" approach; (2) the extent to which the party sought to be estopped had incentive to litigate vigorously the prior case; (3) whether the decision sought to be relied upon is inconsistent with another decision involving the party sought to be estopped; and (4) whether the second case afforded the party sought to be estopped procedural protections that were unavailable in the first case. Vanderpool v. Loftness, 2012 COA 115M, 300 P.3d 953.

Offensive issue preclusion may be waived. Party seeking to use issue preclusion offensively must raise it at the first reasonable opportunity after the court rendered the decision that had a preclusive effect. Trial court did not abuse its discretion in denying plaintiff's motion for directed verdict where 17 months had passed since defendant entered his guilty pleas, plaintiff objected to defendant's efforts to exclude evidence of the guilty pleas, plaintiff did not assert issue preclusion in the proposed trial management order, and plaintiff did not raise the issue until the second day of trial. Vanderpool v. Loftness, 2012 COA 115M, 300 P.3d 953.

E. Negligence Actions.

The last clear chance doctrine is a matter constituting an affirmative defense which must be pleaded, and defendant's purpose to avail himself of such defense should be stated in his answer to plaintiff's complaint. Markley v. Hilkey Bros., 113 Colo. 562, 160 P.2d 394 (1945).

Mutual denials of negligence are sufficient to raise affirmative defense of unavoidable accident. While it is the usual practice to plead unavoidable accident as an affirmative defense, the fact still remains that unavoidable accident is but a denial of negligence, and where the pleadings disclose that there were mutual denials of negligence the issue is in the case. Union P. R. R. v. Shupe, 131 Colo. 271, 280 P.2d 1115 (1955).

The issue of sudden emergency need not be stated in the complaint as an affirmative basis for relief, nor in the answer as a basis of defense; rather, notice of its applicability in any case is found in the evidence that may be offered in support of the claims or defenses. Davis v. Cline, 177 Colo. 204, 493 P.2d 362 (1972).

If negligence is a defense, defendants are deprived thereof by failing to file an affirmative pleading. Carpenter v. Hill, 131 Colo. 553, 283 P.2d 963 (1955).

The burden of alleging and proving contributory negligence rests upon the defendant under section (c) of this rule. Thorpe v. City & County of Denver, 30 Colo. App. 284, 494 P.2d 129 (1971).

Where defendant alleges in one defense of his answer that plaintiff's injuries and damages, if any, were proximately caused by plaintiff's own failure to exercise due care for his own safety, plaintiff is put on notice of defendant's contention of contributory negligence and of possibility of having to rebut showing of negligence on his part, and, therefore, it is reversible error to fail to submit issue

of contributory negligence to jury. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

"Seat belt defense" may not be pleaded affirmatively. An injured driver, or passenger, may recover the actual damages proximately caused by a tort-feasor's negligence, and the amount of such damages is not affected by, and may not be reduced, because the injured person failed to wear a seat belt, since the "seat belt defense" may not be pleaded affirmatively in defense of an action for negligence, and evidence that the injured party failed to wear a seat belt is not admissible to establish contributory negligence or to reduce the amount of the injured party's damages. Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1974).

F. Other Defenses.

An issue of accord and satisfaction is an affirmative defense under section (c) of this rule and must be specifically set forth in the pleadings. Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

In an action on a foreign judgment, the defense of payment must be specially alleged in the answer. Grandbouche v. Waisner, 136 Colo. 374, 317 P.2d 328 (1957).

Failure of consideration is an affirmative defense under section (c) of this rule and C.R.C.P. 12(h), which, if not pleaded, is waived. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

Statute of frauds must be pleaded. It is error to rule that an assignment is ineffective because of the statute of frauds when the statute has not been pleaded or relied upon. Ochsner v. Langendorf, 115 Colo. 453, 175 P.2d 392 (1946).

Assertion that claim is barred by the statute of frauds is an affirmative defense that must ordinarily be raised by answer and, if not, will be deemed waived. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995).

It is not necessary to identify a particular statute of frauds by section number to satisfy requirements of this rule where defendant pled the statute of frauds affirmatively as a defense in its answer and listed the statute of frauds as a defense in its disclosure certificate, where the parties had sufficient opportunity to argue the issue to the trial court, and where the defendant had brought the statute to the court's attention in the form of supplemental authority in support of its motion for summary judgment. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995).

Mitigation of damages must be affirmatively pleaded. Franklin v. Nolan, 28 Colo. App. 229, 472 P.2d 166 (1970).

Reimbursement for paid taxes is claim in mitigation of damages. Where defendants destroyed a valuable property relying upon a tax deed that was invalid and compensatory damages were allowed based on the value of replacing the improvements and the value of the personalty, their claim for reimbursement for taxes paid could only be a claim in mitigation of damages which must be affirmatively pleaded. Carlson v. McNeill, 114 Colo. 78, 162 P.2d 226 (1945).

Where defendant does not plead adverse possession but attempts to amend his answer at the conclusion of the trial, the court properly denies the motion, acting within its discretion. City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Lack of maturity is not one of the defenses specified as mandatory subjects of affirmative pleading under section (c), and where it was apparent from the transcript that this issue was tried by the parties and fully considered by the trial court, the defendant was entitled to consideration of this defense. L.C. Fulenwider, Inc. v. Ginsberg, 36 Colo. App. 246, 539 P.2d 1320 (1975).

Reliance on advice of counsel or consultants is not an affirmative defense or mitigating circumstance, therefore defendant is not required to plead it in its answer. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Rescission of contract must be pleaded. Affirmative defense that plaintiff misrepresented facts in course of negotiating employment contract with defendant would not be construed as demand for rescission where defendant did not give plaintiff or court any specific notice of its intent to rescind. Ice v. Benedict Nuclear Pharmaceuticals, Inc., 797 P.2d 757 (Colo. App. 1990).

Set-off allowed notwithstanding defendant's denomination of defense as a counterclaim. In an action by the assignee of a carrier for shipping charges on an article of furniture, a set-off for damage in transit to such article was properly allowable, notwithstanding defendant denominated defense as a counterclaim rather than set-off. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

Statutory limitation on judgment not affirmative defense. The statutory limitation on judgment in § 24-10-114 is not an affirmative defense and is not waived if not presented in the pleadings, at trial, or in a motion for a new trial. City of Colo. Springs v. Gladin, 198 Colo. 333, 599 P.2d 907 (1979).

Plaintiff relying on unjust enrichment must allege that he conferred a benefit which was known to or appreciated by the defendant, and which the defendant accepted or retained, making it inequitable for him to retain the benefit without payment. Backus v. Apishapa Land

& Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980).

Making an argument for collateral estoppel in a responsive brief and not affirmatively making a motion based on the defense does not negate the duty to affirmatively plead the defense. Trujillo v. Farmers Ins. Exchange, 862 P.2d 962 (Colo. App. 1993).

Plaintiff is entitled to recover based on unjust enrichment of defendant when the plaintiff has no alternative right on an enforceable contract. Backus v. Apishapa Land & Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980).

Filing a homestead claim was not a responsive pleading pursuant to section (c) which requires a party to affirmatively plead a previous discharge in bankruptcy. Matter of Lombard, 739 F.2d 499 (10th Cir. 1984).

Although inconsistent pleadings are permissible, a party may not assert one theory and induce reliance thereon and then shortly before trial reverse theories without acting contrary to the spirit of the rules. Gaybatz v. Marquette Minerals, Inc., 688 P.2d 1128 (Colo. App. 1984).

Buyer's claim under § 38-35-126 (3) to void installment land contract was an affirmative defense and compulsory counterclaim. As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim was related to seller's claim and, therefore, was a compulsory counterclaim. In addition, the primary remedy sought by buyer was rescission, which is a defense or claim which must be pleaded in accordance with section (c) of this rule. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

Insurer's general assertion of a bad faith defense did not specifically apprise plaintiff of a contract-voiding noncooperation defense, as required by section (c). Soicher v. State Farm Mut. Auto. Ins. Co., 2015 COA 46, 351 P.3d 559.

Insurer's reservation-of-rights letter was not a responsive pleading and thus was not a proper vehicle to assert either an affirmative defense or a failure of a condition precedent. Soicher v. State Farm Mut. Auto. Ins. Co., 2015 COA 46, 351 P.3d 559.

G. Election of Remedies.

Doctrine of election of remedies precludes pursuit of alternative remedies where the remedial rights sought necessarily repudiate each other. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

Party is not required to make election of remedies where the remedies he invokes are consistent. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

Inconsistency of demand makes election of one remedy estoppel against other remedy. It is not the fact that the causes of action are different, but the inconsistency of the demands, that makes the election of one remedial right an estoppel against the assertion of the other remedial right. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

V. EFFECT OF FAILURE TO DENY.

Law reviews. For article, ''The Plea of Want of Consideration in Colorado'', see 3 Rocky Mt. L. Rev. 168 (1931).

When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading. Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976).

Where it was necessary for defendants to set forth a "lien waiver" in their answer if they desired to rely thereon under section (c) of this rule, since no reply was ordered by the court, and they did not, this affirmative defense was deemed denied under section (d) of this rule. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

Where no reply was required under the rules, defendants were put on notice that any matter in avoidance of their defense of the statute of limitations would be deemed in issue before the court. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Mutual mistake theory in reply to marriage dissolution petition not waived. In a dispute over a separation agreement, a theory of mutual mistake is not waived by failure to raise the issue in the reply to the petition for dissolution of marriage, since no reply is required and averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980).

Applied in Alspaugh v. District Court, 190 Colo. 282, 545 P.2d 1362 (1976).

VI. PLEADING TO BE CONCISE AND DIRECT.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For article, ''The Federal Rules from the Standpoint of the Colorado Code'', see 27 Dicta 170 (1950). For article, ''One Year Review of Cases on Contracts'', see 33 Dicta 57 (1956). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965).

This rule provides that no technical forms of pleading are required. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780

(1962); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Technical rules will not be permitted to render a pleading defective where the attempt of the pleader to make the pleading more accurate and complete is frustrated at the instance of an objecting party. Boltz v. Bonner, 95 Colo. 350, 35 P.2d 1015 (1934).

Under this rule pleadings otherwise meeting the requirements of the rules are not objectionable for failure to state ultimate facts as distinguished from conclusions of law. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956).

Plaintiffs may state as many separate claims as they have regardless of their consistency and whether based on legal or equitable grounds or on both; the evidence will determine the appropriate relief to be granted. Apex Inv., Inc. v. Peoples Bank, 163 Colo. 325, 430 P.2d 613 (1967).

Where the same amount in question is involved in each of the claims, plaintiffs can only recover that amount. Apex Inv., Inc. v. Peoples Bank, 163 Colo. 325, 430 P.2d 613 (1967).

Where a party has alternative remedies of rescission and of damages for breach, he must elect which remedy he will base his action upon. Holscher v. Ferry, 131 Colo. 190, 280 P.2d 655 (1955).

Colorado's rules of civil procedure are designed to dispense with ritualistic, common-law, forms-of-action pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Colorado has a liberal policy under C.R.C.P. 2 and this rule of dispensing with the overly technical aspects of common-law pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

The new practice is not concerned with meeting technical requirements of theories of causes of actions. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

It no longer is necessary to elect at the peril of the pleader a particular theory or "cause of action". Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Behlen Mfg. Co. v. First Nat'l Bank, 28 Colo. App. 300, 472 P.2d 703 (1970).

The theory of pleading is to give an adversary notice of what is to be expected at trial. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation involved. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

In most cases it is sufficient if the pleader clearly identifies the transactions which form the basis of the claim for relief, and if upon any theory of the law relief is warranted by the evidence offered and received in support of the claim, it should not be denied because of the possible selection by counsel of the wrong technical cause of action. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Behlen Mfg. Co. v. First Nat'l Bank, 28 Colo. App. 300, 472 P.2d 703 (1970).

A plaintiff is not limited in evidence to those examples of conduct contained in the complaint. Since the purpose of the complaint is to provide reasonable notice of the general nature of the matter presented, it need not contain specific examples of misconduct, and therefore, it need not contain all examples of misconduct that are presented at trial. Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990).

Technical theory cannot defeat claim if pleader is entitled to relief under any theory. The technical theory of the old cause of action, as it existed under the common law and to a lesser extent under the former Code of Civil Procedure, can no longer be urged to defeat a litigation if upon any theory of law the claim stated entitles the pleader to relief. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

Just because a formal court order is not sought and entered, petitioner may not be despoiled of any rights in a matter; otherwise, such a holding would be highly technical and essentially unjust. Gillespie v. District Court, 119 Colo. 242, 202 P.2d 151 (1949).

Grounds of recovery can appear partly from both allegations of fact and legal conclusions. It is not a valid objection on a motion to dismiss a complaint as insufficient that the grounds of recovery appear partly from allegations of fact and partly from allegations of legal conclusions of the pleader. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

If the conclusions of law alleged, rather than the ultimate facts from which they flow, are accepted as not objectionable to support the claim under section (e)(1) of this rule, then the complaint is sufficient as against motion to dismiss. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

A trial court errs in dismissing the complaint based on the contentions of the defendant that plaintiffs' "theories" are deficient in one element or another, for this is a matter of evidence and cannot be resolved by the statement of counsel. Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968).

Pleadings sufficient to put contributory negligence in issue, although negligence alleged. Where plaintiff contended that, although

the pleadings made it clear that defendant was alleging negligence by plaintiff, the failure to designate it as contributory negligence changed the nature of preparation necessary to meet the issue at trial, the court held that, regardless of whether it was designated as ''negligence'' or ''contributory negligence'', the pleadings did put plaintiff on notice that he might have to rebut a showing of negligence on his part, and therefore, the pleadings, although not in the best form, were adequate to put contributory negligence in issue. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

Statute of limitations sufficiently pleaded. An allegation in a reply to a counterclaim that the counterclaim is barred by the statute of limitations in such case made and provided is a sufficient pleading to comply with section (e) of this rule. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Where plaintiff commingles in one court several causes of action, a defendant who fails to require plaintiff to state these causes separately and files an answer by way of general denial must be prepared to meet all such causes. Smith v. Gvirtzman, 109 Colo. 314, 124 P.2d 926 (1942).

Issues not pleaded may properly be determined by the trial court by consent, express or implied, where evidence presenting such issues is tendered and received without objection. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Extraneous issues may not be tried in the absence of amendment of the pleadings where timely objection is made. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Complaint did not comply with section (e). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (e) of this rule. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

VII. CONSTRUCTION.

Annotator's note. Since section (f) of this rule is similar to § 83 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Rulings under former practice and procedure that pleadings are construed most strongly against the pleader are not in harmony with present procedure. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

The rule now is that pleadings are to be construed in favor of the pleader. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

Pleadings are to be liberally construed, and doubts are to be resolved in favor of pleader. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

The trial court in its sound discretion should allow plaintiff to amend his 42 U.S.C. § 1983 complaint if justice so requires, especially in light of the liberal construction rules regarding pro se complaints under this statute. Deason v. Lewis, 706 P.2d 1283 (Colo. App. 1985).

Under this rule all pleadings are to be so construed as to do substantial justice, and a court is empowered to grant the relief to which the parties are entitled. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958); McCoy v. People, 165 Colo. 407, 439 P.2d 347 (1968).

Though the title by which a litigant may designate a pleading is not controlling, the substance of the claim rather than the appellation applied thereto controls. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Although a defense is labeled as an attack on subject matter jurisdiction, the specific allegations may be sufficient to raise the issue of lack of personam jurisdiction, depending on the factual context, and regardless of the attached label. Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Where an alleged defect in a complaint is a mere matter of interpretation, defendant cannot interpret plaintiff out of court. Mountain States Tel. & Tel. Co. v. Sanger, 87 Colo. 369, 287 P. 866 (1930).

Amendment of complaint by later argument. Where there are allegations in a complaint and facts appearing in an affidavit which may be construed as supporting the theories of estoppel and waiver, and those theories are argued to the trial court, although the theories were not specifically alleged in the complaint, the trial court must treat the complaint as amended for purposes of considering a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

Objection for insufficient facts overruled if pleading can be upheld by liberal construction. While the objection for insufficient facts is not waived by answer, but may be made at any time, making it for the first time at the trial is not encouraged by the courts and when so made will be overruled if by fair implication or most liberal construction the pleading can be held to state a cause of action. Musgrove v. Brown, 93 Colo. 559, 27 P.2d 590 (1933).

Judicial notice held proper aid in construing pleading. Where the complaint and sum-

mons were entitled in the county of Teller and the complainant alleged a contract to be performed ''in the city of Victor'', not specifying in what county it was held, on motion to change the venue, that the court might take judicial notice that the city of Victor is situate in the county of Teller and construed the complaint accordingly. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

Supreme court endeavors to ascertain the spirit and intent of the rules. In construing the rules of civil procedure applicable to a cause of action, the supreme court endeavors to ascertain the spirit and intent of the rules as reflected by the language employed. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Relief granted, if consistent with the pleadings liberally construed, will not be disturbed. A judgment will not be disturbed on the ground that it is not warranted by the pleadings where the cause has been remanded merely to permit the introduction of evidence on the undetermined issues, and the facts established by the evidence entitle the party to the relief granted, which was consistent with the pleadings liberally construed. Schiffer v. Adams, 13 Colo. 572, 22 P. 964 (1889); Marriott v. Clise, 12 Colo. 561, 21 P. 909 (1889).

The admission into evidence of a copy of a revoked will was held in conformity with the pleadings under section (f) of this rule where the will had been executed when the antenuptial agreement in issue was signed and the complaint alleged that ''in view of all the circumstances, the antenuptial agreement was not fair, equitable or reasonable''. Linker v. Linker, 28 Colo. App. 131, 470 P.2d 921 (1970).

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

Rule 9. Pleading Special Matters

(a) (1) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish same on the trial.

(2) **Identification of Unknown Party.** When a party is designated in the caption as one ''whose true name is unknown'' the pleader shall allege such matters as are within his knowledge to identify such unknown party and his connection with the claim set forth.

(3) **Interest of Unknown Parties.** When parties are designated in the caption as ''all unknown persons who claim any interest in the subject matter of this action'' the pleader shall describe the interests of such persons, and how derived, so far as his knowledge extends.

(4) **Description of Interest.** Where unknown parties claim some interest through some one or more of the named defendants, it shall be a sufficient description of their interests and of how derived to state that the interests of the unknown parties are derived through some one or more of the named defendants.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so

made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damages. When items of special damage are claimed, they shall be specifically stated.

(h) [There is no section (h).]

(i) Pleading Statute. In pleading a statute of Colorado or of the United States, the same need not be set forth at length, but it shall be sufficient to refer to such statute by the appropriate designation in the official or recognized compilation thereof, or otherwise identify the same, and the court shall thereupon take judicial knowledge thereof.

Cross references: For pleadings concerning parties plaintiff and joint defendants, see §§ 13-25-117 and 13-25-118, C.R.S.; for conclusion of a judgment in rem against unknown defendants, see C.R.C.P 54(g); for general rules of pleading, see C.R.C.P. 8.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962).

Applied in Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979); K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981); Ed Hackstaff Concrete, Inc. v. Powder Ridge Condo., 679 P.2d 1112 (Colo. App. 1984); Padilla v. Ghuman, 183 P.3d 653 (Colo. App. 2007).

II. CAPACITY.

Annotator's note. The last clause of section (a)(1) beginning with the words ''and on such issue'', is not in F.R.C.P. 9(a)(1) was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

Want of legal capacity to sue must be raised by special plea. Bohen v. Bd. of County Comm'rs, 109 Colo. 283, 124 P.2d 606 (1942).

It is unnecessary to aver in the pleadings the authority of a party to sue in a representative manner. Alder v. Alder, 167 Colo. 145, 445 P.2d 906 (1968).

If a party desires to raise an issue as to the authority of a party to sue in a representative manner, he must do so by specific negative averment. Adler v. Adler, 167 Colo. 145, 445 P.2d 906 (1968).

An answer stating that the defendant is without knowledge of plaintiff's corporate existence and capacity to sue is not sufficiently specific under this rule to place that matter in issue so that plaintiff's failure to prove its capacity may properly serve as the basis for dismissal of its complaint, and does not meet this rule's requirement for a specific negative averment. Tex-Am Carriers, Inc. v. A.S.T. Brokerage, Inc., 41 Colo. App. 438, 586 P.2d 667 (1978).

Where the pleadings of the plaintiffs in error do not contain the negative averment, the issue is never before the trial court and the objection is waived. Adler v. Adler, 167 Colo. 145, 445 P.2d 906 (1968).

Neither the legal existence of a party nor its capacity to sue can be challenged by motion to dismiss for failure to state a claim, for such issue can be raised only by specific negative averment, and the issue, when so raised, becomes an issue to be settled on the trial of the matter. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Determination whether assignee of claim for attorney's fee acted as a nonlicensed collection agency in bringing suit was not necessary where no issue concerning the capacity of assignee to sue was raised by the pleadings, the pre-trial order did not permit extension of the issues beyond those stated in the order, and the action was neither one to determine the legality of the assignment contract nor one to invoke a penalty against assignee for violation

of the collection agency statute. Reilly v. Cook, McKay & Co., 152 Colo. 269, 381 P.2d 261 (1963).

Where defendant failed to file an objection to plaintiff's motion for substitution of parties and also failed to challenge the trial court's order permitting the substitution, then right to review on appeal has been waived. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Trial court had personal jurisdiction over estate after plaintiffs amended complaint to name estate and estate's special administrator as defendants instead of deceased, non-existent defendant before any answer had been filed in the case. This cured the defect in personal jurisdiction contained in the original complaint. Currier v. Sutherland, 218 P.3d 709 (Colo. 2009).

III. IDENTIFICATION OF UNKNOWN PARTY.

Under this rule, unknown persons may be made parties to a suit to quiet title to lands and may be concluded by the decree therein. Brackett v. McClure, 24 Colo. App. 524, 135 P. 1110 (1913) (decided under § 50(b) of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

IV. INTEREST OF UNKNOWN PARTIES.

Law reviews. For article on requirements of this rule, see 6 Dicta 9 (1929). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953).

V. FRAUD, MISTAKE, CONDITION OF THE MIND.

Law reviews. For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947).

Federal rule is substantially identical, therefore federal cases interpreting F.R.C.P. 9(b) are persuasive in interpreting C.R.C.P. 9(b). State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994); Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

This rule applies to a claim of the securities commissioner for securities fraud under § 11-51-501 (1)(a) to (1)(c). Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Fraud is never presumed. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

This rule provides that in all averments of fraud the ''circumstances constituting fraud'' shall be stated with ''particularity''. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956); Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966); State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Where complaint alleged a conspiracy to defraud an insurance company by virtually every conceivable method of doing so, but failed to identify which of the hundreds of transactions between the parties over a period of years involved fraud, dismissal of the conspiracy claim and other claims incorporating the allegations contained in the conspiracy claim was proper. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Allegations of fraud must be stated with the "particularity" required by this rule. O.K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

Particularity requirement is intended in part to protect defendants from reputational harm that may result from unsupported allegations of fraud, a charge which involves moral turpitude. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

The "particularity" required includes all of the material elements of an action in fraud and deceit as such had theretofore been laid down in the numerous decisions of this court antedating the adoption of the rules of civil procedure. Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d 1080 (1952); Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966).

Particularity requirement applies to all claims "sounding in fraud", regardless of the label that a party has attached to a particular claim. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Rescission based on fraud in the inducement, asserted as an affirmative defense to action on an employment contract, held insufficiently pleaded where defendant did not allege specific damage attributable to reliance on plaintiff's misrepresentations and did not include demand for rescission in complaint. Ice v. Benedict Nuclear Pharmaceuticals, Inc., 797 P.2d 757 (Colo. App. 1990).

Where defense of fraud was stated with sufficient particularity and supported by affidavit in defendant's response to motion for partial summary judgment, it should have been incorporated in defendant's answer for the purpose of technical compliance with C.R.C.P. 8(c), even though the defense is more properly asserted in an answer. Alien, Inc. v. Futterman, 924 P.2d 1063 (Colo. App. 1995).

Earlier cases defining "particularity" required in actions for fraud and deceit. Brown v. Linn, 50 Colo. 443, 115 P. 906 (1911); Kilpatrick v. Miller, 55 Colo. 419, 135 P. 780 (1913); Morrison v. Goodspeed, 100 Colo. 470, 68 P.2d 458 (1937).

Where a plaintiff alleges that specific material representations were made by a defendant, it is insufficient merely to characterize them as false, but such plaintiff must set forth

the falsity thereof by direct and particular allegation of the true facts, demonstrating thereby that the representations are untrue. Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d 1080 (1952).

Although this rule requires particularity in averments of fraud, it does not require detailed allegations of evidentiary facts. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

A complaint need not identify every victim of a defendant's fraudulent activities. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

It is sufficient to state the main facts constituting the fraud. It is not necessary to recite in the bill of complaint all the evidence that may be adduced to prove the fraud, it being sufficient merely to state the main facts or incidents which constitute the fraud. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

Failure to allege precise dates or exact places of misrepresentations would not render fraud defense insufficient. Had the alleged fraud been pleaded with the ''particularity'' required by section (b) of this rule, the fact that the defendants failed to allege in their answer setting up the defense of fraud the precise dates upon which the misrepresentations were made, or the exact places where they were made, would not render the proposed defense legally insufficient. Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966).

The allegations and proofs of fraud must be clear and convincing. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

Allegations of fraud sufficiently averred. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

Where plaintiff does not make a prima facie showing of actionable fraud with the particularity required by section (b) of this rule, the trial court is correct in directing a verdict for defendant and against plaintiff. Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Where a complaint does not allege fraud with the particularity required by this rule and a motion to dismiss is filed, but neither argued nor ruled upon, and an answer thereafter filed in which the motion to dismiss is not repeated and trial proceeds on the issues framed by the complaint and answer without the sufficiency of the complaint being again challenged, an amendment to conform to the proof would have been in order under C.R.C.P. 15(b). O.K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

Particularity requirement of section (b) of this rule does not apply to motions under C.R.C.P. 16.2(e)(10). In re Durie, 2018 COA 143, __ P.3d __.

Complaint contained sufficient allegations of fraud to satisfy the requirements of section (b) where a corporation alleged that former officers and directors misused their access to confidential information regarding customers' identities, contracts, pricing, cost data, suppliers and production techniques to compete with the corporation and produce similar products using production and fabrication process substantially similar to the corporation's confidential processes. Scott Sys., Inc. v. Scott, 996 P.2d 775 (Colo. App. 2000).

Although the court did not decide whether claims arising under the Colorado Consumer Protection Act must be pled under section (b), complaint satisfied the heightened pleading requirements when it contained facts that alleged that a corporation had deceived consumers about their goods' geographic origins. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

VI. CONDITIONS PRECEDENT.

Law reviews. For article, ''One Year Review of Contracts'', see 35 Dicta 18 (1958).

Annotator's note. (1) The last clause of section (c) beginning with the words ''and when so made'' is not in F.R.C.P. 9(c) and was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

(2) Since section (c) of this rule is similar to § 72 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This rule provides that in pleading performance or occurrence of condition precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred but that a denial of performance ''shall be made specifically and with particularity''. Lively v. Price, 165 Colo. 111, 437 P.2d 526 (1968).

This rule permits a plaintiff to plead generally the performance of all conditions. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

Complaint on bond may adopt general averment. A complaint on a bond which prescribes conditions to be performed by the obligee in order to fix the liability of the obligor may effectually adopt the general averment of conditions performed. United States Fid. & Guar. Co. v. Newton, 50 Colo. 379, 115 P. 897 (1911).

Plaintiff under the allegation of performance of an insurance contract can prove waiver of policy requirements by the company. Southern Sur. Co. v. Farrell, 79 Colo. 53, 244 P. 475 (1926).

Complaint failing to allege performance by plaintiff is fatally defective. A complaint based upon a contract executory as to the plain-

tiff which is silent upon the question of plaintiff's performance and contains no averments which, if true, would excuse performance is fatally defective. Armor v. Fisk, 1 Colo. 148 (1869); Jones v. Perot, 19 Colo. 141, 34 P. 728 (1893); Bd. of Pub. Works v. Hayden, 13 Colo. App. 36, 56 P. 201 (1899); Mulford v. Central Life Assurance Soc'y, 25 Colo. App. 527, 139 P. 1044 (1914); Galligan v. Bua, 77 Colo. 386, 236 P. 1016 (1925).

It is not defective for failure to state plaintiff "duly" performed all conditions. In an action on a hail insurance policy where the allegations of the complaint substantially complied with this provision, it is held that it was not defective because it failed to state that plaintiff ''duly'' performed all of the conditions of the contract. Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931).

It is error to refuse filing of answer denying performance. Where the petition alleged performance of the contract on the part of the petitioner, an answer denying the allegations of performance in the petition created a material issue, and it was error to refuse to permit it to be filed. Bd. of Pub. Works v. Hayden, 13 Colo. App. 36, 56 P. 201 (1899).

Defendant must specially allege nonperformance of conditions precedent. Where an averment of performance of conditions precedent is allowed in the complaint, the rule is that if a defendant relies upon nonperformance he must specially allege the condition or conditions on the nonperformance of which he relies and negate their performance. Helvetia Swiss Fire Ins. Co. v. Allis Co., 11 Colo. App. 264, 53 P. 242 (1898); Pennsylvania Mut. Life Ins. Co. v. Ornauer, 39 Colo. 498, 90 P. 846 (1907); Nat'l Sur. Co. v. Queen City Land Co., 63 Colo. 105, 164 P. 722 (1917).

Denial must be made specifically and with particularity. If an adverse party denies the performance of any such conditions, the rule requires that such denial shall be made specifically and with particularity. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

Plaintiff is not obliged to prove performance of condition precedent not put in issue by defendant. Under this rule in an action where a plaintiff alleges generally the performance of all conditions precedent and defendant denies with particularity the performance of specific conditions, the plaintiff is not obliged to prove performance of a condition precedent with reference to which the defendant has tendered no issue. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

Insurer did not sufficiently assert plaintiff's noncooperation as a failure of a condition precedent. General denial of plaintiff's allegation that she had performed all obligations imposed under insurance policy did not satisfy the requirement that insurer plead the denial of the performance of a condition precedent ''specifically and with particularity'' as required by section (c). Soicher v. State Farm Mut. Auto. Ins. Co., 2015 COA 46, 351 P.3d 559.

Insurer's reservation-of-rights letter was not a responsive pleading and thus was not a proper vehicle to assert either an affirmative defense or a failure of a condition precedent. Soicher v. State Farm Mut. Auto. Ins. Co., 2015 COA 46, 351 P.3d 559.

VII. JUDGMENT.

Annotator's note. The last sentence of section (e) is not in F.R.C.P. 9(e) and was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

The manner of pleadings of this rule is prescribed not only to simplify the pleadings relating to judgments, but also to apprise the pleader of a judgment or decision of a court that it is being challenged for jurisdictional reasons as well as the particular grounds of the attack upon it, and for the further purpose of preventing final judgments and decisions of courts from being overthrown unadvisedly. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

The party pleading a foreign judgment must establish all jurisdictional facts when denial of jurisdiction is made with particularity by the opponent. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

A general denial of the validity of the decree is not sufficient to assail it. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

If plaintiff intends to attack a decree upon jurisdictional grounds, he is required to give notice to the defendants by specifically denying jurisdiction and alleging with particularity the grounds showing lack of jurisdiction. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

The mandatory provisions of this rule are not waived by the first pleaders having alleged jurisdictional facts in support of a judgment or decree. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Contrary rulings by the court under the former code are no longer authority in Colorado. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Fraud which will be available to a defendant in his attack upon a foreign judgment is fraud which has deprived him of the opportunity to make a full and fair defense. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

Where the very jurisdictional facts alleged as fraud were those heard and decided by the foreign court, no good reason appears why defendants should be permitted to relitigate this matter, they having had their day in court

thereon. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The doctrine of "res judicata" must be applied to questions of jurisdiction in cases arising in state courts involving application of the full faith and credit clause where under the law of the state in which the original judgment was rendered such adjudications are not susceptible to collateral attack. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The doctrine of "res judicata" applies to adjudications of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. Superior Distrib. Co. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

Court may take judicial notice of doctrine or rule of law adopted in previous action. The rule which precludes a court from taking judicial notice of its own records in other actions, unless properly introduced in evidence, does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principle under the theory of ''stare decisis'' in the second action. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

The trial court can properly take judicial notice of the fact that defendants had a right established by a previous action in its court and as to the wording used in that judgment, which wording later needed interpretation. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

In order that an action may be maintained in one state upon a judgment recovered in another state, it is necessary that the judgment should be a valid and final adjudication, remaining in full force and virtue in the state of its rendition, and capable of being there enforced by final process. Gobin v. Citizens' State Bank, 92 Colo. 350, 20 P.2d 1007 (1933) (decided under § 71 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941); Ginsberg v. Gifford, 144 Colo. 186, 355 P.2d 657 (1960); Superior Distrib. Corp. v. McCrory, 144 Colo. 457, 356 P.2d 961 (1960).

Complaint need not "specifically" allege that foreign judgment "can be enforced". It is not essential to a complaint based upon a foreign judgment that the allegations ''specifically'' state that the judgment sued upon ''can be enforced'' in the jurisdiction in which it was entered where the allegations in substance allege that the judgment is a valid and final adjudication remaining in full force in the state of its rendition and capable of being there enforced by final process, for under the liberalized rules of civil procedure, it is the substance of the complaint rather than the form that is paramount. Superior Distrib. Corp. v. Zarelli, 143 Colo. 358, 352 P.2d 967 (1960); Ginsberg v. Gifford, 144 Colo. 186, 355 P.2d 657 (1960).

Where the pleadings show that a foreign judgment is a contingent, inconclusive adjudication, interlocutory in nature, the complaint is insufficient to state an enforceable claim on a foreign judgment. Superior Distrib. Corp. v. McCrory, 144 Colo. 457, 356 P.2d 961 (1960).

VIII. TIME AND PLACE.

Where the complaint on its face fails to make the material allegation of place, a motion to dismiss is good. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

A motion to dismiss based on the fact that the complaint facially established a jurisdictional defect because of a violation of the statute of limitations has the effect of a motion for judgment on the pleadings, as averments of time will be considered in determining the sufficiency of the pleadings. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

IX. SPECIAL DAMAGES.

Law reviews. For article, ''The Law of Libel in Colorado'', see 28 Dicta 121 (1951). For article, ''Loss of Use as an Element of Damages'', 28 Dicta 277 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963).

Special damages must be specifically set forth in complaint. Where the loss of the business use of plaintiff's car was not the usual and natural consequence of any wrongful act on defendant's part, the damages, if any, which he sustained resulting from defendant's acts were required to be specifically set forth in his complaint. Rogers v. Funkhouser, 121 Colo. 13, 212 P.2d 497 (1949).

Purpose of requiring that special damages be pled with specificity is essentially one of notice. Rodriquez v. Denver & R. G. W. R. R., 32 Colo. App. 378, 512 P.2d 652 (1973).

Only when a party seeks to recover such damages as are not the usual and natural consequence of the wrongful act complained of must special damages be specially pled. Rodriquez v. Denver & R. G. W. R. R., 32 Colo. App. 378, 512 P.2d 652 (1973).

Special damages may be considered by the court when not pleaded. Where special damages are not pleaded by plaintiff as required by section (g) of this rule, but defendant neither attacks the sufficiency of the complaint nor objects to evidence introduced relevant thereto, the trial court may, pursuant to C.R.C.P. 15(b), consider the matter of special damages and enter judgment for such amount as warranted by the evidence. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Where the amended complaint of the plaintiffs did not plead special damages and the record disclosed that the defendant was put on notice of the claim for special damages as early as the pre-trial conference, the trial court's admission of the evidence and grant of leave to amend the complaint to conform to the proof upon motion of the plaintiffs was in conformity with the discretion of C.R.C.P. 15(b). Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968); Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

Complaint in breach of contract suit "specifically stated" items of special damage where it was alleged that as a result of defendants' refusal to permit plaintiffs to use water specified in an agreement to exchange property, plaintiffs were damaged in that they were forced to drill a well on their own property and that there was also some loss of business and profits in the operation of their tourist court. Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

The only claims of defamation which may be maintained without allegation and proof of special damages are claims of libel per se, or claims of libel per quod where the alleged defamatory words meet certain of the specific criteria required in claims of slander per se. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

X. PLEADING STATUTE.

Allegation that action is barred by statute does not require specific citation. Under the rules of pleading the allegation that an action is barred by the statute in such case made and provided is certainly a reference to the statute on which a plaintiff relies and does not require specific citation to chapter and page. Denning v. A.D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Instruction on statute not objectionable where complaint fails to specifically refer to statute. Instruction covering the subject of damages which are recoverable for wrongful death was not objectionable because plaintiff had failed to specifically refer in his complaint to the wrongful death statute. Reidesel v. Blank, 158 Colo. 340, 407 P.2d 30 (1965).

Court may allow amendment to more specifically plead statute subsequent to proof for clarification. After proof had been offered under the issues tendered and some question arose as to whether the statute of limitations had been pleaded, it was permissible for the court to permit counsel leave to amend by more specifically pleading the statute of limitations for the purpose of clarification. Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944).

Rule 10. Form and Quality of Pleadings, Motions and Other Documents

(a) Caption; Names of Parties. Every pleading, motion, E-filed document under C.R.C.P. 121 (1-26), or any other document filed with the court (hereinafter ''document'') in both civil and criminal cases shall contain a caption setting forth the name of the court, the title of the action, the case number, if known to the person signing it, the name of the document in accordance with Rule 7(a), and the other applicable information in the format specified by paragraph (d) and the captions illustrated by paragraph (e) or (f) of this rule. In the complaint initiating a lawsuit, the title of the action shall include the names of all the parties to the action. In all other documents, it is sufficient to set forth the name of the first-named party on each side of the lawsuit with an appropriate indication that there are also other parties (such as ''et al.''). A party whose name is not known shall be designated by any name and the words ''whose true name is unknown''. In an action in rem, unknown parties shall be designated as ''all unknown persons who claim any interest in the subject matter of this action''.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by its paragraph number in all succeeding documents. Each claim founded upon a separate transaction or occurrence, and each defense other than denials, shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Incorporation by Reference; Exhibits. A statement in a document may be incorporated by reference in a different part of the same document or in another document. An exhibit to a document is a part thereof for all purposes.

(d) General Rule Regarding Paper Size, Format, and Spacing. All documents filed after the effective date of this rule, including those filed through the E-Filing System under C.R.C.P. 121 (1-26), shall meet the following criteria:

(1) **Paper:** Where a document is filed on paper, it shall be on plain, white, 8 1/2 by 11 inch paper (recycled paper preferred).

(2) **Format:** All documents shall be legible. They shall be printed on one side of the page only (except for E-Filed documents).

(I) **Margins:** All documents shall use margins of 1 1/2 inches at the top of each page, and 1 inch at the left, right, and bottom of each page. Except for the caption, a left-justified margin shall be used for all material.

(II) **Font:** No less than twelve (12) point font shall be used for all documents, including footnotes.

(III) **Case Caption Information:** All documents shall contain the following information arranged in the following order, as illustrated by paragraphs (e) and (f) of this rule, except that documents issued by the court under the signature of the clerk or judge should omit the attorney section as illustrated in paragraphs (e)(2) and (f)(2). Individual boxes should separate this case caption information; however, vertical lines are not mandatory.

On the left side:
Court name and mailing address.
Name of parties.
Name, address, and telephone number of the attorney or pro se party filing the document. Fax number and e-mail address are optional.
Attorney registration number.
Document title.

On the right side:
An area for ''Court Use Only'' that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court and party information).

Case number, division number, and courtroom number (located opposite the attorney information above).

(3) **Spacing:** The following spacing guidelines should be followed.

(I) **Single spacing for all:**
Affidavits
Complaints, Answers, and Petitions
Criminal Informations and Complaints
Interrogatories and Requests for Admissions
Notices
Pleading forms (all case types)
Probation reports
All other documents not listed in subsection (II) below

(II) **Double spacing for all:**
Briefs and Legal Memoranda
Depositions
Documents that are complex or technical in nature
Jury Instructions
Motions
Petitions for Rehearing
Petitions for Writ of Certiorari
Petitions pursuant to C.A.R. 21
Transcripts

(4) **Signature Block:** All documents which require a signature shall be signed at the end of the document. The attorney or pro se party need not repeat his or her address, telephone number, fax number, or e-mail address at the end of the document.

(e) Illustration of Preferred Case Caption Format:

(1) **Preferred Caption for documents initiated by a party:**

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): *[Substitute appropriate party designations & names]* v. **Defendant(s):**	
Attorney or Party Without Attorney: Name: Address: Phone Number: FAX Number: E-mail: Atty. Reg.#:	▲ **COURT USE ONLY** ▲ Case Number: Div.: Ctrm.:
NAME OF DOCUMENT	

(2) **Preferred Caption for documents issued by the court under the signature of the clerk or judge:**

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): *[Substitute appropriate party designations & names]* v. **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Div.: Ctrm.:
NAME OF DOCUMENT	

(f) Illustration of Optional Case Caption:

(1) **Optional Caption for documents initiated by a party:**

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): *[Substitute appropriate party designations & names]* v. **Defendant(s):**	
Attorney or Party Without Attorney: Name: Address: Phone Number: FAX Number: E-mail: Atty. Reg.#:	▲ **COURT USE ONLY** ▲ Case Number: Div.: Ctrm.:
NAME OF DOCUMENT	

(2) **Optional Caption for documents issued by the court under signature of the clerk or judge:**

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): *[Substitute appropriate party designations & names]* v. **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Div.: Ctrm.:
NAME OF DOCUMENT	

(g) Court Designation Examples:

APPELLATE
SUPREME COURT, STATE OF COLORADO
COURT OF APPEALS, STATE OF COLORADO

WATER
DISTRICT COURT, WATER DIVISION ___, COLORADO

DISTRICT
DISTRICT COURT, _____ COUNTY, COLORADO

COUNTY
COUNTY COURT, _____ COUNTY, COLORADO

CITY AND COUNTY
COUNTY COURT, CITY AND COUNTY OF _____, COLORADO
PROBATE COURT, CITY AND COUNTY OF _____, COLORADO

JUVENILE COURT, CITY AND COUNTY OF _____, COLORADO
DISTRICT COURT, CITY AND COUNTY OF _____, COLORADO

(h) The forms of case captions provided for in this rule replace those forms of captions otherwise provided for in other Colorado rules of procedure, including but not limited to the Colorado Rules of County Court Procedure, the Colorado Rules of Procedure for Small Claims Courts, and the Colorado Appellate Rules. These forms of case captions apply to criminal cases, as well as civil cases.

(i) State Judicial Pre-Printed or Computer-Generated Forms. Forms approved by the State Court Administrator's Office (designated ''JDF'' or ''SCAO'' on pre-printed or computer-generated forms), forms set forth in the Colorado Court Rules, volume 12, C.R.S., (including those pre-printed or computer-generated forms designated ''CRCP'' or ''CPC'' and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, ''ICON,'' shall conform to criteria established by the State Court Administrator's Office with the approval of the Colorado Supreme Court. Such forms, whether preprinted or computer-generated, shall employ a form of caption similar to those contained in this rule, contain check-off boxes for the court designation, have at least a 9-point font, and 1 inch left margin, 1/2 inch right and bottom margins, and at least 1 inch top margin, except that for forms designated ''JDF'' or ''SCAO'' the requirement of at least 1 inch for the top margin shall apply to forms created or revised on and after April 5, 2010.

Source: (d)(1) amended and effective September 6, 1990; entire rule amended and Comment added June 1, 2000, effective July 1, 2000; entire rule and Comment amended and adopted June 28, 2001, effective July 1, 2001; entire rule amended and adopted November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004; (i) amended and effective March 30, 2006; (i) amended and effective April 5, 2010; (d)(2)(II), (d)(3), and Comments amended and adopted January 29, 2016, effective for motions filed on or after April 1, 2016.

Cross references: For pleadings allowed, see C.R.C.P. 7(a); for general rules of pleading, see C.R.C.P. 8.

COMMENTS

2001

[1] This rule sets forth forms of case captions for all documents that are filed in Colorado courts, including both criminal and civil cases. The purpose of the form captions is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently. Judges are encouraged in their orders to employ a caption similar to that found in paragraph (e)(2).

[2] The preferred case caption format for documents initiated by a party is found in paragraph (e)(1). The preferred caption for documents issued by the court under the signature of a clerk or judge is found in paragraph (e)(2). Because some parties may have difficulty formatting their documents to include vertical lines and boxes, alternate case caption formats are found in paragraphs (f)(1) and (f)(2). However, the box format is the preferred and recommended format.

[3] The boxes may be vertically elongated to accommodate additional party and attorney information if necessary. The ''court use'' and ''case number'' boxes, however, shall always be located in the upper right side of the caption.

[4] Forms approved by the State Court Administrator's Office (designated ''JDF'' or ''SCAO''), forms set forth in the Colorado Court Rules, volume 12, C.R.S. (including those designated ''CRCP'' or ''CPC'' and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, ''ICON,'' shall conform to criteria established by the State Court Administrator's Office as approved by the Colorado Supreme Court. This includes preprinted and computer-generated forms. JDF and SCAO forms and a flexible form of caption which allows the entry of additional party and attorney information are available and can be downloaded from the Colorado courts web page at http://www.courts.state.co.us/scao/Forms.htm.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951).

Actions may be brought only by and against legal entities. Actions may be brought only by legal entities and against legal entities. There must be some ascertainable persons, natural or artificial, to whom judgments are awarded and against whom they may be enforced. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

II. CAPTION; NAMES OF PARTIES.

Law reviews. For article, ''The Federal Rules from the Standpoint of the Colorado Code'', see 17 Dicta 170 (1940). For article, ''Motion for Publication of Summons on Quiet Title Proceedings'', see 26 Dicta 182 (1949). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with John Doe pleadings, see 62 Den. U. L. Rev. 220 (1985).

Naming exception is not applicable to verdicts and judgments. A verdict is not a pleading, and those who formulated in C.R.C.P. 10(a) an exception to naming parties in pleadings did not have any intention of making the same exception for verdicts and judgments. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

There is no exception to naming requirement. The rules of civil procedure make no exception in ''in rem'' actions, as distinguished from ''in personam'' actions, to the requirement that defendants be named if their names are known or be designated as ''unknown'' when such is the case. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

Naming of defendants insufficient. The designations, ''owner'' and ''operator'', in the caption of the case, without naming them, when those persons were known to the district attorney, are not in compliance with the requirements of the rules of civil procedure that a party defendant shall be named unless his name is unknown. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

Rule is only an attempt to standardize the method of form by which all complaints are to be made, not a device by which claims may be forever preserved. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

There is no indication in the rule that naming a "John Doe" defendant operates to toll the statute of limitations, nor have any Colorado courts recognized that the rule was intended to toll the statute or in any manner preserve any claims against later identified parties. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

The public has an interest in disclosure of who the parties to an action are. A party may use a pseudonym for the name of a party upon a motion to the court. The court in determining whether use of a pseudonym for a party is appropriate shall evaluate: Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; whether the action is against a governmental or a private party; whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution; and the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. A pseudonym may not be used merely to avoid embarrassment, humiliation, or economic loss. Doe v. Heitler, 26 P.3d 539 (Colo. App. 2001).

III. ADOPTION BY REFERENCE; EXHIBITS.

Annotator's note. Since section (c) of this rule is similar to rule 2 of the former supreme court rules, cases construing that rule are included in the annotations to this rule.

Section (c) was intended to eliminate unnecessary repetition. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

This rule was intended to prevent the necessity of repeating the parts relevant to a later count, and it was expected that pleaders would refer only to the relevant parts by the words ''as in the first cause of action stated'' or their equivalent, as was the custom at common law. Fulton Inv. Co. v. Farmers Reservoir & Irrigation Co., 76 Colo. 472, 231 P. 61 (1925).

The pleader has no right to adopt wholesale all the allegations of a previous cause of action. Fulton Inv. Co. v. Farmers Reservoir & Irrigation Co., 76 Colo. 472, 231 P. 61 (1925).

This rule permits a document to be made a part of a pleading by attaching it as an exhibit, and in so attaching it, it amounts to the same

thing as if it were set forth in the body of the pleading, as was the practice before the rule. Sparks v. Eldred, 78 Colo. 55, 239 P. 730 (1925).

Rule 11. Signing of Pleadings

(a) Obligations of Parties and Attorneys. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name. The initial pleading shall state the current number of his registration issued to him by the Supreme Court. The attorney's address and that of the party shall also be stated. A party who is not represented by an attorney shall sign his pleadings and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader. If the current registration number of the attorney is not included with his signature, the clerk of the court shall request from the attorney the registration number. If the attorney is unable to furnish the court with a registration number, that fact shall be reported to the clerk of the Supreme Court, but the clerk shall nevertheless accept the filing. If a pleading is signed in violation of this Rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee, provided, however, that failing to be registered shall be governed by Rule 227.

Reasonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.

(b) Limited Representation. An attorney may undertake to provide limited representation in accordance with Colo.RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement. In helping to draft the pleading or paper filed by the pro se party, the attorney certifies that, to the best of the attorney's knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. Assistance by an attorney to a pro se party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 11(b).

Limited representation of a pro se party under this Rule 11(b) shall not constitute an entry of appearance by the attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 5(b), and does not authorize or require the service of papers upon the attorney. Representation of the pro se party by the attorney at any proceeding before a judge, magistrate, or other judicial officer on behalf of the pro se party constitutes an entry of an appearance pursuant to C.R.C.P. 121, section 1-1. The attorney's violation of this Rule 11(b) may subject the attorney to the sanctions provided in C.R.C.P. 11(a).

Source: Entire rule amended and adopted June 17, 1999, effective July 1, 1999.

Cross references: For stating defenses and form of denials, particularly general denials, see C.R.C.P. 8(b); for requirement of verification or affidavit in depositions to perpetuate testimony, see C.R.C.P. 27(a)(1), in injunctions, see C.R.C.P. 65, in certiorari, see C.R.C.P. 106(a)(4), in civil contempt, see C.R.C.P. 107(c), in motion for service by mail or publication, see C.R.C.P. 4(g), and, in motion for orders authorizing foreclosure sales under power in deed of trust to public trustee or in response thereto, see C.R.C.P. 120.

ANNOTATION

Law reviews. For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953). For article ''Van Cise on Rule Eleven'', see 31 Dicta 14 (1954). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For article, ''Rule 11 as a Litigation Tool'', see 12 Colo. Law. 1242 (1983). For article, ''Lawyers' Liability for Attorney's Fees Awarded Against Clients'', see 12 Colo. Law. 1638 (1983). For article, ''The Expanding Liability of Colorado Lawyers for Sanctions and Malpractice Claims'', see 22 Colo. Law. 1701 (1993). For article, ''Recovery of Attorney Fees and Costs in Colorado'', see 23 Colo. Law. 2041 (1994). For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (January 2000). For article, ''Combating Bad-Faith Litigation Tactics With Claims for Abuse of Process'', see 38 Colo. Law. 31 (December 2009). For article, ''Pretext Investigations: An Ethical Dilemma for IP Attorneys'', see 43 Colo. Law. 41 (June 2014).

Annotator's note. For cases construing verification of pleadings as required by § 67 of the former Code of Civil Procedure, which was supplanted by this rule in 1941, see Martin v. Hazzard Powder Co., 2 Colo. 596 (1875); Nichols v. Jones, 14 Colo. 61, 23 P. 89 (1890); Speer v. Craig, 16 Colo. 478, 27 P. 891 (1891); Tulloch v. Belleville Pump & Skein Works, 17 Colo. 579, 31 P. 229 (1892); Perras v. Denver & R. G. R. R., 5 Colo. App. 21, 36 P. 637 (1894); Hill Brick & Tile Co. v. Gibson, 43 Colo. 104, 95 P. 293 (1908); Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910); Johnson v. Johnson, 78 Colo. 187, 240 P. 944 (1925); Prince Hall Grand Lodge v. Hiram Grand Lodge, 86 Colo. 330, 282 P. 193 (1929). For cases construing § 66 of the former Code of Civil Procedure, which was supplanted in part by this rule in 1941, concerning sham answers, see Glenn v. Brush, 3 Colo. 26 (1876); Rhodes v. Hutchins, 10 Colo. 258, 15 P. 329 (1887); Patrick v. McManus, 14 Colo. 65, 23 P. 90 (1890); Johnson v. Tabor, 4 Colo. App. 183, 35 P. 199 (1893); Cochrane v. Parker, 5 Colo. App. 527, 39 P. 361 (1895); Sylvester v. Case Threshing Mach. Co., 21 Colo. App. 464, 122 P. 62 (1912); Eastenes v. Adams, 93 Colo. 258, 25 P.2d 741 (1933); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934); Greagor v. Wilson, 103 Colo. 329, 86 P.2d 265 (1938).

The rule imposes the following independent duties on an attorney or litigant who signs a pleading: (1) Before a pleading is filed, there must be a reasonable inquiry into the facts and the law; (2) based on this investigation, the signer must reasonably believe that the pleading is well grounded in fact; (3) the legal theory asserted in the pleading must be based on existing legal principles or a good faith argument for the modification of existing law; and (4) the pleading must not be filed for the purpose of causing delay, harassment, or an increase in the cost of litigation. Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992).

The standard established by this rule focuses on what should have been done before a pleading was filed, and trial court's award of attorney fees to person wrongfully sued, even though the case was dismissed, was not abuse of discretion where the plaintiffs were not prevented from conducting additional investigation to establish whether they were suing the correct party. Switzer v. Giron, 852 P.2d 1320 (Colo. App. 1993).

Sanction under this rule can be imposed only, as the rule itself states, if a pleading is signed in violation of the rule and not on the basis of any post-signing, post-filing conduct by the attorney. SRS, Inc. v. Southward, 2012 COA 19, 272 P.3d 1179.

Inquiry under section (a) of this rule does not turn on the outcome of the case; instead, it turns on whether attorney met the reasonable inquiry and proper purpose threshold in preparing and signing the pleading. The rule's explicit application to the signing attorney or pro se party signing the pleading is clear and unambiguous. While pleadings may identify other attorneys who may have had some role in the case, the signature requirement is designed to hold only the signing attorney responsible for the required certification. If more than one attorney signs a pleading, each one who has signed the pleading is responsible for the certification. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Section (a) requires a signature and holds the signing attorney responsible for the certificate. Certification by signature requirement vindicates rule's purpose: To deter the filing of frivolous actions and pleadings. It personalizes the responsibility of the person who has undertaken to certify the pleading. Here, only the attorney who signed complaint and amended complaint at issue is answerable to the motion for sanctions. Presiding disciplinary judge erred by ordering attorney whose name appeared in the signature block on both pleadings, but who did not sign either of the pleadings, to respond to motion for sanctions. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Abuse of discretion for presiding disciplinary judge to hold that assistant attorney regulation counsel violated rule when she advanced claim that attorney had violated C.R.P.C. 8.4(c). No evidence that assistant attorney regulation counsel failed to investigate either the facts or the law and she did not misrepresent them in the complaint. People v. Trupp, 92 P.3d 923 (Colo. 2004).

Compliance with this rule should be had in all pleadings. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Even though C.R.P.C. 1.2(c) allows unbundling of legal services, an attorney remains obligated to comply with section (b) of this rule. In re Merriam, 250 B.R. 724 (Bankr. D. Colo. 2000).

This rule is applicable to motions and other papers pursuant to C.R.C.P. 7(b)(2), and sanctions may be imposed for violation. An attorney or litigant who signs a motion or other paper has the same obligation as the signer of a pleading to ensure that the document is factually and legally justified. Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Sanctions are improper where allegations set forth in response brief were based on statements made during witness' deposition. Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Trial court abused its discretion when, as a sanction for filing a disclosure certificate signed by plaintiff's former attorney's paralegal rather than the plaintiff herself, the court limited the witnesses the plaintiff could call to the defendant and herself. Defendants did not suffer any prejudice as a result of the improper signing of the certificate since the filing served its purpose of timely informing them of the evidence plaintiff intended to present at trial. Keith v. Valdez, 934 P.2d 897 (Colo. App. 1997).

This rule contemplates an answer that speaks the truth. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Where none of the specific denials has any foundation in fact, a general denial should not be filed. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

This rule grants authority for subjecting an attorney to appropriate disciplinary action. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

Court may impose appropriate sanctions for violation of rule, including reasonable expenses incurred because of the filing of the pleadings. Schmidt Const. Co. v. Becker-Johnson Corp., 817 P.2d 625 (Colo. App. 1991).

Assessment of costs should await final judgment and become a part thereof, thus subject to review. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

To warrant the trial court's exercise of discretion in ordering sanctions against a client under the rule, the trial court must find and the record must confirm some nexus between the proscribed conduct and a specific undertaking by or knowledge of the client that the rule is being violated. Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Trial court's discretion. Whether attorney fees are awarded under this rule is within the trial court's discretion and will not be disturbed unless the discretion is abused. Findings of the trial court that the plaintiff bank's claims of fraud were not groundless or frivolous were supported by the record, and the trial court did not abuse its discretion in denying the motion for sanctions. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993).

A state court cannot impose sanctions under this rule for the conduct of an attorney during a federal court proceeding even if the proceeding is part of a single litigation that also includes state law claims heard by the state court, because the decision to impose such sanctions is necessarily a matter within the jurisdiction of the court in which the conduct occurred. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

Award of attorney fees against plaintiff's attorney appropriate use of trial court's discretion given attorney's allegations as to the personal conduct of individuals who had not been joined in the action, insistence on relitigating issues when the court had made it clear that those issues were moot, reckless allegations of wrongdoing by individuals and attorneys without a showing of competent investigation or facts to support the allegations, and a request for fines or imprisonment without any showing to support such a request. Carder, Inc. v. Cash, 97 P.3d 174 (Colo. App. 2003).

Trial court was not obligated to assess attorney fees as a sanction for a violation of this rule when the attorney presented a rational argument, based on documentary evidence and established principles of contract interpretation,

in support of his position. E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002).

Sanctions are for the benefit of a party and not a nonparty. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

Victim of a frivolous lawsuit has a duty to mitigate attorney fees incurred in defending the lawsuit by taking reasonable measures to extricate himself or herself from the frivolous lawsuit at the earliest possible time. Consequently, trial court should not have awarded attorney fees incurred in pursuing defendant's counterclaims after plaintiff dismissed its original complaint against defendants. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

This rule imposes sanctions upon those who violate its provisions, it does not preclude relief under C.R.C.P. 60(b)(1). Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

The failure to sign a complaint is not jurisdictional, but is subject to correction upon being called to the attention of the court. Harris v. Mun. Court, 123 Colo. 539, 234 P.2d 1055 (1951).

Failure of attorney representing county department of social services to sign verified dependency petition held to be harmless. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

County attorney not immune from award of fees under this rule when filing petition for temporary guardianship under § 26-3.1-104. Stepanek v. Delta County, 940 P.2d 364 (Colo. 1997).

Omission of party's address does not warrant dismissal. The original failure to comply with this rule by omitting the address of the party does not warrant dismissal of an action. Glickman v. Mesigh, 200 Colo. 320, 615 P.2d 23 (1980).

An independent claim based upon an alleged violation of this rule may not be asserted in a proceeding separate from the underlying cause of action. Henry v. Kemp, 829 P.2d 505 (Colo. App. 1992).

Defendant in legal malpractice action entitled to hearing on his or her claim for sanctions under this rule and § 13-17-102. When a party requests a hearing regarding the award of attorney fees and costs under § 13-17-102, the trial court must conduct an evidentiary hearing. Because the trial court denied the motion without conducting a hearing on defendant's motion for sanctions, remand is required for a hearing. Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Applied in People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988).

Rule 12. Defenses and Objections — When and How Presented — by Pleading or Motion — Motion for Judgment on Pleadings

(a) When Presented.

(1) A defendant shall file his answer or other response within 21 days after the service of the summons and complaint. The filing of a motion permitted under this Rule alters these periods of time, as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, or for a statement in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the more definite statement or amended pleading.

(2) If, pursuant to special order, a copy of the complaint is not served with the summons, or if the summons is served outside of Colorado or by publication, the time limit for filings under subsections (a)(1) and (e) of this Rule shall be within 35 days after the service thereof.

(3) A party served with a pleading stating a cross-claim against that party shall file an answer thereto within 21 days after the service thereof.

(4) The plaintiff shall file a reply to a counterclaim in the answer within 21 days after the service of the answer.

(5) If a reply is made to any affirmative defense, such reply shall be filed within 21 days after service of the pleading containing such affirmative defense.

(6) If a pleading is ordered by the court, it shall be filed within 21 days after the entry of the order, unless the order otherwise directs.

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted

in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:

(1) lack of jurisdiction over the subject matter;
(2) lack of jurisdiction over the person;
(3) insufficiency of process;
(4) insufficiency of service of process;
(5) failure to state a claim upon which relief can be granted; or
(6) failure to join a party under C.R.C.P. 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under this Rule or C.R.C.P. 98. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated in subsections (1)-(6) of section (b) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this Rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for Separate Statement or for More Definite Statement. Within the time limits for filings under subsections (a)(1) and (a)(2) of this Rule, the party may file a motion for a statement in separate counts or defenses or for a more definite statement of any matter that is not averred with sufficient definiteness or particularity to enable the party properly to prepare a responsive pleading. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion filed by a party within the time for responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this section (f).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to that party. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party which this Rule permits to be raised by motion, that party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) of this Rule on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived: (A) If omitted from a motion in the circumstances described in section (g); or (B) if it is neither made by motion under this

Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Source: (a), (e), and (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (a), (b), and (e) to (g) amended and adopted and comments added and adopted May 28, 2015, and effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For pleadings allowed and form of motions, see C.R.C.P. 7; for pleadings genereally, see C.R.C.P. 8; for joinder of persons needed for just adjudication, see C.R.C.P. 19; for summary judgments, see C.R.C.P. 56; for motions relating to venue, see C.R.C.P. 98.

COMMENTS

2015

[1] The practice of pleading every affirmative defense listed in C.R.C.P. 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a). The pleading of affirmative defenses is subject not only to C.R.C.P. 8(b), which requires a party to ''state in short and plain terms his defense to each claim asserted,'' but also to C.R.C.P. 11(a): ''The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'' Some affirmative defenses are also subject to the special pleading requirements of C.R.C.P. 9. To the extent a defendant does not have sufficient information under Rule 11(a) to plead a particular affirmative defense when the answer must be filed but later discovers an adequate basis to do so, the defendant should move to amend the answer to add the affirmative defense.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964). For article, ''A Litigator's Guide to Summary Judgments'', see 14 Colo. Law. 216 (1985). For article, ''Recent Developments in Governmental Immunity: Post-Trinity Broadcasting'', see 25 Colo. Law. 43 (June 1996). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013). For article,

''A Modest Proposal: The Rule 3(a) Waiver Agreement'', see 46 Colo. Law. 23 (Mar. 2017). For article, ''Sovereign Immunity in Colorado: A Look at the CGIA'', see 46 Colo. Law. 49 (Apr. 2017).

If the plaintiff fails to establish that the trial court has subject matter jurisdiction, the court must dismiss the matter. Any other order or judgment entered by the court would be void and unenforceable. Adams County Dept. of Soc. Serv. v. Huynh, 883 P.2d 573 (Colo. App. 1994).

Applied in Posey v. Intermountain Rural Elec. Ass'n, 41 Colo. App. 7, 583 P.2d 303 (1978); Kraft v. District Court, 197 Colo. 10, 593 P.2d 321 (1979); Burrows v. Greene, 198 Colo. 167, 599 P.2d 258 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 421, 599 P.2d 950 (1979); City of Sheridan v. City of Englewood, 199 Colo. 348, 609 P.2d 108 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); State Dept. of Hwys. v. District Court, 635 P.2d 889 (Colo. 1981); Christensen v. Hoover, 643 P.2d 525 (Colo. 1982); In re George, 650 P.2d 1353 (Colo. App. 1982); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); People ex rel. MacFarlane v. Alpert Corp., 660 P.2d 1295 (Colo. App. 1982); Anchorage Joint Venture v. Anchorage Condo. Ass'n, 670 P.2d 1249 (Colo. App. 1983); Seigneur v. Motor Vehicle Div., 674 P.2d 967 (Colo. App. 1983); Wing v. JMB Prop. Mgmt. Corp., 714 P.2d 916 (Colo. App. 1985); Nat'l Sur. Corp. v. Citizens State Bank, 734 P.2d 663 (Colo. App. 1986); Tallman Gulch Metro. v. Natureview Dev., 2017 COA 69, 399 P.3d 792.

II. WHEN PRESENTED.

Law reviews. For article, ''Mandamus and Other Writs'', see 18 Dicta 333 (1941).

Court has discretion to grant dismissal motion where pleadings not timely filed. Where a motion to dismiss is made because a reply is not filed in time, it is within the sound discretion of the court to grant it. Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944).

The court lacks authority to enter a final judgment prior to the expiration of the time fixed in the summons and by this rule for defendant to appear, and where such a judgment is entered, it is void. Erickson v. Groomer, 139 Colo. 32, 336 P.2d 296 (1959).

A judgment by default entered before the expiration of the time allowed to plead or answer is premature, and in a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. Netland v. Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

Party's right to notice prior to entry of default, under C.R.C.P. 55(b)(2), is not extinguished by the fact that his appearance in the action was not made within the time required for an answer under section (a) of this rule. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Issues concerning subject matter jurisdiction may be raised at any time. Sanchez v. State, 730 P.2d 328 (Colo. 1986); People in Interest of Clinton, 742 P.2d 946 (Colo. App. 1987).

A defendant may seek dismissal for failure to state a claim at any stage in the proceedings prior to the entry of judgment. Colo. Land & Res., Inc. v. Credithrift of Am., Inc., 778 P.2d 320 (Colo. App. 1989).

Court order extending time must conform to this rule. Order of court extending the time within which the defendant might answer or plead, which is entered pursuant to authority expressly granted to the court by C.R.C.P. 6(b), does not derogate from the requirements of section (a) of this rule. Oldland v. Gray, 179 F.2d 408 (10th Cir.), cert. denied, 339 U.S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (1950).

Where defendants did not interpose a motion to dismiss until nearly one year after the filing of the complaint, there was no abuse of discretion in denying the motion. Hoy v. Leonard, 13 Colo. App. 449, 59 P. 229 (1899) (decided under former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Applied in Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

III. HOW PRESENTED.

A. In General.

Law reviews. For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947). For note, ''Comments on Last Clear Chance — Procedure and Substance'', see 32 Dicta 275 (1955). For article, ''Another Decade of Colorado Conflicts'', see 33 Rocky Mt. L. Rev. 139 (1961). For article, '''Trinity' Hearings: Understanding Colorado Governmental Immunity Act Motions to Dismiss'', see 33 Colo. Law. 91 (December 2004).

This rule is patterned after F.R.C.P. 12(b). Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956); Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Like its federal counterpart, this rule is based on the theory that the quick presentation of defenses and objections should be encouraged and that successive motions which prolong such presentation should be carefully limited. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

In this rule there is no provision for a "special" appearance. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Section (b) of this rule did away with "general" and "special" appearances. At Home Magazine v. District Court, 194 Colo. 331, 572 P.2d 476 (1977).

The trial court must determine if under any theory of law plaintiff would be entitled to relief, for if relief could be granted under such circumstances, then the complaint is sufficient. Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

A trial court is not required to make findings of fact or conclusions of law when ruling on a motion to dismiss under section (b) of this rule. Jamison v. People, 988 P.2d 177 (Colo. App. 1999).

Although there exists no procedural rule specifically designed to address dismissal or transfer of a case on the basis of a forum selection clause, sections (b)(1) and (b)(5) are not appropriate mechanisms for addressing such clause. Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. App. 2006).

For a discussion of the appropriate method of evaluation of a motion to dismiss based on a forum selection clause, see Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. App. 2006).

Plaintiff must have remedial interest which is recognized and can be enforced. In order to withstand a challenge, the plaintiff must have, in the claim asserted, a remedial interest which the law of the forum can recognize and enforce. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Plaintiff has the burden to prove jurisdiction. Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996).

A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. Pfenninger v. Exempla, Inc., 12 P.3d 830 (Colo. App. 2000).

Where claims contain allegations which, if established upon trial, would entitle one to relief, a motion to dismiss would be erroneous to grant. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

When one pleads ultimate facts which, if supported by adequate proof, would justify a recovery, then he is entitled to his day in court to attempt to prove his allegations. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge, in denying a motion under this rule, did not grant relief from the waiver imposed by section (h)(1) of this rule, by granting 20 days ''to answer or otherwise plead'', as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Dismissal of judgment debtor's action to enforce settlement agreement error. Judgment debtor's action to enforce settlement agreement against judgment creditor's wife was not collateral attack on judgment and therefore could be enforced by separate action for specific performance. Tripp v. Parga, 764 P.2d 369 (Colo. App. 1988).

Applied in Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); Commercial Indus. Const., Inc. v. Anderson, 683 P.2d 378 (Colo. App. 1984).

B. Lack of Jurisdiction.

In testing the jurisdictional limit of courts the body of the complaint must be looked to to determine the amount in controversy and not the ''ad damnum'' clause. If the allegations of the complaint showed that the amount that could have been recovered was within the jurisdiction of the court, the fact that plaintiff's damage was alleged in a greater amount would not defeat the jurisdiction. Sams Automatic Car Coupler Co. v. League, 25 Colo. 129, 54 P. 642 (1898) (decided under section 56 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

With respect to a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden to prove jurisdiction, and an appellate court reviewing a trial court's decision uses a mixed standard of review under which the trial court's evidentiary findings are reviewed under the clear error standard, and the trial court's legal conclusions are reviewed de novo. Bazemore v. Colo. State Lottery Div., 64 P.3d 876 (Colo. App. 2002).

Trial court erred in treating plaintiff's alleged lack of capacity to sue as a lack of subject matter jurisdiction. Ashton Props., Ltd. v. Overton, 107 P.3d 1014 (Colo. App. 2004).

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Although the lack of jurisdiction is not raised by the parties, an appellate court may take note of this lack of jurisdiction on its own motion. Moschetti v. Liquor Licensing Auth., 176 Colo. 281, 490 P.2d 299 (1971).

A motion to quash is a proper method of raising the question of jurisdiction over the person of the defendant where the statutory requirements providing for service of process on nonresident motorists were not met, and where, in any event, such service was improper because defendant was not a nonresident at the time of the accident out of which the action arose. Carlson v. District Court, 116 Colo. 330, 180 P.2d 525 (1947).

A party may appear generally and still raise objections to jurisdiction of the person. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Such a motion must be filed in apt time, and the question cannot be raised after answers and other motions as to the merits have been filed. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

If a motion to quash for lack of jurisdiction of a person is made before answer, then the jurisdiction of the court over the person is properly raised and stands in question until the motion is disposed of. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

In determining proper jurisdiction as between district court and probate court, the court must look at the facts alleged, the claims asserted, and the relief requested. Here, where the complaints were premised upon defendant's alleged legal malpractice in the drafting of the estate instruments, the estate planning, and the implementation of the estate plan, the complaints were not considered probate claims, and, therefore, jurisdiction lay with the district court not the probate court. Levine v. Katz, 192 P.3d 1008 (Colo. App. 2006).

Probate court lacks subject matter jurisdiction over claims of legal malpractice where plaintiff does not seek to recover assets of the estate. Levine v. Katz, 167 P.3d 141 (Colo. App. 2006).

Generally, the issue of immunity under the Colorado Governmental Immunity Act (CGIA) is a question of subject matter jurisdiction to be decided pursuant to section (b)(1). Kittinger v. City of Colo. Springs, 872 P.2d 1265 (Colo. App. 1993); Fogg v. Macaluso, 892 P.2d 271 (Colo. 1995); Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995); DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Sanchez v. Sch. Dist. 9-R, 902 P.2d 450 (Colo. App. 1995); Hallam v. City of Colo. Springs, 914 P.2d 479 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Johnson v. Reg'l Transp. Dist., 916 P.2d 619 (Colo. App. 1995); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Harris v. Reg'l Transp. Dist., 15 P.3d 782 (Colo. App. 2000); Wark v. Bd. of County Comm'rs, 47 P.3d 711 (Colo. App. 2002).

Standing treated as a question of subject matter jurisdiction under section (b)(1). Grand Valley Citizens v. Colo. Oil & Gas, 298 P.3d 961 (Colo. App. 2010), rev'd on other grounds, 2012 CO 52, 279 P.3d 646.

The trial court is the fact finder and may hold an evidentiary hearing to resolve any factual dispute upon which the existence of its subject matter jurisdiction under the CGIA may turn. Lyons v. City of Aurora, 987 P.2d 900 (Colo. App. 1999).

Where a plaintiff has sued a governmental entity and that entity interposes a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of demonstrating that governmental immunity has been waived. However, because there is no presumption against state court jurisdiction and because the court must construe statutes that grant governmental immunity narrowly, the plaintiff should be afforded the reasonable inferences of this evidence. When the alleged jurisdictional facts are in dispute, the trial court should conduct an evidentiary hearing and enter findings of fact. When there is no evidentiary dispute, the trial court may rule without a hearing. Tidwell v. City & County of Denver, 83 P.3d 75 (Colo. 2003).

Motion brought under section (b)(1) is not the proper vehicle to decide questions of first amendment immunity. A defendant's claim that he has immunity under the first amendment invokes the court's authority to adjudicate the case; the court is considering whether the defendant is immune from an improperly instigated suit, not whether it has the authority to decide the case. Accordingly, summary judgment is the appropriate procedure to employ in this context. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859 (Colo. 2004).

State court lacked subject matter jurisdiction to issue writ of mandamus to federal officer. Hansen v. Long, 166 P.3d 248 (Colo. App. 2007).

Tribal sovereign immunity is properly raised in a motion to dismiss. The state bears the burden of establishing by a preponderance of the evidence that the trial court has subject matter jurisdiction over defendants. Cash Advance & Pref. Cash Loans v. State, 242 P.3d 1099 (Colo. 2010).

Trial court erred in attempting to resolve the various material questions of fact presented to it without holding an evidentiary hearing to resolve those issues. Werth v. Heritage Int'l Holdings, PTO, 70 P.3d 627 (Colo. App. 2003).

Trial court may determine jurisdictional issue without an evidentiary hearing if it accepts all of plaintiffs assertions of fact as true. In such cases, the jurisdictional issue may be determined as a matter of law, and the appellate court reviews the trial court's ruling de novo. Hansen v. Long, 166 P.3d 248 (Colo. App. 2007); Asphalt Specialties, Co. v. City of Com-

merce City, 218 P.3d 741 (Colo. App. 2009); Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Notice issues arising under the CGIA must be decided pursuant to section (b)(1), rather than by summary judgment and, depending on the case, the trial court may allow limited discovery and conduct an evidentiary hearing before deciding the notice issue. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

The standards of section (b)(5) of this rule and C.R.C.P. 56 should not be applied in a CGIA motion to dismiss. When a plaintiff sues a governmental entity and that entity moves to dismiss for lack of jurisdiction, the plaintiff has the burden of proving jurisdiction under section (b)(1). The court may conduct a hearing under Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993), at which the parties may present evidence related to all issues of immunity, including facts not in dispute. After the hearing, the court must weigh the evidence and decide the facts to satisfy itself of its power to hear the case. In doing so, the court must afford the plaintiff the reasonable inferences from his or her evidence. The same lenient standard applies to facts related to both the jurisdictional issue and the merits of the case. Dennis v. City & County of Denver, 2016 COA 140, 419 P.3d 997, rev'd on other grounds, 2018 CO 37, 418 P.3d 489.

Sovereign immunity issues concern subject matter jurisdiction and are determined in accordance with this section. Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous. Swieckowski v. City of Fort Collins, 934 P.2d 1380 (Colo. 1997); Mason v. Adams, 961 P.2d 540 (Colo. App. 1997).

A section (b)(1) motion to dismiss on grounds of immunity under the CGIA raises a jurisdictional issue. The plaintiff has the burden of demonstrating jurisdiction. When the alleged jurisdictional facts are in dispute, trial court should conduct an evidentiary hearing before ruling on the jurisdictional issue. Where there is no evidentiary dispute, governmental immunity or waiver of immunity is a matter of law, and trial court may rule on the jurisdictional issue without a hearing. Padilla ex rel. Padilla v. Sch. Dist. No. 1, 25 P.3d 1176 (Colo. 2001).

District court erred in dismissing case on the grounds of lack of jurisdiction due to CGIA immunity when the conduct in question occurred in the operation of a jail. Immunity does not apply to injuries resulting from the negligent operation of a jail, regardless of whether conduct was willful and wanton. Therefore, a district court should not address allegations that a public employee engaged in willful and wanton conduct in the operation of a jail via section (b)(1) and the evidentiary hearing described in Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993). Hernandez v. City & County of Denver, 2018 COA 151, 439 P.3d 57.

A motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction which cannot be resolved by the presumptive truthfulness of the complaint but which must be determined in a factual hearing. Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993).

If the defendant answers as to the merits of the allegations of the complaint without embodying the motion to quash, then the jurisdictional question is thereby waived. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Two-pronged test for standing. First, the plaintiff must have suffered an injury in fact, and second, this harm must have been to a legally protected interest. Grand Valley Citizens v. Colo. Oil & Gas, 298 P.3d 961 (Colo. App. 2010), rev'd on other grounds, 2012 CO 52, 279 P.3d 646.

Procedural injury, as well as substantive injury, may confer standing. Procedural injury consists of harm to an intangible or noneconomic interest such as a citizen's interest in ensuring that governmental units conform to the state constitution. Such injuries may exist solely by virtue of statutes creating legal rights. Grand Valley Citizens v. Colo. Oil & Gas, 298 P.3d 961 (Colo. App. 2010), rev'd on other grounds, 2012 CO 52, 279 P.3d 646.

For purposes of standing, substantive injury may consist of the risk of environmental injuries to places used by plaintiff. Therefore, persons who owned or used land three miles from potential natural gas drilling activity were entitled to challenge a denial of their right to a hearing on the issuance of permits. Grand Valley Citizens v. Colo. Oil & Gas, 298 P.3d 961 (Colo. App. 2010), rev'd on other grounds, 2012 CO 52, 279 P.3d 646.

Allegation of harm to a protected interest is sufficient to confer standing. A civil plaintiff claiming to have been injured by a defendant's actions has standing to sue even if a court, upon reaching the merits, ultimately determines that the defendant committed no wrong. Grand Valley Citizens v. Colo. Oil & Gas, 298 P.3d 961 (Colo. App. 2010), rev'd on other grounds, 2012 CO 52, 279 P.3d 646.

Application of the long-arm statute, constitutional due process, and the minimum-contacts test are properly raised by a nonresident defendant under section (b)(2). Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Because the long-arm statute extends jurisdiction to the maximum extent allowed by the

due process clause, the due process inquiry is controlling. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

The nature of the minimum contacts required depends on whether the plaintiff alleges specific or general jurisdiction. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Specific jurisdiction is properly exercised over a nonresident defendant where the injuries triggering litigation arise out of and are related to significant activities directed by the defendant toward the forum state. The court should apply a two-part test to determine (1) whether the defendant purposefully availed himself or herself of the privilege of conducting business in the forum state, and (2) whether the litigation arises out of the defendant's forum-related contacts. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Contacts with the forum state must be established by the defendant, not by the unilateral activity of those who claim some relationship with the defendant. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Once the requisite minimum contacts are established, they must be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with notions of fair play and substantial justice, that is, whether jurisdiction over the defendant would be reasonable. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

Individual contacts must not be viewed in isolation, but considered in their totality. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

A factor bearing on the reasonableness of asserting personal jurisdiction over a nonresident defendant alleged to have violated the Colorado Securities Act is that the securities commissioner can file suit only in Denver district court. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

A "relief defendant", who is not accused of violating substantive law but who holds assets essential to providing relief for a plaintiff's financial losses, may reasonably be compelled to appear in the forum state due to her role in a fraudulent scheme. Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

A party may move to dismiss an action under this rule by asserting the applicability of the doctrine of forum non conveniens as a ground for refusal by the court to exercise jurisdiction over a transitory cause of action which arose outside the state. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of forum non conveniens must be applied with restraint and only after a proper showing has been made. What constitutes a proper showing must, of necessity, turn on the particular facts of each case. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of forum non conveniens is founded upon the equitable power of a court to refuse, in its sound discretion, to exercise jurisdiction over a transitory cause of action when, after a consideration of all relevant factors, the ends of justice strongly indicate that the action may be more appropriately tried in a different forum. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

Among the relevant factors which a court should consider in reaching its determination of forum non conveniens are: The relative availability of sources of evidence and the burden of defense and prosecution in one forum rather than another, the relative availability and accessibility of an alternative forum, the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the interest of the state in providing a forum for its residents, and the interest of the state in the litigation measured by the extent to which the defendant's activities within the state gave rise to the cause of action, as well as factors of public interest. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The thrust of forum non conveniens is not to determine the perfect forum but to provide a vehicle for choice between two or more alternative forums to avoid the hardship and expense of the one that is clearly inconvenient. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

A plaintiff need only make a prima facie showing of threshold jurisdiction, which may be determined from the allegations of the complaint, to withstand defendant's motion to dismiss under section (b)(2) of this rule. Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

If a section (b)(2) jurisdictional challenge is decided on documentary evidence alone, the trial court's role is to determine whether the plaintiff successfully asserted a prima facie case of personal jurisdiction over each defendant. In making that assessment, any disputed issues of material jurisdictional fact must be resolved in favor of the plaintiff. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007); Rome v. Reyes, 2017 COA 84, 401 P.3d 75.

If the court determines that plaintiff made a prima facie showing of personal jurisdiction over each defendant, the trial court may still hold an evidentiary hearing to resolve the issue fully prior to trial or proceed to trial. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

A trial court must not weigh and resolve disputed facts raised in section (b)(2) motion unless it conducts an evidentiary hearing. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC, 166 P.3d 166 (Colo. App. 2007); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007); Griffith v. SSC Pueblo Belmont Oper. Co., 2016 CO 60M, 381 P.3d 308.

Trial court erroneously denied motion to dismiss for lack of personal jurisdiction because facts alleged by plaintiff were insufficient to demonstrate, and trial court failed to consider, whether corporate defendant was essentially at home in Colorado. The trial court did not properly apply the test for general jurisdiction because, although it found that defendant had ''continuous and systematic'' contacts with Colorado, it did not go on to determine whether those contacts rendered the defendant essentially at home in the state. Moreover, the facts alleged by plaintiff were insufficient to demonstrate general jurisdiction over defendant where the facts alleged merely indicated that defendant solicited and facilitated some business in the state. Clean Energy Collective v. Borrego Solar, 2017 CO 27, 394 P.3d 1114.

When out-of-state parent corporation may be answerable for actions of in-state subsidiary. First, the trial court must determine whether to pierce the corporate veil and impute the resident subsidiary's contacts to the nonresident parent company. If so, the contacts of both may be considered together. If not, the contacts of each entity with the forum state must be considered separately. Griffith v. SSC Pueblo Belmont Oper. Co., 2016 CO 60M, 381 P.3d 308; Meeks v. SSC Colo. Springs Colonial Columns Oper. Co., 2016 CO 61, 380 P.3d 126.

Trial court should have held a hearing and made substantial factual findings before applying the ''distinct entities'' test to determine whether piercing the corporate veil and subjecting the nonresident parent of a resident subsidiary to either general or specific personal jurisdiction was appropriate. Meeks v. SSC Colo. Springs Colonial Columns Oper. Co., 2016 CO 61, 380 P.3d 126.

Factors to be considered before piercing the corporate veil are set forth in Griffith v. SSC Pueblo Belmont Oper. Co., 2016 CO 60M, 381 P.3d 308.

Distinction between general and specific personal jurisdiction. A corporation may be subject to specific personal jurisdiction when it has ''certain minimum contacts'' with Colorado and the cause of action arises out of those contacts. However, exercising general personal jurisdiction over a nonresident corporation exposes it to suits in this state for any and all claims against it, even if the parties and events underlying a claim have no connection to the state. Therefore, a company is subject to general jurisdiction only where it is incorporated, has its principal place of business, or is ''essentially at home''. Griffith v. SSC Pueblo Belmont Oper. Co., 2016 CO 60M, 381 P.3d 308.

Defenses not raised by motion are waived. Sections (g) and (h)(1) of this rule make it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Clearly erroneous standard must be followed in appellate review of trial court determination regarding subject matter jurisdiction. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Lyon v. Amoco Prod. Co., 923 P.2d 350 (Colo. App. 1996); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Lyons v. City of Aurora, 987 P.2d 900 (Colo. App. 1999).

A reviewing court may apply section (b)(1) to the record without a remand if the court is satisfied that all relevant evidence has been presented to the trial court. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

If the court is satisfied that all the relevant evidence has been presented to the trial court, it may apply section (b)(1) to the record before it without remanding the case for an evidentiary hearing. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

The statements that gave rise to plaintiff's claims of slander were issued within the constitutionally protected context of the first amendment of the U.S. Constitution because they occurred during a church meeting concerning whether to terminate the plaintiff as the church's pastor. The Colorado supreme court has recognized that the courts have no authority to determine claims that directly concern a church's choice of minister and, therefore, the trial court properly refused to exercise jurisdiction. Seefried v. Hummel, 148 P.3d 184 (Colo. App. 2005).

A court lacks subject matter jurisdiction over minister's claim against church for compensation not paid where resolution of the claim would require the court to determine whether the minister adequately performed his ecclesiastical duties. Jones v. Crestview S. Baptist Church, 192 P.3d 571 (Colo. App. 2008).

Colorado state courts have jurisdiction over private actions under the Telephone

Consumer Protection Act (TCPA), 47 U.S.C. § 227, under the supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. v. 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

A Court lacks subject matter jurisdiction over claims filed against a financial institution that is subsequently placed in receivership where the claimant failed to exhaust the administrative claims process set forth in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, codified at 12 U.S.C. § 1821(d). Liberty Bankers Life v. First Citizens, 2014 COA 151, 411 P.3d 111.

Omission of a party's name from a Colorado anti-discrimination act charging document should be considered under the relation-back doctrine, C.R.C.P. 15 (c). Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272, rev'd on other grounds, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

Because the three requirements for application of the relation-back doctrine were satisfied, the administrative law judge did not err when he denied respondents' motion to dismiss. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272, rev'd on other grounds, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

C. Insufficiency of Process.

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Denial of motion to quash service of process is error. Denial of a party's motion to quash service of process under this rule is error if party has not been properly served under C.R.C.P. 4(e)(5) and (f)(2). Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

There was no waiver of defense of insufficiency of service of process, raised by motion to quash, where the court did not rule on the question on previous motion to quash. Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

A party who seeks to set aside a judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

D. Failure to State a Claim upon which Relief can be Granted.

Federal jurisprudence under Fed. R. Civ. P. 12(b)(6) is persuasive, since the federal rule is identical to section (b)(5) of this rule. Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

And the Colorado supreme court has always preferred to interpret state rules of civil procedure harmoniously with similarly worded federal rules. Warne v. Hall, 2016 CO 50, 373 P.3d 588.

A section (b)(5) motion to dismiss tests the sufficiency of the complaint. In assessing such a motion a court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff and may grant the motion only if the plaintiff's factual allegations cannot support a claim as a matter of law. Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009).

The primary difference between section (b)(1) and section (b)(5) is that under section (b)(1) the trial court is permitted to make findings of fact. Under section (b)(5) it is not; it must take the allegation of the complaint as true and draw all inferences in favor of the plaintiff. Medina v. State, 35 P.3d 443 (Colo. 2001); Schwindt v. Hershey Food Corp., 81 P.3d 1144 (Colo. App. 2003).

To the extent that the trial court's conclusion that a tow truck was merely an extension of the vehicle being pushed by it was a finding of fact, such a finding could not be made in the context of a motion under section (b)(5). Titan Indem. Co. v. Sch. Dist. No. 1, 129 P.3d 1075 (Colo. App. 2005).

Generally, the issue of immunity under the CGIA is a question of subject matter jurisdiction to be decided pursuant to section (b)(1). Kittinger v. City of Colo. Springs, 872 P.2d 1265 (Colo. App. 1993); Fogg v. Macaluso, 892

P.2d 271 (Colo. 1995); Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995); DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Sanchez v. Sch. Dist. 9-R, 902 P.2d 450 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Medina v. State, 17 P.3d 178 (Colo. App. 2000), aff'd, 35 P.3d 443 (Colo. 2001).

A motion to dismiss pursuant to section (b)(5) tests the sufficiency of a plaintiff's complaint. Such a motion is looked on with disfavor and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. The court must accept all averments of material fact as true, and all the allegations in the complaint must be viewed in the light most favorable to the plaintiff. The court reviews the trial court's ruling de novo. Verrier v. Colo. Dept. of Corr., 77 P.3d 873 (Colo. App. 2003); Sweeney v. United Artists Theater Circuit, Inc., 119 P.3d 538 (Colo. App. 2005); Allen v. Steele, 252 P.3d 476 (Colo. 2011).

In narrow circumstances, when allegations indicate the existence of an affirmative defense that will bar the award of any remedy, a party may raise an affirmative defense in a motion to dismiss. Where an employee brought a claim under § 24-34-402.5 (1), the affirmative defense raised by the employer under § 24-34-402.5 (1)(a) was a proper basis for its motion to dismiss. Williams v. Rock-Tenn Servs., Inc., 2016 COA 18, 370 P.3d 638.

Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted under ''notice pleadings''. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286 (Colo. 1992); Story v. Bly, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010); Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011).

A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it clearly appears that the plaintiff would not be entitled to any relief under the facts pleaded. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

Whether a claim is stated must be determined solely from the complaint. In passing on a motion to dismiss a complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957); McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969); Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286 (Colo. 1992); Fluid Tech., Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. App. 1998); Kratzer v. Colo. Intergovernmental Risk Share Agency, 18 P.3d 766 (Colo. App. 2000).

A motion to dismiss for failure to state a claim must be decided solely on the basis of allegations stated in the complaint. Foster Lumber Co. v. Weston Constructors, Inc., 33 Colo. App. 436, 521 P.2d 1294 (1974); Nat'l Camera, Inc. v. Sanchez. 832 P.2d 960 (Colo. App. 1991).

Upon review of a grant of a motion to dismiss under section (b)(5) of this rule, it must be assumed that the material allegations of the complaint are true. Schmaltz v. St. Luke's Hosp., 33 Colo. App. 351, 521 P.2d 787 (1974), modified, 188 Colo. 353, 534 P.2d 781 (1975).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by section (b)(5) in resolving defendant's motion to dismiss. Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856 (Colo. App. 2007).

Plain language of this rule precludes a party from filing a motion under section (b)(5) after filing a responsive pleading. BSLNI, Inc. v. Russ T. Diamonds, Inc., 2012 COA 214, 293 P.3d 598.

"Matters outside the pleadings", consideration of which requires the court to convert a motion for dismissal into a motion for summary judgment, does not include a document referred to in the complaint, notwithstanding that the document is not formally incorporated by reference or attached to the complaint. Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

The same is true of counterclaims and cross claims. Whether or not counterclaims and cross claims state a claim upon which relief could be granted, the court must look to the four corners of the pleading in question to determine whether a claim is stated. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

Although a court primarily considers the pleadings, certain matters of public record may also be taken into account, and matters that are properly the subject of judicial notice may be considered without converting the motion for dismissal into a motion for summary judgment. Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

Judicial notice of prior pleadings, orders, judgments, and other items appearing in the court records of prior litigation are "matters outside the pleadings" that invoke the requirement that a motion to dismiss for failure to state a claim be treated instead as one for summary

judgment under C.R.C.P. 56. Bristol Bay Prod., LLC v. Lampack, 2013 CO 60, 312 P.3d 1155.

Collateral estoppel or "issue preclusion" should be argued as part of a motion for summary judgment under C.R.C.P. 56, not a motion to dismiss for failure to state a claim under section (b)(5) of this rule. Bristol Bay Prod., LLC v. Lampack, 2013 CO 60, 312 P.3d 1155.

Application of the discovery rule to limitation period was a factual question that could not be resolved in a ruling under section (b)(5). Bell v. Land Title Guar. Co., 2018 COA 70, 422 P.3d 613.

A motion to dismiss based on an affirmative defense should be converted to a motion for summary judgment if the court considers matters outside the complaint when ruling on the motion. If the bare allegations of the complaint reveal that the affirmative defense applies, the court need not convert the motion. Prospect Dev. v. Holland & Knight, 2018 COA 107, 433 P.3d 146.

Upon a motion to dismiss for failure to state a claim, the facts of the complaint should be taken as true. Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

In ruling on a motion to dismiss for failure to state a claim, the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. If relief could be granted under such circumstances, the complaint is sufficient. Schlitters v. State, 787 P.2d 656 (Colo. App. 1989); Chidester v. Eastern Gas & Fuel Assoc., 859 P.2d 222 (Colo. App. 1992); Rosenthal v. Dean Witter Reynolds, Inc., 908 P.2d 1095 (Colo. 1995); Flatiron Linen, Inc. v. First Amer. State Bank, 1 P.2d 244 (Colo. App. 1999), rev'd on other grounds, 23 P.3d 1209 (Colo. 2001); W.O. Brisben Co., Inc. v. Krystkowiak, 66 P.3d 133 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 859 (Colo. 2004); Dotson v. Dell L. Bernstein, P.C., 207 P.3d 911 (Colo. App. 2009).

But a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Case law interpreting the state rules of civil procedure reflects first and foremost a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the United States supreme court's interpretation of corresponding federal rules. It is thus appropriate for the state to adopt for state complaints the new plausible-on-its-face standard for federal complaints adopted by the United States supreme court in lieu of the prior federal and state standard that deemed a complaint sufficient unless it appears beyond doubt on the face of the complaint that the plaintiff can prove no set of facts in support of the claims alleged. Warne v. Hall, 2016 CO 50, 373 P.3d 588.

Material allegations must be taken as admitted. When deciding whether a complaint is sufficient to state a claim upon which relief can be granted, the material allegations of the complaint must be taken as admitted. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972); Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

On appeal from the dismissal of a complaint for failure to state a claim upon which relief could be granted, the material allegations of the complaint must be taken as admitted. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

When reviewing a motion to dismiss, the court must accept the material allegations of the complaint as true and the complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of facts which may be proved in support of the claims. Douglas County Nat. Bank v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991).

Trial court is not required to accept complaint's legal conclusions or factual claims at variance with the express terms of documents attached to the complaint. When documents are attached to a complaint, the legal effect of the documents is determined by their contents rather than by allegations in the complaint. Thus, trial court need not consider the allegations of the complaint as true and in the light most favorable to plaintiffs, if such consideration would conflict with the attached documents. Stauffer v. Stegemann, 165 P.3d 719 (Colo. App. 2006).

Court is not required to accept as true legal conclusions that are couched as factual allegations. Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011).

Since under the present rules a motion to dismiss is treated as a demurrer, it must be assumed that the allegations of a petition are true. Nielsen v. Nielsen, 111 Colo. 344, 141 P.2d 415 (1943).

A motion for failure to state a claim is not identical to a demurrer. While motion under section (b) of this rule, for ''failure to state a claim upon which relief can be granted'', may in some cases serve the purpose of a demurrer and is analogous to it in some respects, it is not an identical attack. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

A party's capacity to sue may not be raised by motion to dismiss. A party who wishes to raise the issue of capacity must do so by specific negative averment. Ashton Props., Ltd. v. Overton, 107 P.3d 1014 (Colo. App. 2004).

In a complaint, a plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity, especially as to those matters reasonably unknown to him

and within the cognizance of the defendants. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

When it appears on the face of the complaint, or is admitted, that the complaint does not state a claim upon which relief can be granted, the claim is barred, the court has no jurisdiction of the subject matter, and the court can, for that reason, grant a motion to dismiss on this ground. Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

Want of merit may consist of an absence of substantive law to support a claim of the type alleged. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

A complaint will not be dismissed unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944); Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Where complaint against a partner in a limited liability partnership lacks any factual allegations explaining how limited partner could be individually liable for alleged retaliatory discharge, the complaint is deficient in stating a claim. Middlemist v. BDO Seidman, LLP, 958 P.2d 486 (Colo. App. 1997).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Kratzer v. Colo. Intergovernmental Risk Share Agency, 18 P.3d 766 (Colo. App. 2000).

It is error to dismiss a complaint if plaintiff can be granted relief under any state of facts which may be proved in support of the claim. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

Where a plaintiff in his complaint states a case entitling him to some relief, a motion to dismiss the action should not be granted. Stapp v. Carb-Ice Corp., 122 Colo. 526, 224 P.2d 935 (1950); Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957).

It is error to grant a motion to dismiss for failure to state a claim upon which relief can be granted if in fact a ''relievable'' claim is stated. Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc., 128 Colo. 399, 262 P.2d 927 (1953).

Where payee of checks and its insurer pled that bank paid checks payable to corporation upon forged endorsements, the plaintiffs properly stated a cause of action for conversion against the bank, and the trial court therefore erred in granting the bank's motion to dismiss under section (b)(5). Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

A court errs in granting a defendant's motion to dismiss under section (b)(5) of this rule, when claims are sufficient statements of a cause of action for which relief may be granted. Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972).

Only where a complaint fails to give defendants notice of the claims asserted is dismissal under section (b)(5) proper. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

Denial of a motion to dismiss for failure to state a claim is not prejudicial to movant where claim was included in a stipulated trial management order, giving movant sufficient notice that the claim would be tried. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Failure to specifically request relief under a particular claim, where complaint included a general request for relief, is not sufficient grounds to dismiss claim on a motion to dismiss for failure to state a claim. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Failure to state claim where special damages in libel per quod action are not pleaded results in dismissal of complaint. Since special damages are an essential element of an action for libel per quod, plaintiff is required to specifically plead them, and if the plaintiff fails to do so, the trial court can then dismiss the plaintiff's complaint under section (b)(5) of this rule for failure to state a claim upon which relief could be granted. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed under section (b)(5) of this rule. Clark v. City of Colo. Springs, 162 Colo. 593, 428 P.2d 359 (1967).

Individual shareholders were not entitled to relief where no injury suffered. Where the complaint alleged only that the individual plaintiffs were shareholders of the corporation and that the corporation sustained damages as a result of defendants' actions, plaintiffs, as individual shareholders, suffered no individually redressable injury thereby, and their complaint was properly dismissed because it stated no claim upon which they were entitled to relief. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Permission to amend should be given where there is possibility of adequate statement of claim. While a judgment of dismissal for failure to state a claim upon which the relief can be granted may be entered upon a motion for summary judgment, such judgment must specifically disclose the inadequacy of the complaint as the ground therefor, and permission to

amend should be given where there is a possibility by amendment of an adequate statement of claim. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

When a person has been acquitted of a crime and denied the return of the arrest record without justification, a suit by the person alleging violation of the right to privacy is not to be dismissed for failure to state a claim upon which relief could be granted. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

Discovery not required. If a challenged complaint sufficiently states a claim for relief, the trial court may not require the plaintiff to undertake discovery merely to withstand a motion to dismiss. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

It is appropriate for a trial court to treat a motion for failure to state a claim upon which relief can be granted as a motion for summary judgment when it is necessary to consider the factual circumstances and the party against whom the motion is filed is accorded an opportunity to respond with evidence and counter-affidavits. Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

Order granting summary judgment where a motion to dismiss for failure to state a claim upon which relief can be granted must be affirmed if the pleadings, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972).

Where statute provided defendant with only qualified immunity, and plaintiff's allegations, if accepted as true, adequately asserted ''willful and wanton'' misconduct abrogating such immunity, dismissal was not proper. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Employee's allegation that his demotion was in violation of the policies and procedures of the employer and therefore constituted a breach of contract was sufficient to survive a motion to dismiss, but the employee's allegation that the demotion constituted extreme and outrageous conduct failed to state a cognizable claim. Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. App. 1984).

Employee's mere allegation of termination from employment because of compliance with the employer's safety policy, rather than any allegation of breach of contract for failure of the employer to comply with its own discharge procedures or a termination for cause provision specified in any handbook distributed to the employee, was insufficient to state a claim upon which relief could be granted. Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. App. 1984).

In considering a motion to dismiss a damages claim by an employee against a co-employee based upon a defense or immunity provided by § 8-41-104, the county court erred in not considering matters outside the pleadings where issues regarding the defense were absent from the pleadings and in not treating the motion as one for summary judgment under C.R.C.P. 56. Popovich v. Irlando, 811 P.2d 379 (Colo. 1991).

In reviewing a motion to dismiss a complaint, the appellate court can consider only matters stated therein and must not go beyond the confines of the pleading, for in reviewing the action of the trial court in dismissing a complaint for failure to state a claim, the appellate court is in the same position as the trial judge. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

In evaluating such motions, trial courts and appellate courts apply the same standards. Van Wyk v. Pub. Serv. Co. of Colo., 996 P.2d 193 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 27 P.3d 377 (Colo. 2001).

The appellate court reviews a trial court's determination on a motion to dismiss de novo, and, like the trial court, must accept all averments of material fact contained in the complaint as true. Fluid Tech., Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. App. 1998).

Because the substance, rather than the name or denomination of a pleading determines its character and sufficiency, a ruling on a motion made in limine that sought to dismiss a claim for failure of pleading was properly reviewed de novo, not under an abuse of discretion standard. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Both courts must view complaint's allegations favorable to plaintiff. When ruling upon a motion to dismiss a complaint for failure to state a claim, a trial court and a reviewing court must view the allegations of the complaint in a light most favorable to the plaintiff. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971); Halverson v. Pikes Peak Fam. Counseling, 795 P.2d 1352 (Colo. 1990); Nat'l Camera, Inc. v. Sanchez, 832 P.2d 960 (Colo. App. 1991); Story v. Bly, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010).

In so testing all matters well pleaded will be assumed to be true. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

In determining whether a motion to dismiss for failure to state a claim is to be granted, all

matters well pleaded must be considered to be true, and the trial court can consider only those matters stated in the complaint. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

A motion to dismiss based on the exclusivity provisions of the Workers' Compensation Act does not go to the subject matter jurisdiction of the court, therefore, an evidentiary hearing is neither required nor appropriate. The trial court did not err in ruling on employer's motion without such a hearing. Schwindt v. Hershey Food Corp., 81 P.3d 1144 (Colo. App. 2003).

Colorado state courts have jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, under the supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

Trial court properly granted dismissal of state law claims under section (b)(5) on grounds that such claims were preempted by federal Employee Retirement Income Security Act of 1974 (ERISA) legislation. Fact that former employees were not entitled to bring a cause of action under ERISA did not mean that state law claims could not be preempted. Houdek v. Mobil Oil Corp., 879 P.2d 417 (Colo. App. 1994).

Question not before district court was not before supreme court. Where the question as to whether the complaint failed to state facts on which a claim of relief could be based was not placed before the district court by motion under this rule, a fortiori, it was not before the supreme court. Allen v. Evans, 193 Colo. 61, 562 P.2d 752 (1977).

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

Motion to dismiss was properly granted where there was no evidence that petitioner could have proffered regarding the importance of assisted suicide to his belief system that would exempt him, or his designated third persons, on first amendment grounds from the provisions of § 18-3-104. Sanderson v. People, 12 P.3d 851 (Colo. App. 2000).

Defendant's actions do not constitute either a taking or a damaging of plaintiffs' property, and, therefore, the complaint, even when viewed in the light most favorable to the plaintiffs, cannot sustain a claim for inverse condemnation. Therefore, the district court properly dismissed plaintiffs' inverse condemnation claim pursuant to defendant's section (b)(5) motion. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Plaintiff's takings claim was improperly dismissed based on a ruling that claim was not ripe. Even though final condemnation proceedings had not been instituted, plaintiffs alleged that they had already been harmed, and those allegations must be viewed in the light most favorable to the plaintiffs. Therefore, the claim was ripe. G & A Land, LLC v. City of Brighton, 233 P.3d 701 (Colo. App. 2010).

With regard to plaintiffs' claim for trespass, the complaint does not allege specific physical damage to their property resulting from the intangible intrusions of which they complained. Because plaintiffs have not alleged physical damage, plaintiffs cannot prove trespass based on the alleged intangible intrusions. Nor have plaintiffs alleged any tangible intrusions upon their property to support a claim of trespass. Therefore, the complaint, when viewed in the light most favorable to the plaintiffs, cannot support a cause of action for trespass and was properly dismissed by the district court. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Respondent failed to state a claim for intentional interference with contractual relations against petitioner. Under the Nonprofit Corporation Act, neighborhood association could not individually bind its members, including petitioner, to a contract its president signed. At all times, individual members of the neighborhood association, including petitioner, were free to disassociate from the association and to express their own views about the proposed development. Respondent's complaint failed to allege petitioner's first amendment rights were limited by the settlement agreement. The complaint essentially pointed to the fact petitioner

exercised his or her first amendment rights without alleging that the exercise of such rights was improper. Further, there is no allegation that petitioner's exercise of his constitutional rights persuaded, intimated, or intentionally made it impossible for the association to perform its contract. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859 (Colo. 2004).

Plaintiffs' complaint satisfies both of the requirements necessary to allege a nuisance. Thus, the nuisance section of plaintiffs' complaint sufficiently states a nuisance claim, and the district court improperly dismissed the nuisance claim. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Motion to dismiss should have been denied on the basis that a joint venturer cannot shield itself from liability on the grounds that the joint venture was prohibited by the Colorado rules of professional conduct. Bebo Constr. Co. v. Mattox & O'Brien, 998 P.2d 475 (Colo. App. 2000).

Motion to dismiss is properly granted when plaintiffs lack standing because the complaint does not show actual injury to a legally protected right. Kreft v. Adolph Coors Co., 170 P.3d 854 (Colo. App. 2007).

Motion to dismiss was properly granted under section (b)(5) where plaintiff claimed undercharges resulted in defendant's unjust enrichment. There is nothing unjust about retaining a benefit conferred gratuitously. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd on other grounds, 136 P.3d 252 (Colo. 2006).

Motion to dismiss was properly granted as a matter of law when the allegations in the complaint were too vague, insubstantial, and attenuated to support plaintiff's legal malpractice claims. Bristol Co., LP v. Osman, 190 P.3d 752 (Colo. App. 2007).

Trial court properly dismissed complaint under section (b)(5) alleging city council's use of anonymous ballot procedure to fill city council vacancies and to appoint municipal judge was prohibited under Colorado open meetings law (COML). COML does not impose specific voting procedures on local public bodies let alone one that prohibits the use of anonymous ballots. COML is silent as to whether the votes taken need to be recorded in a way that identifies which elected official voted for which candidate. Rather, COML only requires that the public have access to meetings of local public bodies and be able to observe the decision-making process. Henderson v. City of Fort Morgan, 277 P.3d 853 (Colo. App. 2011).

Plaintiffs failed to state a constitutional due process claim upon which relief can be granted. Plaintiffs did not cite any authority supporting the theory that a board of county commissioners' failure to act on a citizen petition implicates due process. Moss v. Bd. of County Comm'rs for Boulder County, 2015 COA 35, 411 P.3d 918.

Mutuality is a necessary element of defensive claim preclusion or res judicata. Foster v. Plock, 2017 CO 39, 394 P.3d 1119.

Appellate court erred in dismissing appeal by finding that mutuality was not required, but, because the defendant in the second action was in privity with wife in the first action and therefore mutuality was met, the supreme court affirmed the case. Foster v. Plock, 2017 CO 39, 394 P.3d 1119.

Court properly dismissed one claim and erred in dismissing two other claims pursuant to section (b)(5). Court properly dismissed plaintiff's claim for civil theft for failure to state a claim under section (b)(5). Court erred in dismissing plaintiff's claims for conversion and unjust enrichment. Unlike civil theft, conversion and unjust enrichment do not require wrongdoing on the part of the defendant and thus the plaintiff sufficiently plead both claims. Scott v. Scott, 2018 COA 25, 428 P.3d 626.

E. Failure to Join Parties.

Where defendants contended that the failure to join all the children of a deceased as his heirs constituted a failure to join indispensable parties under section (b)(6) of this rule in a creditor's action on a deed of trust executed to deceased and defendant, the deceased's children were held not indispensable parties, inasmuch as, when deceased died, there was no estate probated, no personal representative appointed, and no determination of heirship. Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

Failure to name all stockholders as parties plaintiff does not render the complaint fatally defective for failure to join an indispensable party, since the stockholders are neither necessary nor proper parties in an action filed by a corporation. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

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

Trial court did not abuse its discretion by denying county's motion to dismiss under sections (b)(5) and (b)(6) of this rule and C.R.C.P. 19(a) for failure to join landowners as indispensable parties. A finding that county land use department abused its discretion by refusing to perform ministerial task of accepting application of fire protection district in no way implicated landowner's interests as to make them indispensable parties. Nor did fire protection district's request for a declaration that proj-

ect could proceed absent an amendment to the planned unit development (PUD). At root, question presented involved which process the district was required to employ in order to build a fire station. This determination did not impair the landowners' ability to protect their interests because, whether the court required a location and extent review, as the district sought, or an amendment to the PUD, which the county believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs, 205 P.3d 487 (Colo. App. 2008), aff'd on other grounds, 221 P.3d 1063 (Colo. 2009).

Court erred in dismissing case for failure to join a party under C.R.C.P. 19. Defendant's husband's estate did not need to be joined because complete relief could be accorded between plaintiff and defendant. The defendant was in possession of the life insurance proceeds at issue and the estate had no interest in those proceeds since they were not part of the estate assets. Scott v. Scott, 2018 COA 25, 428 P.3d 626.

F. Statute of Limitations.

Laches and the statute of limitations cannot be raised by motion to dismiss or strike. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for a motion to dismiss for failure to state a claim upon which relief can be granted. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under section (b) of this rule, since under C.R.C.P. 8(c), that is a defense which must be set forth affirmatively by answer. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

The statute of limitations is not a basis for dismissal on motion on the ground that it appears from the complaint that the claim is barred for failure to timely file suit, for the reason that in the absence of an affirmative defense based on the statute such defense is waived, and the assertion or waiver of the defense can only be determined from the answer. Furthermore, even if pleaded, the running of the statute may have been tolled, and plaintiff in his complaint is not required to anticipate the defense. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953).

Statute of limitations may be raised by motion to dismiss. The statute authorizing forfeiture for a public nuisance is penal in nature. In an action premised on a penal statute as opposed to a civil claim, the statute of limitations is jurisdictional in nature, in that it specifies the time period during which a cause of action exists. Since the statute of limitations is jurisdictional, it may be raised at any stage of the proceeding, including a motion to dismiss. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

Appellate review of order granting motion to dismiss on statute of limitations grounds is de novo. Meyerstein v. City of Aspen, 282 P.3d 456 (Colo. App. 2011).

G. Other Grounds.

The constitutionality of an act may be raised and considered on motion to dismiss. Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960) (unfair practices act).

Courts should be wary of dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and important public policy questions are necessarily involved. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

In an order denying the motion to dismiss where the issues involved are purely questions of law and no good purpose would be served in requiring the filing of individual claims before an administrative agency, whose presumed expertise would not be helpful in resolving legal as distinguished from factual issues, a dismissal is not appropriate. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

A complaint may be dismissed on motion if it is clearly without any merit. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

To sustain the defense of "res judicata" facts in support of it must be affirmatively shown either by the evidence adduced at the trial under C.R.C.P. 8(c), or by way of uncontroverted facts properly presented in a motion for summary judgment, or by a motion to dismiss under section (b) of this rule where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under C.R.C.P. 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963).

Where prior case is decided in same court where a second case is filed and records of prior case are before court for consideration, that court may properly treat a motion to dismiss as one for summary judgment and consider defense of ''res judicata'' on its merits.

Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Affirmative defenses may be considered on motion for summary judgment. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Venue motions shall be filed together. C.R.C.P. 98(e)(1), when read together with this rule, requires that all venue motions except those based on C.R.C.P. 98(c)(3), (f)(2), and (g) must be filed together. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

The granting of a motion to dismiss a complaint is not in and of itself a final and reviewable order of judgment to which a writ of error will lie. District 50 Metro. Recreation Dist. v. Burnside, 157 Colo. 183, 401 P.2d 833 (1965).

Motion to dismiss converted to motion for summary judgment. Following a hearing on plaintiffs' motion for preliminary injunction, the court heard and granted defendants' motion to dismiss. With consent of all parties, the evidence presented in the injunction hearing was considered by the court in ruling on the dismissal motion. Under section (b) of this rule this consideration of matters outside the pleadings made the motion one for summary judgment. Kolwicz v. City of Boulder, 36 Colo. App. 142, 538 P.2d 482 (1975).

IV. MOTION FOR JUDGMENT ON THE PLEADINGS.

Law reviews. For article, ''Again — How Many Times?'', see 21 Dicta 62 (1944).

Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law. Trip v. Parga, 847 P.2d 165 (Colo. App. 1992); City & County of Denver v. Qwest Corp., 18 P.3d 748 (Colo. 2001).

Motion to dismiss for failure to state a claim upon which relief can be granted treated as motion for summary judgment. Enger v. Walker Field, 181 Colo. 253, 508 P.2d 1245 (1973).

Where the trial court, in ruling upon a motion to dismiss for failure to state a claim, considered affidavit submitted by the parties, the motion should have been treated as one for summary judgment. Foster Lumber Co. v. Weston Constructors, Inc., 33 Colo. App. 436, 521 P.2d 1294 (1974).

A judgment of dismissal for failure to state a claim upon which relief can be granted may be entered upon a motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where the record before the trial court, which it considered in ruling on the motion to dismiss, contained substantial material in the form of depositions and deposition exhibits and in argument on the motion, counsel quoted from the said depositions and deposition exhibits, and the court considered all relevant material contained in the exhibits or depositions, the action taken by the court must be considered a ruling on the motion for summary judgment under section (c) of this rule, which can be made at any time. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Judgment must disclose no genuine issue as to material fact regarding complaint's adequacy. A judgment of dismissal for failure to state a claim upon which relief can be granted must specifically disclose that there is no genuine issue as to any material fact relating to the adequacy of the complaint. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Allegations construed strictly against movant. In considering a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant. Strout Realty, Inc. v. Snead, 35 Colo. App. 204, 530 P.2d 969 (1975).

In considering on appeal a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Allegations of opposing parties' pleadings considered true. In considering a motion for judgment on the pleadings, the court must consider the allegations of the opposing parties' pleadings as true. Strout Realty, Inc. v. Snead, 35 Colo. App. 204, 530 P.2d 969 (1975).

A motion for judgment on the pleadings should not be sustained unless it appears that pleadings are such that no amendment could be made. Lammon v. Zamp, 81 Colo. 90, 253 P. 1056 (1927); Kingsbury v. Vreeland, 58 Colo. 212, 144 P. 887 (1914); McLaughlin v. Niles Co., 88 Colo. 202, 294 P. 954 (1930).

Where, after the pleadings in a case are settled, there is no issue of law or fact left for determination, judgment on the pleadings is properly entered. Atterbury v. Nat'l Union Fire Ins. Co., 94 Colo. 518, 31 P.2d 489 (1934).

It is immaterial whether the court considers the judgment of dismissal proper under this rule or as a summary judgment under C.R.C.P. 56 if the defendant is entitled to judgment under either thereof. Haigler v. Ingle, 119 Colo. 145, 200 P.2d 913 (1948).

Second amended complaint sufficient. A second amended complaint plainly asserting an allegation not contained in earlier amended complaint was sufficient to survive a motion for dismissal notwithstanding similarity of wording to earlier amended complaint. Chappell v. Bonds, 677 P.2d 955 (Colo. App. 1983).

A motion to dismiss based on the fact that the complaint facially established a jurisdictional defect because of a violation of the statute of limitations has the effect of a motion for judgment on the pleadings, as averments of time will be considered in determining the sufficiency of the pleadings. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

Criteria for determining reversible error in granting motion applied. Where a ruling on a motion to dismiss is considered a ruling on a motion for summary judgment, whether the court committed reversible error in granting the motion for dismissal must be tested against the legal criteria for granting a motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings or a partial summary judgment. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Appellate court shall review complaint as trial court does. In reviewing the action of a trial court in dismissing a complaint for failure to state a claim, an appellate court is in the same position as the trial judge and must consider only matters stated within the four corners of the pleading. Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981).

V. MOTION FOR SEPARATE, OR MORE DEFINITE, STATEMENT.

Law reviews. For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947).

Granting of motion for bill of particulars is in court's discretion. Whether to grant or deny a motion for a bill of particulars in accordance with section (e) of this rule calls into play the sound discretion of the court. Morgan v. Brinkhoff, 145 Colo. 78, 358 P.2d 43 (1960).

Even prior to the adoption of this rule a motion to require a complaint to be made more specific was addressed to the sound legal discretion of the trial court. Mulligan v. Smith, 32 Colo. 404, 76 P. 1063 (1904); Hall v. Cudahy, 46 Colo. 324, 104 P. 415 (1909); Louden Irrigating Canal & Reservoir Co. v. Neville, 75 Colo. 536, 227 P. 562 (1924) (decided under section 69 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bills of particulars ordinarily should not be utilized to unduly expand the pleadings where discovery is the proper method for obtaining information falling outside the category of ultimate facts. Morgan v. Brinkhoff, 145 Colo. 78, 358 P.2d 43 (1960).

After denial of a motion to dismiss, the trial court has the discretion to allow the plaintiff an opportunity to supply an essential allegation by a more definite statement and is not bound to dismiss the complaint in the first instance for failure to plead such. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Plaintiff allowed to supply essential allegation of special damages by a more definite statement. In an action for damages for libel ''per quod'', the trial court had discretion to allow the plaintiff the opportunity of supplying the essential allegation of special damages by a more definite statement; it was not bound to dismiss the complaint entirely under the circumstances. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

VI. MOTION TO STRIKE.

Law reviews. For article, ''The Federal Rules from the Standpoint of the Colorado Code'', see 17 Dicta 170 (1940). For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For article, ''Litigating Disputes Involving the Medical Marijuana Industry'', see 41 Colo. Law. 103 (August 2012).

Annotator's note. Since section (f) of this rule is similar to § 66 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Where a complaint contains redundant matter, advantage cannot be taken thereof on motion to require the complaint to be made more specific; rather, the proper remedy is by motion to strike. Commonwealth Co. v. Nunn, 17 Colo. App. 117, 67 P. 342 (1902).

It is not error to refuse to strike out pleas which are merely cumulative and which tender the same issue as an objectionable plea subsequently filed. Glenn v. Brush, 3 Colo. 26 (1876).

It is not error to strike out allegations that are simply a recital of the motives of defendant in doing the acts complained of by plaintiff, which add nothing to the cause of action stated. Equitable Sec. Co. v. Montrose & Delta Canal Co., 20 Colo. App. 465, 79 P. 747 (1905).

On a motion to strike on the ground that a pleading is a sham, it is not the province of the court to determine the veracity of the respective parties, for that is a question of fact to be determined on the trial; rather, the duty of the court is to determine whether an issue of fact is presented, not to try that issue. Midwest Fuel & Timber Co. v. Steele, 111 Colo. 458, 142 P.2d 1011 (1943); Kullgren v. Navy Gas & Supply Co., 112 Colo. 331, 149 P.2d 653 (1944).

Once a pleading is accepted for filing, the striking of a pleading is not a proper sanction

for failure to pay a docket fee. Miller v. Charnes, 694 P.2d 348 (Colo. App. 1984).

The court can on its own motion amend by striking out. Elzroth v. Murphy, 75 Colo. 5, 223 P. 760 (1923).

VII. CONSOLIDATION OF DEFENSES.

This rule makes it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

VIII. WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945).

Section (h)(1) of this rule makes it expressly clear that if a party makes a motion under section (b) of this rule, and in doing so omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge did not grant relief from the waiver imposed by this rule, in denying a motion under section (b) of this rule by granting 20 days ''to answer or otherwise plead'', as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A party may, by its actions, waive the court's lack of in personam jurisdiction, and, even when jurisdiction over the person is raised as an issue, it must be preserved and brought to the attention of the trial court at a reasonable time. Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Section (h)(2) of this rule cannot be interpreted to mean that a party with the necessary information to make a motion for joinder of an indispensable party at his disposal can sit back and raise it at any point in the proceedings, when the only effect of the motion under the circumstances would be to protect himself and not the person alleged to be indispensable. Such an interpretation would violate the direction of C.R.C.P. 1, that the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

The question of jurisdiction may be raised at any stage of an action, and that, too, without an assignment of error on the subject. Peaker v. Southeastern Colo. Water Conservancy Dist., 174 Colo. 210, 483 P.2d 232 (1971).

Failure to raise subject matter jurisdiction objection in court in which action is filed does not waive right to raise the objection in court to which action is transferred. Luebke v. Luebke, 143 P.3d 1088 (Colo. App. 2006).

Defenses and objections not presented as required by the rules of civil procedure are deemed waived. Maxly v. Jefferson County Sch. Dist. No. R-1, 158 Colo. 583, 408 P.2d 970 (1965).

Assertion of a compulsory counterclaim alone is insufficient to waive a personal jurisdiction defense. Giduck v. Niblett, 2014 COA 86, 408 P.3d 856.

Under C.R.C.P. 8(c) and section (h) of this rule, a party waives all defenses and objections which he does not present in his answer. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Laches and waiver must be affirmatively set forth in the answer under C.R.C.P. 8(c) and section (h) of this rule. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Failure of consideration is an affirmative defense which, if not pleaded, is waived under C.R.C.P. 8(c) and section (h) of this rule. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

An affirmative defense cannot be urged for the first time on appeal. Where such a defense is neither pleaded nor raised at any stage of the proceedings in the trial court, it cannot be urged for the first time on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962); Davis v. Gourdin, 831 P.2d 497 (Colo. App. (1992).

A motion to dismiss which has been previously denied can be renewed before the same judge, and there is no good reason for adopting a contrary view merely because the case is transferred to another judge. Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

Where a court does not have jurisdiction, the remedy is not change of venue but rather dismissal of the action. Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

IX. FORM OF JUDGMENT.

Findings of fact and conclusions of law are not required when ruling on a motion under this rule or under C.R.C.P. 56. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

Findings of fact and conclusions of law are unnecessary on decisions under the rule, except those granting involuntary dismissal pursuant to C.R.C.P. 41(b) for failure to prosecute with diligence. Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

Rule 13. Counterclaim and Cross Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaim. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) [There is no section (d).]

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross Claim Against Coparty. A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross claim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) Claims Against Assignee. Except as otherwise provided by law as to negotiable instruments, any claim, counterclaim, or cross claim which could have been asserted against an assignor at the time of or before notice of an assignment, may be asserted

against his assignee, to the extent that such claim, counterclaim, or cross claim does not exceed recovery upon the claim of the assignee.

(k) Claims Against Personal Representative. The death of a person shall not prejudice the rights of a third person to assert a claim, cross claim, or counterclaim surviving death against the personal representative of the deceased in the time and manner provided by law.

(l) Superior Courts. Repealed May 30, 1991, effective July 1, 1991.

Source: (l) repealed May 30, 1991, effective July 1, 1991.

Cross references: For application of this rule to replevin actions, see C.R.C.P. 104(p); for claimant having same rights and remedies as a plaintiff where a counterclaim or cross claim is filed, see C.R.C.P. 110(d); for claims for relief, see C.R.C.P. 8(a); for pleadings allowed, see C.R.C.P. 7(a); for joinder of persons needed for just adjudication, see C.R.C.P. 19; for permissive joinder of parties, see C.R.C.P. 20; for jurisdiction of various courts, see title 13, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''Forms Committee Presents Standard Pleading Samples to Be Used in Divorce Litigation'', see 29 Dicta 94 (1952). For article, ''Plaintiff's Advantageous Use of Discovery, Pretrial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For article, ''Joinder of Claims and Counterclaims in Cases Under the Uniform Dissolution of Marriage Act'', see 15 Colo. Law. 1818 (1986).

A counterclaim is a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

A counterclaim is a species of setoff or recoupment of a broad and liberal character. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

One who seeks relief by cross-bill or counterclaim and actively presses his claim thereby invokes the court's jurisdiction in the case so that he cannot thereafter question the authority of the court to pass upon all questions raised between himself and his adversary. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

One may not claim that he was present only for the limited objectives of his answer and counterclaim. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

There is nothing inherently improper about asserting a counterclaim in a reply to a counterclaim. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

The rules of civil procedure specifically authorize the inclusion of counterclaims in replies to counterclaims, and the analogous federal rules have been so interpreted by the federal courts. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

This rule applies in a court foreclosure action. There is no reason why the rules applicable to responsive pleadings and counterclaims should not apply to court foreclosures as they do to any other civil action not specifically exempted. Torbit v. Griffith, 37 Colo. App. 460, 550 P.2d 350 (1976).

II. COMPULSORY.

Law reviews. For note, ''Pleading a Claim Barred by Statute of Limitations by Way of Recoupment'', see 7 Rocky Mt. L. Rev. 204 (1935). For article, ''Elmer Lumpkin Pinch-Hits for the Judge on Rule 14'', see 19 Dicta 250 (1942). For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945).

The purpose of subsection (a) is to prevent a multiplicity of lawsuits arising from one set of circumstances, and a party who fails to plead a compulsory counterclaim is barred from raising the claim in a later action against a person who was a plaintiff or in privity with a plaintiff in the prior action. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

An appellate court reviews de novo a trial court's determination that a claim is a compulsory counterclaim. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

A "setoff" is embraced in the term "counterclaim". First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914) (decided under § 63 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

A setoff arising from the same subject matter or occurrence as plaintiff's claim is a compulsory counterclaim which must be affirmatively pleaded. Corbin Douglass, Inc. v. Kelley, 28 Colo. App. 369, 472 P.2d 764 (1970); Grynberg v. Rocky Mountain Natural Gas, 809 P.2d 1091 (Colo. App. 1991).

Counterclaims arising out of events unrelated to the event in the complaint are not compulsory counterclaims. Bohlender v. Oster, 165 Colo. 164, 439 P.2d 999 (1968).

A counterclaim arises out of the same transaction or occurrence as an initial claim if the subject matter of the counterclaim is logically related to the subject matter of the initial claim. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Under this rule the best test of a compulsory counterclaim inquires into the logical relationship between the opposing claims. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997); In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

The logical relationship test inquires, ''Is there any logical relation between the claim and the counterclaim?'' McCabe v. United Bank, 657 P.2d 976 (Colo. App. 1982).

A counterclaim is "logically" related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971).

A logical relationship exists when the counterclaim arises from the same ''aggregate of operative facts'' as the opposing party's claim. McCabe v. United Bank, 657 P.2d 976 (Colo. App. 1982).

Any claim that a party might have against an opposing party which is logically related to the claim brought by the opposing party and which is not within the exceptions stated in the pertinent rule is a compulsory counterclaim. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971).

A legal malpractice claim is a compulsory counterclaim in an action to collect attorney fees if the malpractice claim arises from the same representation as the collection action. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Even though the evidence needed to establish the opposing claims may differ. A counterclaim may be compulsory where it arises from the same events even though the evidence needed to establish the opposing claims may be quite different. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Grynberg v. Rocky Mountain Natural Gas, 809 P.2d 1091 (Colo. App. 1991); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997).

Where a compulsory counterclaim is not raised in the pleadings or otherwise put into issue, the trial court is precluded from rendering a finding on the matter. Corbin Douglass, Inc. v. Kelley, 28 Colo. App. 369, 472 P.2d 764 (1970).

The failure to assert a compulsory counterclaim bars the assertion of such claim in a subsequent action. Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971); Wood v. Jensen, 41 Colo. App. 301, 585 P.2d 309 (1978); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997); In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

The purpose of the rule is to avoid multiple lawsuits between the parties to a transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

A trial court does not err in granting a motion for summary judgment on the ground that the claim made in the case is compulsory counterclaim which should have been raised in another action and is therefore barred. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

The effect of a voluntary dismissal of a compulsory counterclaim is similar to the failure to file such a claim. The purpose of this rule is to require parties to present all of their existing claims simultaneously to the court or to be forever barred. Therefore, the trial court did not err in ruling that appellant's voluntary dismissal of a compulsory counterclaim in a previous action precluded litigation of that claim in a subsequent case. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006).

A divorce action subsequent to one for separate maintenance is not barred by this rule as a compulsory counterclaim which should have been asserted in the earlier complaint for separate maintenance, inasmuch as C.R.C.P. 81(b) provides that the rules of civil procedure do not govern procedure and practice in actions in divorce or separate maintenance where they may conflict with the procedure and practice provided by the applicable statutes; provided that a decree granting separate maintenance shall not bar either party from ''subsequently'' bringing and maintaining an action for divorce. Moats v. Moats, 168 Colo. 120, 450 P.2d 64 (1969).

No trial by jury on issues raised by counterclaim. Defendants whose counterclaim raises issues which would properly be matters

for jury trial in a separate action are not entitled to a jury trial under C.R.C.P. 38 where plaintiff's action invokes the equity arm of the court, since the character of the action is thereby determined. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Express exception to compulsory counterclaim rule applies where claim has not matured at the time of the pleading, even if it arises from the same transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000); Stone v. Dept. of Aviation, 453 F.3d 1271 (10th Cir. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

If there is no controlling Colorado authority construing the language of C.R.C.P. 13, courts may look to federal precedent construing the almost identical F.R.C.P. 13 for guidance. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Here, claimant's claim for payment matured at the time he was required to file his answer, and was therefore a compulsory counterclaim in 1991 action. Accordingly, claim should have been raised in the 1991 action, and trial court properly dismissed it and granted summary judgment on that basis. This holding is consistent with the purpose of the compulsory counterclaim rule, i.e., promoting justice by avoiding multiple lawsuits between the parties to a transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

A counterclaim that is contingent has not matured for purposes of subsection (a). Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

The maturity of a noncontingent counterclaim should be measured by the discovery rule, and under the rule a claim matures when the claimant knew or reasonably should have known of the general facts underlying the claim. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Buyer's claim under § 38-35-126 (3) to void installment land contract was an affirmative defense and compulsory counterclaim. As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim arose out of and related directly to the same contract claim seller sought to enforce against buyer. Buyer's claim was related to seller's claim and, therefore, was a compulsory counterclaim. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

Assertion of a compulsory counterclaim alone is insufficient to waive a personal jurisdiction defense. Giduck v. Niblett, 2014 COA 86, 408 P.3d 856.

Applied in Smith v. Hoyer, 697 P.2d 761 (Colo. App. 1984); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

III. PERMISSIVE.

Law reviews. For article, ''A Victim of 'Permissive Counterclaims''', see 18 Dicta 83 (1941).

A counterclaim is a "permissive" counterclaim when it does not arise out of the same transaction or occurrence as the original cause of action, and is a separate and distinct claim. T.L. Smith v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

A claim is not a permissive counterclaim within this rule where the claims arise out of the same transaction. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

A court does not abuse its discretion in declining to consider as permissive counterclaims those counterclaims based on events taking place substantially prior to and unrelated to the event on which the complaint is based. Bohlender v. Oster, 165 Colo. 164, 439 P.2d 999 (1968).

Doctrine of claim preclusion does not bar permissive counterclaims that could have been, but were not required to be, raised in an initial civil action from being raised in a second civil action even if there is a final judgment in the first action, and identity of parties and subject matter between the actions. Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, 327 P.3d 321.

Claim held not to be permissive counterclaim. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

IV. OMITTED.

Compulsory counterclaim that ripens after commencement of action should be allowed in amended pleadings. Bobrick v. Sanderson, 164 Colo. 46, 432 P.2d 242 (1967).

Counterclaims not waived or abandoned even though defendant failed to reassert them in the answer to the amended complaint. Plaintiff failed to timely object to defendant's continued prosecution of its counterclaims and, therefore, implicitly consented to the counterclaims being tried. Mullins v. Med. Lien Mgmt., Inc., 2013 COA 134, 411 P.3d 798.

V. CROSS CLAIM.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945).

This rule provides that the cross claims against coparties may also include a claim that the coparty may be liable to the cross claimant for all or part of the claim asserted in the action against the cross claimant. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

The wording of this rule is clearly permissive, not compulsory. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

VI. JOINDER OF ADDITIONAL PARTIES.

Annotator's note. Since section (h) of this rule is similar to § 16 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Public policy and reason, as well as equity, required that all matters pertaining to the transaction should be adjudicated at the same time. Strang v. Murphy, 1 Colo. App. 357, 29 P. 298 (1871).

The law encourages the determination of all controversies in one action by bringing the either necessary or proper parties. Pollard v. Lathrop, 12 Colo. 171, 20 P. 251 (1888); Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934).

With equal discrimination, the law disapproves of bringing in parties whose presence is neither necessary nor proper. Russell v. Cripple Creek State Bank, 71 Colo. 238, 206 P. 160 (1922); Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929); Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934); Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934).

Jurisdiction of the subject matter is conferred by law. Davis v. Davis, 70 Colo. 37, 197 P. 241 (1921).

Jurisdiction exists even before a suit is begun. Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

Jurisdiction is not affected by the omission of a party. Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

The court is required to order an indispensable party to be brought in. Day v. McPhee, 41 Colo. 467, 93 P. 670 (1907); Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

This rule authorizes the joinder of parties necessary to the granting of complete relief in the determination of a counterclaim or cross claim, even though their presence is not indispensable to such determination. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

All who are interested in the subject matter of an action should be made parties thereto, so that complete justice might be done and the rights of all parties in the subject matter of controversy finally determined. Denison v. Jerome, 43 Colo. 456, 96 P. 166 (1908); Buckhorn Plaster Co. v. Consolidated Plaster Co., 47 Colo. 516, 108 P. 27 (1910).

It is an everyday matter on trial to admit a new plaintiff when he appears to have an interest in the case. Dickson v. Retallic, 80 Colo. 78, 249 P. 2 (1926).

Waiver of right shall include other interested parties. Where, for the purpose of a complete determination of all the rights involved, others should have been made parties defendant by virtue of this rule, the failure to do so could not be considered because appellants by answering over, after demurrer on the ground of defect of parties, waived the right to raise the question on appeal. Zang v. Wyant, 25 Colo. 551, 56 P. 565 (1898).

This matter is not applicable where the court could not proceed to judgment without the presence of others who were not parties to the proceedings. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908). See Denison v. Jerome, 43 Colo. 456, 96 P. 166 (1908).

Where the defendant wishes to assert a claim against a codefendant and a third party, the correct procedure is to file a cross claim, combined with a motion under section (h) of this rule, to bring in the third party as an additional defendant on the cross claim. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

A similar combination of a counterclaim and a motion under section (h) of this rule is appropriate where the claim is against the original plaintiff and a third party. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

VII. CLAIMS AGAINST ASSIGNEE.

Annotator's note. Since section (j) of this rule is similar to § 4 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

An assignee takes no greater right than the assignor had to convey, and his rights and remedies are those of the assignor. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

Valid existing defenses may be interposed. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

Setoff against an original payee is allowed in a suit upon a promissory note by an assignee, taking it after due. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Irrespective of the number of assignments, the language of this rule is as broad as it could well have been, so that a note assigned after it was due a half dozen times would be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of assignment, or before notice thereof. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Owner entitled to credit only up to the amount of assignee's claim. The owner of a house was entitled to credit against building contractor's assignee for assignor's liabilities at time of assignment up to amount of assignee's

claim. Jones v. Panak, 84 Colo. 62, 268 P. 535 (1928).

Applied in Jackson v. Hamm, 14 Colo. 58, 23 P. 88 (1890).

VIII. CLAIMS AGAINST PERSONAL REPRESENTATIVE.

For cases construing § 64 of the former Code of Civil Procedure from which section (k) of this rule was derived, see Rathvon v. White, 16 Colo. 41, 26 P. 323 (1891); Inland Box & Label Co. v. Richie, 57 Colo. 532, 143 P. 581 (1914).

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 14 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaim against the third-party plaintiff and cross claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaim and cross claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this Rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this Rule would entitle a defendant to do so.

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

Cross references: For claimant having same rights and remedies as a plaintiff where a third-party claim is filed, see C.R.C.P. 110(d); for presentation of defenses, see C.R.C.P. 12; for counterclaims and cross claims, see C.R.C.P. 13; for amended and supplemental pleadings, see C.R.C.P. 15; for separate trials, see C.R.C.P. 42.

ANNOTATION

I. General Consideration.
II. When Defendant May Bring In.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Elmer Lumpkin Pinch-Hits for the Judge on Rule 14'', see 19 Dicta 250 (1942). For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For article, ''Direct Action Against the Liability Insurer Under the Rules of Civil Procedure'', see 22 Dicta 314 (1945). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958). For article, ''Impleader Under

Rule 14(a): Will the Practice in Colorado Ever Catch up to the Theory?'', see 17 Colo. Law. 635 (1988).

The provisions of this rule control "third-party" procedure and practice. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

This rule permitting third-party impleader is intended to liberalize and simplify procedure. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

The purpose of this rule is to reduce litigation by having one lawsuit do the work of two. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

The purpose of this rule is to settle as many conflicting interests as possible in one proceeding and thus avoid circuity of action, save time, and expense, as well as eliminate a serious handicap to the defendant of a time difference between the judgment against him and a judgment in his favor against the third-party defendant. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952); Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

The object of this rule is to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

This rule was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

The underlying purpose of this rule is to consolidate suits that should be tried together in the interest of saving the time of the courts, parties, and witnesses and avoiding unnecessary expense. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Purposes of rule must be balanced against prejudice. The purposes of this rule — including avoiding circuity of actions and inconsistent result — must be balanced against any prejudice the impleaded party or the original plaintiff might suffer in having the matter resolved in the same suit rather than in a separate suit brought by the original defendant. United Bank of Denver Nat'l Ass'n v. Shavlik, 189 Colo. 280, 541 P.2d 317 (1975).

This rule is not intended to be used as a means of trying two separate and distinct causes of action in the same proceeding. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Denial of a motion, made on the day of trial, for leave to file third-party complaints is not an abuse of discretion, for the reasons that the motion is not timely made and, if granted, would result in further delay. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

Court may dismiss or deny leave to file complaint. The court may properly deny leave to file a third-party complaint, or may dismiss a third-party complaint which has been timely filed, if the claim for liability by the defendant against the third party is doubtful or if the introduction of the third-party claim would unduly complicate the case to the prejudice of the plaintiff. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

Applied in Naiman v. Warren A. Flickinger & Assocs., 43 Colo. App. 279, 605 P.2d 63 (1979).

II. WHEN DEFENDANT MAY BRING IN.

Law reviews. For article, ''Form of Third-Party Summons Modified by Colorado Supreme Court'', see 32 Dicta 230 (1955).

This rule is almost identical to F.R.C.P. 14(a). Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Third-party proceedings provide for a method whereby a party made a defendant in a law suit brought against it by a plaintiff may bring into court a party who would be liable for the claim being asserted by the plaintiff. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

It is a suit to substitute a third party for the claim being brought by the plaintiff. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

Third-party practice, and particularly the practice provided for in this rule, is procedural. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

This rule does not abridge, enlarge, or modify the substantive rights of any litigant. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

It creates no substantive rights. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952); Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

Unless there is some substantive basis for the third-party plaintiff's claim, he cannot utilize the procedure of this rule. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

The third-party plaintiff must assert a substantive basis upon which the third party may be held liable to it for all or part of the plaintiff's claim. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

This rule does not establish a right of reimbursement, indemnity, or contribution. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Where there is a basis for such right, this rule expedites the presentation and in some cases accelerates the accrual, of such right. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Granting leave to interplead a third-party defendant is a matter of judicial discretion, but only up to the point where facts exist upon which this rule was intended to operate. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Discretion of the court in determining whether to grant or deny a motion to interplead a third party is limited to those cases where a finding is made that the third party may be liable to the original defendant for all or part of a plaintiff's claim. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

The test to determine when a third-party defendant may be impleaded under this rule is whether the third party "is or may be liable to [the defendant] for all or part of the plaintiff's claim against [the defendant]". Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981); Weston v. Mincomp. Corp., 698 P.2d 274 (Colo. App. 1985).

This rule does not permit impleading when there are separate and independent controversies between a defendant and his desired third-party defendant. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

The cases in which impleading a third-party defendant has been allowed have been cases where the third-party is liable as a guarantor, surety, insurer, or indemnifier of the principal defendant, and those in which the third-party defendant may be liable for causing the damage to the plaintiff, it being a factual question which of two people is responsible for a given injury. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Pleadings are subsidiary and serve the ends of justice by giving notice of the issues to be litigated. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

There is no jurisdiction over third-party defendants where rule is not complied with. Where it appears that provisions of section (a) of this rule and C.R.C.P. 4(c) concerning the essential content of summons have not been complied with, the trial court has no jurisdiction over third-party defendants, and a special appearance and motion to quash filed on behalf of them should be sustained. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

It is not necessary for plaintiff to amend his complaint to include third-party defendant. It was not essential to the validity of the judgment entered against the third-party defendant that the original plaintiff should have formally entered an amendment to his complaint to include a claim against him. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Where the third-party defendant not only answered the third-party complaint, but in a separate pleading undertook to answer the original complaint categorically and asserted all of the defenses he could have asserted had the plaintiff amended his complaint and alleged a claim against the third party, such an answer amounts to a waiver of amendment. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Where the parties litigated the issues between them just as if there had been actual notice through an amendment to the complaint stating in terms the plaintiff's claim against the third-party defendant, an amendment including the third-party defendant in the original complaint was unnecessary. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Retrial on third-party complaint concerning indemnity does not require retrial of original complaint. Where defendant's liability to plaintiff has been properly determined but defendant's third-party complaint was erroneously dismissed, retrial of issues under the third-party complaint does not entitle defendant to a contemporaneous retrial of the issues between himself and the plaintiff under the original complaint where the matter of the third-party complaint is one of indemnity and not that of a joint tort-feasor. Jacobson v. Dahlberg, 171 Colo. 42, 464 P.2d 298 (1970).

Leave to file third-party complaint denied. The court did not abuse its discretion in denying leave to file a third-party complaint when the third-party claims may have unduly complicated the case to the prejudice of the plaintiffs, and the third-party claims would be better handled in a separate action. Elijah v. Fender, 674 P.2d 946 (Colo. 1984).

Even though defendant may assert claim against third party who may be liable to defendant for all or part of plaintiff's claim, he may not file separate and independent claims against the third party. Martinez v. Denver Transformer Sales, 780 P.2d 49 (Colo. App. 1989).

Principal may join agent. A principal being sued by a third party for the negligent act of his agent is entitled to join the agent as a party to the suit. Schledewitz v. Consumer's Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

Parent may join his child who caused auto accident for contribution. Since liability of automobile owner for accident caused by his minor offspring is based upon the family purpose doctrine, where liability is predicated on a principal-agent or master-servant theory, and not wrongdoing on the part of the parent himself where there would be no contribution between joint tort-feasors, it is permissible for a

parent to join his child in order to recover from him the damages for which the parent is held liable, and therefore it is error to dismiss a parent's fourth-party claim which demands that the liability, if any, be made a joint one with contribution to be ordered. Schledewitz v. Consumer's Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

If an insurance company has by its policy agreed to insure against liability on the part of a defendant, then a third-party procedure is justified and the third-party plaintiffs are only seeking to compel the insurance company to do that which it contracted to do. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

If the policy were one of indemnity rather than of liability, then this procedure would not be applicable, the insurer not being liable until an actual loss is sustained. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Where an employee asserts his own claim against the state compensation insurance fund, third-party proceedings are not provided in section (a) of this rule for such a claim. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

An employer cannot maintain a third-party action against industrial commission regardless of whether former employee, who brought common-law tort action against the employer for injuries sustained in an altercation with another employee in connection with his discharge from employment, was an employee at time of the altercation. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970) (decided prior to abolition of industrial commission).

An employer's claim against the state compensation insurance fund for attorney fees is not properly a third-party claim under Rule 14(a), C.R.C.P., so dismissal without prejudice of the employer's third-party action against industrial commission would not bar such employer from bringing a separate suit against the industrial commission for attorney fees if liability therefor should arise. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970) (decided prior to abolition of industrial commission).

The makers of a promissory note when sued by a holder in due course may not file a third-party complaint under this rule against the original payee who transferred the note before maturity without recourse, since a claim for damages by the makers against the original payee is independent and apart from the claim of the holder in due course and cannot affect such holder's right to a judgment against the makers. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Applied in Taylor v. Peterson, 133 Colo. 218, 293 P.2d 297 (1956).

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted

relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Source: (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (c) amended and effective September 5, 2013.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''Pre-Trial Procedure — Should It Be Abolished in Colorado?'', see 30 Dicta 371 (1953). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For note on current developments, ''Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado'', see 46 U. Colo. L. Rev. 609 (1974-75). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with John Doe pleadings, see 62 Den. U. L. Rev. 220 (1985).

When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading. Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976).

Amended and supplemental pleadings differ in that the former relate to matters occurring before the filing of the original pleading and entirely replace the original pleading, while the latter concern events subsequent to the original pleading and constitute only additions to the earlier pleading. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Applied in Tumbarello v. Byers, 37 Colo. App. 61, 543 P.2d 1278 (1975); Central City Opera House Ass'n v. Brown, 191 Colo. 372, 553 P.2d 64 (1976); People in Interest of A.A.T., 191 Colo. 494, 554 P.2d 302 (1976); Woodruff World Travel, Inc. v. Indus. Comm'n, 38 Colo. App. 92, 554 P.2d 705 (1976); Buena Vista Bank & Trust Co. v. Lee, 191 Colo. 551, 554 P.2d 1109 (1976); Mansfield Dev. Co. v. Centennial Enters., Inc., 38 Colo. App. 36, 554 P.2d 1362 (1976); People in Interest of C.R., 38 Colo. App. 252, 557 P.2d 1225 (1976); Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977); Robertson v. Bd. of Educ., 39 Colo. App. 462, 570 P.2d 19 (1977); In re Heinzman, 40 Colo. App. 262, 579 P.2d 638 (1977); Shepard v. Wilhelm, 41 Colo. App. 403, 591 P.2d 1039 (1978); In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 421, 599 P.2d 950 (1979); Fitzgerald v. Edelen, 623 P.2d 418 (Colo. App. 1980); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); Graefe & Graefe, Inc. v. Beaver Mesa Exploration Co., 635 P.2d 900 (Colo. App. 1981); Concerned Citizens v. Bd. of County Comm'rs, 636 P.2d 1338 (Colo. App. 1981); Turley v. Ball Assocs., 641 P.2d 286 (Colo. App. 1981); Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. App. 1981); King

v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); In re Boyd, 643 P.2d 804 (Colo. App. 1982); Parry v. Walker, 657 P.2d 1000 (Colo. App. 1982); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); Memorial Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc., 661 P.2d 296 (Colo. App. 1982); Isbill Assocs. v. City & County of Denver, 666 P.2d 1117 (Colo. App. 1983); Emrich v. Joyce's Submarine Sandwiches, 751 P.2d 651 (Colo. App. 1987); Harris v. Reg'l Transp. Dist., 155 P.3d 583 (Colo. App. 2006); Loveland Essential Group v. Grommon Farms, 2012 COA 22, 318 P.3d 6.

II. AMENDMENTS.

A. In General.

Law reviews. For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965).

Annotator's note. Since section (a) of this rule is similar to §§ 59 and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule is clear and unequivocal. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960).

An amendment is a defensive weapon offered one whose defective pleading is assailed. Lamar Bldg. & Loan Ass'n v. Truax, 95 Colo. 77, 33 P.2d 978 (1934).

No exceptions to these rights to amend are provided. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960).

Amendment provision of section (a) has no counterpart in county court rules. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Amended pleadings supersede the originals. Handy Ditch Co. v. Greeley & Loveland Irrigation Co., 86 Colo. 197, 280 P. 481 (1929); Kalish v. Brice, 130 Colo. 220, 274 P.2d 600 (1954).

Amended pleadings become the pleadings which defendant is called upon to answer. Kalish v. Brice, 130 Colo. 220, 274 P.2d 600 (1954).

Notice is essence of rule. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

This rule assumes a service of an amendment on the other party to the action, since, otherwise, that portion of the rule providing that a responsive pleading shall be within 10 days after service of the amended pleading would be meaningless. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

Where plaintiff has been permitted to amend the complaint without notice to the defendant, it is error for the court to deny the latter's motion — interposed before the decree becomes final — to set aside the decree and permit him to answer. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

A defendant brought into the cause by an amended complaint appears generally. Wyoming Nat'l Bank v. Shippey, 23 Colo. App. 225, 130 P. 1021 (1896).

Whether an amended complaint should be stricken rested in the sound discretion of the court. Youngberg v. Orlando Canal & Reservoir Co., 98 Colo. 111, 53 P.2d 651 (1935).

The striking of an amended complaint and dismissal of the action was held not to be an abuse of discretion where no permission to file the amendment was obtained, the stricken amendment was plaintiff's third attempt to make his pleading unobjectionable, and the dismissal was without prejudice. Burson v. Adamson, 87 Colo. 451, 288 P. 623 (1930).

Matter of amendment cannot be raised for first time on appeal. Where no oral or written motion requesting amendment of the written complaint is made by plaintiff at the trial level and the matter of the amendment is not raised in plaintiff's motion for new trial, the plaintiff is therefore precluded from raising this question in the supreme court for the first time. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Generalized statement that ''even if the court were to decide that the complaint lacks some level of specificity, the court should allow the plaintiffs to amend their complaint'' was not sufficiently specific to constitute a valid motion for leave to amend the complaint. Kreft v. Adolph Coors Co., 170 P.3d 854 (Colo. App. 2007).

Mere amendment of pleadings cannot accomplish ends which are inconsistent with statutory procedures. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Limitations period in § 38-22-110 applies to joinder of additional parties by amendment. In the ordinary mechanic's lien case, the six-month limitations period set down in § 38-22-110 applies to joinder of additional parties by amendment. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Absence of authorization for amendment in § 22-42-111 reflects section's legislative intent. The absence of authorization for amendment in § 22-42-111 reasonably can be construed to reflect legislative intent that prompt resolution of election disputes must be achieved in order that the machinery of government not be slowed any more than strictly necessary to permit such disputes to be fairly resolved. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Applied in Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977).

B. Purpose and Object of Amendment.

Amendments to pleadings should be granted in accordance with overriding purposes of rules of civil procedure — to secure the just, speedy, and inexpensive determination of every action. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Originals not to be treated as sacrosanct. As with most pleadings and writings in the nature of pleadings, the purpose of justice is best served not by treating originals as sacrosanct, but rather by permitting the parties to ensure that the issues, as ultimately framed, represent the parties' true positions. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978); K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981); Zavorka v. Union Pacific R. Co., 690 P.2d 1285 (Colo. App. 1984).

Leave to amend shall be freely given when justice so requires. Zertuche v. Montgomery Ward & Co., Inc., 706 P.2d 424 (Colo. App. 1985); Lutz v. District Court, 716 P.2d 129 (Colo. 1986).

Motions to amend should be freely permitted when the interests of justice would be served thereby. In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

Under this rule leave to amend should be freely granted. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954); Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976); H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Provision is made in this rule that leave to amend shall be freely given when justice so requires. Lerner v. Stone, 126 Colo. 589, 252 P.2d 533 (1952); Coffman v. Tate, 151 Colo. 533, 379 P.2d 399 (1963).

Section (a) reflects a liberal policy of amendment and encourages trial courts to look favorably on a request to amend. Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998).

Substantial rights should never be sacrificed to mere forms. Sellar v. Clelland, 2 Colo. 532 (1875); Green v. Davis, 67 Colo. 52, 185 P. 369 (1919).

The rationale behind this rule is that a substantial right should never be sacrificed to mere form. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Since the object of this rule is to permit amendments freely with the thought of making disposition of causes expeditious. Patrick v. Crowe, 15 Colo. 543, 25 P. 985 (1890); Seymour v. Fisher, 16 Colo. 188, 27 P. 240 (1891); Saint v. Guerrerio, 17 Colo. 448, 30 P. 335, 31 Am. St. R. 320 (1892); McCracken v. Montezuma Water & Land Co., 25 Colo. App. 280, 137 P. 903 (1914).

Where the effect of an amendment is to interpose a purely legal obstruction to the enforcement of a just demand, the party making the application should be allowed only what the letter of the law gives. People ex rel. Republican Publishing Co. v. Barton, 4 Colo. App. 455, 36 P. 299 (1894).

To allow an amendment without cause shown therefor as required is a violation of this provision. Collins v. Bailey, 22 Colo. App. 149, 125 P. 543 (1912).

After a judgment has been reversed by the supreme court upon appeal and the cause remanded for a new trial, the trial court might permit the pleadings to be amended whenever the ends of justice would be subserved thereby. Horn v. Reitler, 15 Colo. 316, 25 P. 501 (1890).

Rule prescribes liberal policy of amendment and encourages the courts to look favorably on requests to amend. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

The rule emphasizes liberality in its application. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954).

Amendments at all times should be liberally allowed when they do not lead to surprise or injury. Sellar v. Clelland, 2 Colo. 532 (1875); Green v. Davis, 67 Colo. 52, 185 P. 369 (1919).

Since this rule states no exceptions, contention that claims dismissed for lack of subject matter jurisdiction cannot be amended is rejected. Stuart v. Frederick R. Ross Inv. Co., 773 P.2d 1107 (Colo. App. 1988).

C. When Permitted as a Matter of Right.

This rule permits a party to amend his pleading once as a matter of course at any time before a responsive pleading is filed. Kalish v. Brice, 136 Colo. 179, 315 P.2d 829 (1957); Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Otherwise, amendments may be made only by leave of court or with consent of the adverse party. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Party may amend pleading within 20 days if there is no responsive pleading. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Where no responsive pleading has been filed in these instances, no final judgment should be entered in the absence of a showing of record that plaintiff waived the right to

file an amended complaint and elected to stand upon the allegations of the complaint to which the motion to dismiss was addressed. Passe v. Mitchell, 161 Colo. 501, 423 P.2d 17 (1967).

Where the defendant merely files a motion to dismiss for failure to state a claim without an answer, plaintiff then would be entitled to amend his complaint as a matter of right. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

The court erred in overruling a plaintiff's motion to amend his complaint following an order sustaining a motion to dismiss, since plaintiff is entitled to one such amendment as a matter of right under section (a) of this rule. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Davis v. Paolino, 21 P.3d 870 (Colo. App. 2001); Grear v. Mulvihill, 207 P.3d 918 (Colo. App. 2009).

The trial court cannot enter its judgment of dismissal until plaintiff has had at least an opportunity to amend his complaint. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964); Passe v. Mitchell, 161 Colo. 501, 423 P.2d 17 (1967).

With the filing of defendant's answer, the right to amend as a matter of course is lost. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950).

Plaintiff reserves the right to amend the complaint with respect to any defendants who have not filed a responsive pleading in a case where there are multiple defendants and some, but not all, have filed a responsive pleading. Grear v. Mulvihill, 207 P.3d 918 (Colo. App. 2009).

Where a party sought to prevent an amendment of his adversary's pleading by filing a motion for judgment on the pleadings, the court held that the right of amendment could not thus be cut off. Cornett v. Smith, 15 Colo. App. 53, 60 P. 953 (1900); Jones v. Ceres Inv. Co., 60 Colo. 562, 154 P. 745 (1916); Jackisch v. Quine, 62 Colo. 72, 160 P. 186 (1916); Colo. Inv. & Realty Co. v. Riverview Drainage Dist., 83 Colo. 468, 266 P. 501 (1928).

If final judgment is entered before a responsive pleading is filed, the absolute right to amend the complaint is lost and leave to amend becomes a matter of discretion for the court. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

Once a final judgment is entered, a court should not allow the plaintiff to amend the complaint unless the judgment is set aside or vacated under C.R.C.P. 60. Since the plaintiff could have asserted the additional claims and added additional defendants during the three months before the court entered default judgment, there were no grounds for vacating the judgment, and the trial court did not abuse its discretion in denying leave to amend the original complaint. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

D. Amendment at Discretion of Court.

Amendment after a responsive pleading is within the discretion of the trial court. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950); Coon v. Guido, 170 Colo. 125, 459 P.2d 282 (1969).

Amendment of a pleading after a responsive pleading has been filed is within the discretion of the trial court. Conyers v. Lee, 32 Colo. App. 337, 511 P.2d 506 (1973).

After responsive pleadings have been filed, amendments may be made only by the leave of court. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

The granting of a motion to amend a complaint is within the discretion of the trial court. H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

The trial court does not abuse its discretion when it denies a motion to amend which is futile. Conrad v. Imatni, 724 P.2d 89 (Colo. App. 1986); Bristol Co., LP v. Osman, 190 P.3d 752 (Colo. App. 2007).

The decision to grant or deny a motion to amend a complaint is committed to the sound discretion of the court and will not be reversed on review without a showing of abuse of discretion. In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

After issues are joined and a cause has been set for trial, a court may in the exercise of reasonable discretion and in the interest of justice permit the filing of an amended answer pleading additional defenses. Flanders v. Kochenberger, 118 Colo. 104, 193 P.2d 281 (1948).

Although a motion to amend is entitled to a lenient examination, such leniency is not without limits. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993); Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Court was within its discretion to deny a motion to amend the answer 62 days before trial, more than 100 days after the cut-off date for amendment of pleadings, and after defendant had sought and obtained one continuance of the trial. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Although leave to amend should generally be freely granted pursuant to section (a) of the rule, the trial court does not abuse its discretion in refusing to permit a futile amendment. Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

In ruling on a motion to amend, the court must consider the totality of the circumstances by balancing the policy favoring the amendment of pleadings against the burden which

granting the amendment may impose on the other parties. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

In denying a motion to amend, the trial court did not abuse its discretion where: (1) The plaintiff knew of the basis for his counterclaims when filing the original pleading almost three years before and has offered no reasonable excuse for the delay in bringing the counterclaims; (2) the defendant would be prejudiced in addressing the counterclaims by requiring it to conduct additional and unanticipated discovery long after the case was filed; and (3) the motion to amend was made almost three years after filing the original answer and only five months before trial, resulting in yet another postponement of a trial date. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Denial of motion to amend was not an abuse of discretion where: (1) the motion was submitted after the discovery deadline and only a few months before trial; (2) the case had been pending for five years and the complaint amended five times; and (3) the moving parties failed to explain why they could not previously have added the claim for which leave to amend was sought. Francis v. Aspen Mtn. Condo. Ass'n, 2017 COA 19, 401 P.3d 125.

A trial court necessarily abuses its discretion by granting leave to amend a claim of fraud against an opposing party by joining that party's attorney, without first determining that the amendment at least advances a legal theory that can withstand a motion to dismiss. Vinton v. Virzi, 2012 CO 10, 269 P.3d 1242.

Whether amendment adding parties to action is proper is within district court's discretion. It is within the discretion of the district court to make a determination whether amendment of a complaint adding parties to a pending action is proper. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); Meyer v. Landmark Universal, Inc., 692 P.2d 1129 (Colo. App. 1984).

Courts have authority to grant leave to amend any time before final judgment, so long as they retain jurisdiction of the cause. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

Amendment to a pleading is not allowed under section (a) once final judgment is entered unless the judgment is set aside or vacated. Estate of Hays v. Mid-Century Ins. Co., 902 P.2d 956 (Colo. App. 1995).

When all claims for relief have been decided on appeal and the case is remanded for the sole purpose of awarding costs to the prevailing party, that party cannot amend its complaint to add a new claim for relief as the case is effectively over. Civil Serv. Comm'n v. Carney, 97 P.3d 961 (Colo. 2004) (Carney II).

Where the appellate court remands a case to the trial court to calculate costs to be paid to the prevailing party, this is a post-judgment issue, and motions to amend a complaint to add a new claim for relief, essentially starting the litigation anew, are barred. Civil Serv. Comm'n v. Carney, 97 P.3d 961 (Colo. 2004) (Carney II).

That an amendment is made after verdict is not conclusive against the validity of the order, for so long as the court retains jurisdiction of a cause, and certainly before final judgment, it has authority to grant leave to amend any pleading or proceeding therein. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

If a plaintiff files a motion to amend accompanied by an amended complaint pursuant to section (a), and if the motion, amended complaint, and summons are served on a defendant before expiration of the statute of limitations, then the statute of limitations is tolled until the trial court rules on plaintiff's motions. Moore v. Grossman, 824 P.2d 7 (Colo. App. 1991).

Permission to file an amended complaint at the close of the plaintiff's evidence is not prejudicial to the defendants where the matter set forth therein is already before the court, for, in such a situation, nothing new is injected into the case. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Since plaintiffs did not object at trial and further addressed issues not previously raised, plaintiffs consented to the trial on the unpled issues. Kennedy v. Aerr Co. 833 P.2d 807 (Colo. App. 1991).

Delay alone insufficient to grant defendant's motion for summary judgment. Where the plaintiff has delayed in substituting the parties until after the statute of limitations has run, delay alone, without any specifically resulting prejudice or any obvious design to harass, is not sufficient to grant defendants' motion for summary judgment. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Where the party attempting to amend his pleadings is guilty of delay in seeking an amendment, it is preferable to allow the amendment subject to any conditions necessary to avoid prejudice to the opposing parties. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

In ruling on motion to amend made long after original pleading and shortly before trial, court should weigh prejudice to opponent in granting motion against prejudice to movant in denying motion, and movant has burden to prove lack of knowledge, mistake, inadvertence, or other reason for not having made the amended claim earlier. Gaybatz v. Marquette Minerals, Inc., 688 P.2d 1128 (Colo. App. 1984).

Denial of amendment appropriate where court or other party prejudiced. Only if the

opposing party can demonstrate prejudice to it (other than having the case resolved on its merits) or if the court itself is prejudiced is the denial of a motion to amend an appropriate exercise of discretion. K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981).

If the opposing party can demonstrate prejudice to it, the denial of a motion to amend is an appropriate exercise of discretion where the motion to amend is filed shortly before the trial date and on the eve of the discovery cut-off date and the amended claim tendered is to be supported by expert testimony which would require additional discovery by the defendant and possibly the presentation by it of independent expert testimony, the defendant demonstrates prejudice and the trial court acts within its discretion in offering the plaintiff the option of proceeding with trial as scheduled or filing the additional claim and continuing the trial date. Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042 (Colo. App. 1983).

No abuse of discretion in denial by district court of motion to amend to substitute new party as petitioner. Amendment would have been unduly prejudicial to respondents, would not have cured deficiencies in petition regarding statutory pre-filing requirements, and would have unnecessarily increased respondents' costs. Akin v. Four Corners Encampment, 179 P.3d 139 (Colo. App. 2007).

Court may properly deny leave to amend because of resulting delay, undue expense, or other demonstrable prejudice to the opposing party. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

Court improperly denied motion to amend on the basis of undue delay where: (1) The previous delay in the case was not attributable to the movant; (2) no case management order had entered, the parties had not commenced discovery, mandatory disclosures were not yet due, and no trial date had been set; and (3) the amendments included interpleader claims that were calculated to resolve the merits of the dispute in one lawsuit. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

Concerns about collecting a judgment are not sufficient to support a finding of prejudice to justify denying a motion to amend. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

Although the rules and caselaw prohibit a draconian approach to the amendment of pleadings, unexplained careless or thoughtless mistakes in pleadings on the part of counsel or the parties cannot be excused through amendments and continuances at the expense of fairness to opposing parties and to the judicial process. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Preservation of trial date insufficient justification to deny amendment. The trial court's desire to preserve the scheduled trial date is not a sufficient justification to deny a motion to amend. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Trial court's desire to preserve original trial date, absent a showing of prejudice to opposing party, is not sufficient to warrant court's denial of motion to amend or supplement complaint. Lutz v. District Court, 716 P.2d 129 (Colo. 1986).

Although the desire to preserve a trial date alone is not a sufficient reason to deny a motion to amend, it is still a valid factor to be considered by a trial court in ruling on such motion. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Trial court abused its discretion when it denied plaintiffs' motion to amend their complaint to add a claim for exemplary damages where amended complaint satisfied the burden of proof set forth in section (3)(c)(I). Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007).

Court did not abuse discretion in granting motion to amend where defendants were on notice of issue raised in amended pleading by virtue of the evidence presented, the proposed jury instructions, and a conference during trial. Anderson v. Dunton Management Co., 865 P.2d 887 (Colo. App. 1993).

Trial court did not abuse its discretion by permitting plaintiff to amend the complaint after the close of evidence to include a punitive damages claim because defendant failed to demonstrate any prejudice arising from the late amendment where both plaintiff and defendant presented evidence on the issue of whether defendant engaged in willful and wanton conduct generally. Davis v. GuideOne Mut. Ins. Co., 2012 COA 70M, 297 P.3d 950.

A trial court may grant parties leave to amend their pleadings upon remand so long as matters already settled by the appellate court are not relitigated. Union Ins. Co. v. Kjeldgaard, 820 P.2d 1183 (Colo. App. 1991).

District court erred in allowing buyer under section (a) of this rule to amend his answer to raise defense under § 38-35-126 (3) following trial after ruling immediately before trial that he would not be permitted to raise such defense. Where a defense or claim is not pleaded or intentionally and actually tried, a court cannot render a judgment thereon. This rule cannot be circumvented by allowing a party to amend his or her answer after trial where the defense or claim was not tried by express or implied consent. Further, the district court abused its discretion in effectively permitting buyer to amend his answer after trial because seller was clearly prejudiced. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

E. Subject of Amendment.

Amendment to substitute new theory is not prejudicial where notice of claim has been given. Where complaint furnishes defendant with complete notice of the circumstances and occurrence of plaintiff's claim, amendment of the complaint during trial to substitute a new theory of recovery is not prejudicial to defendant. Continental Sales Corp. v. Stookesberry, 170 Colo. 16, 459 P.2d 566 (1969).

Where it is contended that an amended complaint merely adds a second cause of action to that already stated in the original complaint, it is within the discretion of the court whether the amendment should be allowed after the defendant's answer, and it is doubtful that this discretion is abused where counsel for both sides subsequently entered into an agreed statement of facts. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950).

Fact that proposed amendment set forth alternate theories of recovery furnished no reason to withhold permission to amend, especially where those theories were rooted in the very same transaction underlying the original complaint. Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

Where a complaint is amended to provide for a different remedy, the principal consideration is whether the amended pleading will permit an expeditious disposition to be made of the case. Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960).

Where the complaint filed constitutes an election of a choice of remedies provided for by contract, an amendment to the complaint which provides for the alternative remedy in the event recovery cannot be had under the original complaint is erroneous to permit, for the plaintiff cannot pursue two inconsistent remedies. Green v. Hertz Drivurself Sys., 130 Colo. 238, 274 P.2d 597 (1954).

Amendment authorized where matter of damages not entirely known at time complaint filed. The trial court correctly authorized amendment of the complaint upon a showing that the nature and extent of plaintiff's damages were not entirely known at the time the original complaint was filed. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

An amendment to a complaint dropping equitable issue with consent of defendants and court does not create a right to a jury trial that cannot be denied. Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975).

The court might permit amending the complaint to show residency. Where the complaint in an action for divorce alleged that plaintiff was and had been for more than one year immediately preceding the commencement of the action a bona fide resident and citizen of the state but failed to allege that either party resided in the county in which the action was brought, the court might permit an amendment after verdict inserting in the complaint an allegation of plaintiff's residence in the county where the proof showed such residence. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

Matters purely jurisdictional may be made the subject of amendment the same as other matters of substance. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

The argument that the complaint could not be amended because the allegation of notice of a claim was "jurisdictional" is without merit, for the office of the complaint is to establish by proper factual averment that the case is within the jurisdiction of the court, and thus a defect in allegations of fact upon which the court's jurisdiction depends can be cured or supplied by amendment. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

It is within the province of the court to permit the striking of allegations, and leave shall be freely given when justice so requires. Barth v. Powell, 127 Colo. 78, 254 P.2d 428 (1953).

Averments stricken from a complaint might be allowed in an amended complaint in the discretion of the court. Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910).

Filing an amended complaint waives error, if any, in striking an amendment to the complaint and a bill of particulars. Burson v. Adamson, 87 Colo. 451, 288 P. 623 (1930).

Rule does not govern election contest. This rule normally applicable to a civil action does not govern an election contest. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

New parties may be added or substituted in action when the new and old parties have such an identity of interests that it can be assumed, or proved, that relation back is not prejudicial. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

Identity of interest means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of litigation to the other. Such an identity of interest exists between past and present forms of the same enterprise. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

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

F. Appellate Review.

An appellate court will not review refusal to grant leave to amend for insufficiency except when an abuse of discretion is shown. Buno v. Gomer, 3 Colo. App. 456, 34 P. 256 (1893); Klippel v. Oppenstein, 8 Colo. App. 187, 45 P. 224 (1896); Cascade Ice Co. v. Austin Bluff Land & Water Co., 23 Colo. 292, 47 P. 268 (1896); Hyman v. Jockey Club Wine, Liquor, & Cigar Co., 9 Colo. App. 299, 48 P. 671 (1897); Gambrill v. Brown Hotel Co., 11 Colo. App. 529, 54 P. 1025 (1898); Wiggington v. Denver & R. G. R. R., 51 Colo. 377, 118 P. 88 (1911); Perry v. Perry, 74 Colo. 106, 219 P. 221 (1923).

Leave to amend is within the discretion of the trial court. Absent an abuse of discretion, the supreme court will not interfere with the trial court's ruling. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993); Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

The decision whether to grant leave to amend lies within the trial court's sound discretion, and its ruling will not be disturbed on review absent a clear abuse of discretion. Lyons v. Teamsters Local Union No. 961, 903 P.2d 1214 (Colo. App. 1995).

Abuse of discretion in denying leave to amend pleadings. Where it was shown to the trial court that the filing of a counterclaim would not delay the trial or cause a postponement, that the other side did not object, and that it was a compulsory counterclaim which if denied foreclosed possible future relief, the trial court abused its discretion in denying petitioners leave to amend their pleadings. Bobrick v. Sanderson, 164 Colo. 46, 432 P.2d 242 (1967).

No error where no abuse of discretion is shown. Where a party fails to point out an abuse of discretion on the part of the trial court in permitting the opposing party to amend his pleading, there is no error. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967); Jenkins v. Glen & Helen Aircraft, Inc., 42 Colo. App. 118, 590 P.2d 983 (1979).

Absent an abuse of discretion, the supreme court will not overrule the trial court. H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Generally speaking, allowing pleadings to be amended is a matter within the discretion of a trial court, not to be disturbed unless an abuse thereof is demonstrated. K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981).

III. TO CONFORM TO THE EVIDENCE.

A. In General.

Law reviews. For note, ''Comments on Last Clear Chance — Procedure and Substance'', see 32 Dicta 275 (1955). For comment on Carpenter v. Hill appearing below, see 32 Dicta 393 (1955).

Annotator's note. Since section (b) of this rule is similar to § 84 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (b) softens apparent rigidity of C.R.C.P. 8(c). The apparent rigidity of C.R.C.P. 8(c), which states that a party shall affirmatively plead all matters constituting an avoidance or affirmative defense, is softened by section (b) of this rule, which provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974).

Pleadings are subsidiary and serve the ends of justice by giving notice of the issues to be litigated. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

The contradiction which results in an amendment where the plaintiff testifies differently from an allegation in his complaint merely goes to the credibility of the plaintiff, and where the instruction upon credibility sets forth the test to be applied, the weight then to be given plaintiff's testimony is for the jury. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Where the plaintiff files a pleading which is subsequently superseded by amendment, the original pleading is admissible against the pleader in the proceeding in which it is filed as evidence of admission against interest. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Such an admission cannot be withdrawn by amendment. Where the original complaint was an admission which brought the transaction squarely within the terms of the uniform commercial code and an amendment was a withdrawal of this admission and the introduction of an entirely different theory as an effort to escape the effect of the uniform commercial code with the defendant strongly objecting when the amendment was proposed and when it was granted, it was held that its claim of surprise was well founded and that the amendment should not have been allowed. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Where the parties litigated the issues between them just as if there had been actual notice through an amendment to the complaint stating in terms the plaintiff's claim against the third-party defendant, an amendment including the third-party defendant in the original complaint was unnecessary. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Surprise or prejudice not found. The defendant cannot claim that either surprise or prejudice resulted from the introduction of evidence regarding a certain issue allegedly not properly pled where the plaintiff's pretrial statement clearly identifies this issue. Andrikopoulos v. Broadmoor Mgt. Co., 670 P.2d 435 (Colo. App. 1983).

Where the third-party defendant not only answered the third-party complaint, but in a separate pleading undertook to answer the original complaint categorically and asserted all of the defenses he could have asserted had the plaintiff amended his complaint and alleged a claim against the third party, such an answer amounts to a waiver of amendment. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Complainant can recover upon the theory of extrinsic or constructive fraud under this rule where the issue of extrinsic or constructive fraud is in fact tried by express or implied consent of the parties. United States Nat'l Bank v. Barges, 120 Colo. 317, 210 P.2d 600 (1949), cert. denied, 338 U.S. 955, 70 S. Ct. 493, 94 L. Ed. 589 (1950).

Where a foreign court had jurisdiction over the parties and the subject matter, its decree may not be collaterally attacked on the grounds of intrinsic fraud, and the trial court properly denied the motion to amend the return and the answer to include such an allegation of fraud based on the evidence tendered for consideration. Fahrenbruch v. People ex rel. Taber, 169 Colo. 70, 453 P.2d 601 (1969).

Trial court erred in allowing insurer to assert a belated noncooperation defense by implied consent of the parties. Although insurer mentioned noncooperation in opening statement and introduced evidence, testimony, and arguments tending to show plaintiff's lack of cooperation, this evidence was equally applicable to insurer's contention that it did not unreasonably delay paying plaintiff''s claim and to its defense of plaintiff's violation of the implied covenant of good faith and fair dealing. Soicher v. State Farm Mut. Auto. Ins. Co., 2015 COA 46, 351 P.3d 559.

Applied in Padilla v. Ghuman, 183 P.3d 653 (Colo. App. 2007).

B. Purpose and Object of Amendment.

The purpose of this rule is to allow litigation to be determined on the merits and not to be limited to the strict parameters of the pleadings. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

This rule permits amendments to conform to the evidence when issues not raised by the pleadings are tried by express or implied consent of the parties. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971); Cox v. Bertsch, 730 P.2d 889 (Colo. App. 1986).

This rule directs that amendment of pleadings to conform to the evidence be freely granted. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Care must be taken not to prejudice the case of either party. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Amendment should be permitted where the presentation of the merits of the action would be subserved thereby, it cannot be claimed that it would be prejudicial upon the merits, and the granting of the motion would facilitate a fair trial of the actual issues between the litigants. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

Amendments under this rule should be granted after the close of the evidence only in cases where no reasonable doubt remains that the issue raised by the amendment has been intentionally and actually tried, since it is not enough that some evidence has been received germane to the issue sought to be raised. Clemann v. Bandimere, 128 Colo. 24, 259 P.2d 614 (1953); Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

The same principles are applicable when the motion to amend the pleadings is made during the progress of the trial. Real Equity Diversification v. Covilli, 744 P.2d 756 (Colo. App. 1987).

Amendment to add a new claim should be allowed only when the issue raised by amendment has been intentionally and actually tried. It is not enough that some pertinent evidence has been heard. Pickell v. Arizona Components Co., 902 P.2d 392 (Colo. App. 1994), rev'd on other grounds, 931 P.2d 1184 (Colo. 1997).

Under this rule a liberal provision is made for amendments to conform the pleadings to the evidence. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950); Underwriters Salvage Co. v. Davis & Shaw Furn. Co., 198 F.2d 450 (10th Cir. 1952).

This rule must be judiciously applied. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Considerable liberality should be exercised in allowing a complaint to be amended during a trial so as to correspond with the proof. Atchison, T. & S. F. Ry. v. Baldwin, 53 Colo. 426, 128 P. 453 (1912).

C. Amendment at Discretion of Court.

The matter of such an amendment rests in the sound discretion of the court. Fedderson v. Goode, 112 Colo. 38, 145 P.2d 981 (1944); Pickell v. Arizona Components Co., 902 P.2d

392 (Colo. App. 1994), rev'd on other grounds, 931 P.2d 1184 (Colo. 1997).

Wide discretion is given to the trial court under this rule to permit amendment of the pleadings to conform with the evidence. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Amendments "to conform to the proof" should not be allowed when not germane to the case as made. Buchhalter v. Myers, 85 Colo. 419, 276 P. 972 (1929).

It is error where matter constitutes a new cause of action. Where plaintiff asked leave to amend to correspond with the proof, it was held that it was error to permit him to allege matters not legitimately connected with the complaint which constituted a new cause of action and a departure from the issues as made. Buchhalter v. Myers, 85 Colo. 419, 276 P. 972 (1929).

Upon a proper application interposed in apt time it would become the duty of the trial court to permit a complaint to be amended to correspond with the proof, and it is the duty of a court of review to treat the complaint as so amended. English Lumber Co. v. Hireen, 25 Colo. App. 199, 136 P. 475 (1913).

Where at the start of the trial defendant applies for an order amending his answer to a defense which he has failed to plead affirmatively and plaintiff does not object to this request, it is within the discretion of the court to consider this defense under section (a) or (b) of this rule in view of the sweep of the evidence. White v. Widger, 144 Colo. 566, 358 P.2d 592 (1960).

Where the amended complaint did not plead a certain matter, but the record disclosed that the defendant was put on notice of the claim for that matter as early as the pre-trial conference, then the trial court's admission of the evidence and, upon motion of the plaintiffs, grant of leave to amend the complaint to conform to the proof was in conformity with the discretion of section (b) of this rule. Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968); Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

Where plaintiff establishes a prima facie case, then, under the spirit and intent of section (b) of this rule, the failure to permit the plaintiff to amend his complaint and plead matter not initially pleaded is an abuse of discretion. Martin v. Kennell, 169 Colo. 122, 453 P.2d 797 (1969); Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971); Real Equity Diversification v. Coville, 744 P.2d 756 (Colo. App. 1987).

Motion to amend pleadings to conform to the proof allowed only in cases where no reasonable doubt remains that the issue raised by the amendment has been intentionally and actually tried. Absent abuse of discretion, trial court's denial of a motion pursuant to this rule will not be disturbed on appeal. Gabel v. Jefferson County Sch. Dist. R-1, 824 P.2d 26 (Colo. App. 1991).

Where parties agree to litigate on a certain theory, the trial court does not abuse its discretion by denying a motion of one of the parties made at the close of its evidence to amend its pleadings to add another claim when the other party objects to such an amendment. Quandary Land Dev. Co. v. Porter, 159 Colo. 8, 408 P.2d 978 (1965).

It is no abuse of discretion in denying motion to amend where evidence conflicting and conditional. Trial court did not abuse its discretion in denying plaintiffs' motion to amend their pleading to conform to the evidence where the evidence was conflicting and conditional. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

D. Determination of Issues Not Pleaded.

Where an issue is completely foreign to the issues in the case and is not tried with the consent of the parties, it cannot be injected into the case by amendment. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971).

Issues not pleaded may be determined by the trial court by consent, express or implied, where evidence presenting such issues is tendered and received without objection. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Extraneous issues may not be tried in the absence of amendment of the pleadings where timely objection is made. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

It is the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950); Underwriters Salvage Co. v. Davis & Shaw Furn. Co., 198 F.2d 450 (10th Cir. 1952); Prato v. Minnesota Mut. Life Ins. Co., 40 Colo. App. 1, 572 P.2d 487 (1977).

Parties who acquiesced in trial conducted at variance with the pleadings cannot complain of failure to amend the pleadings. Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966).

Where it is apparent from the testimony, the exhibits, and the finding of the court that an issue was tried by implied consent because the record is otherwise silent, one will not be held to have waived his rights because he did not specially plead this matter either by complaint, by answer to intervener's petition, or by motion. Rose v. Rose, 119 Colo. 473, 204 P.2d 1075 (1949).

Where a certain matter is alleged in the complaint, but the evidence shows another matter and throughout the trial it is apparent that the cause is being presented upon the

theory of the latter without objection, then, under section (b) of this rule, the judgment entered upon the issue actually tried would be good. United States Nat'l Bank v. Bartges, 122 Colo. 546, 224 P.2d 658 (1950), cert. dismissed, 340 U.S. 957, 71 S. Ct. 575, 95 L. Ed. 689 (1951).

When an application for the enlargement of a specifically-identified dam incorrectly stated the location of the dam but the issue of the discrepancy in location was not raised until nine months after trial, the parties impliedly consented to the trial of the enlargement at the correct location without the need to amend the application. City of Black Hawk v. City of Central, 97 P.3d 951 (Colo. 2004).

Judgment can be entered on different theory than that of pleadings. Issues not raised by the pleadings were nonetheless tried by the express consent of the parties; it is of no legal significance that the trial court entered judgment on a "theory" different from the "theory" pled in the complaint. Ward v. Nat'l Medical Ass'n, 154 Colo. 595, 392 P.2d 162 (1964); Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

If, under the facts, the substantive law provides relief upon any theory, the cause should proceed to judgment, and, if such be the case, the theory of the pleader is not important. Ward v. Nat'l Medical Ass'n, 154 Colo. 595, 392 P.2d 162 (1964); Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

While issues may properly be tried even when not pleaded, they must be deliberately presented and knowingly considered by the court. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970); Maehal Enters. v. Thunder Mtn. Custom, 313 P.3d 584 (Colo. App. 2011).

Party may not amend complaint to conform to evidence when party did not intentionally and actually try the issue sought to be raised; it is not enough that the party present some evidence germane to the issue. People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011).

E. Applicability.

Before the provisions of this rule apply, a trial court must first determine what are the material issues made by a complaint and if the evidence objected to at a trial is within the issues made by the pleadings. Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

The amendment allowable or "such amendment" refers to situations where issues are not raised by the pleadings and are tried by the express or implied consent of the parties. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

This fact is made clear by the further provision that the amendment may be made "even after judgment". Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

In an action to quiet title where defendants did not allege adverse possession, but there was evidence before the court that defendants and their predecessors in interest had occupied the land for more than 60 years prior to the commencement of the action, under section (b) of this rule it became the court's duty to determine the issue so presented as if it had been raised by the pleadings. Hodge v. Terrill, 123 Colo. 196, 228 P.2d 984 (1951).

Equitable relief not precluded. Although the plaintiffs originally sought damages in an action at law, equitable relief was not precluded where a change in circumstances altered the posture of the case and rendered the original relief sought inappropriate. Rice v. Hilty, 38 Colo. App. 338, 559 P.2d 725 (1976).

Where an unpleaded affirmative defense appears as an afterthought following the entry of judgment, although evidence with relation thereto is clearly admissible as bearing upon issues which were framed by the pleadings, the affirmative defense is not tried by express or implied consent. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

It is error for court to go beyond pleadings where affirmative defense is not pleaded. Carpenter v. Hill, 131 Colo. 553, 283 P.2d 963 (1955).

Where an election of remedies is made plaintiff may not amend his cause of action to conform to the evidence by alleging the remedy which he did not elect at the outset, inasmuch as no proposition of law is better settled in Colorado than that a plaintiff may not play "fast and loose" with his right of election and, since the remedies are inconsistent, to permit one character of action involving one measure of damages to be pleaded and tried and another character of action involving a different measure of damages substituted at the close of the trial would of necessity be to work injustice instead of justice. Gibraltar Colo. Life Co. v. Brink, 113 Colo. 304, 157 P.2d 134 (1945).

Where a motion to dismiss is filed but neither argued nor ruled upon, an answer thereafter is filed in which the motion to dismiss is not repeated, and the trial proceeds on the issues framed by the complaint and answer without the sufficiency of the complaint being again challenged, an amendment to conform to the proof would have been in order under section (b) of this rule. O. K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

It is not necessary for plaintiff to amend his complaint to include third-party defendant. It was not essential to the validity of the judgment entered against the third-party defendant that the original plaintiff should have formally entered an amendment to its complaint to include a claim against him. Ashford v.

Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Amendment shall conform to evidence allowed. Niles v. Builders Serv. & Supply, Inc., 667 P.2d 770 (Colo. App. 1983).

F. Objections.

This rule is not controlling where there are objections. This rule is not controlling where the issue presented to the jury is not raised by the pleadings and is not tried by express or implied consent of the parties because of objections to a trial of any issue not presented by the pleadings. W.T. Grant Co. v. Casady, 117 Colo. 405, 188 P.2d 881 (1948); Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951).

It is error to grant plaintiff leave to so amend the complaint over defendant's objection. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

Where attention is called by plaintiff to a defective pleading by timely objections to evidence in support of a matter not pleaded by defendant, the duty of amending the unsatisfactory pleading falls upon the defendant, and unless defendant does so, such matter cannot be litigated and it is error for the court to permit it to be so. Lamar Bldg. & Loan Ass'n v. Truax, 95 Colo. 77, 33 P.2d 978 (1934).

A trial court's qualified ruling initially sustaining objection to the amendment of the complaint does not preclude the court from considering all of the evidence offered and received, without objection, relating to an issue and thereafter concluding that indeed the issue had been submitted to the court for its determination, and the failure to actually amend does not affect the result of the trial of the issue where the court's determination of this issue is without prejudice. Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

Under this rule when an issue is tried before the court without timely objection or motion, then the issue is before the court regardless of any defect in the pleading. Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

Section (b) has been interpreted to provide that when an issue is tried before the court without timely objection or motion, then the issue is deemed properly before the court despite any defect in the pleading. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974); Kennedy v. Aerr Co., 833 P.2d 807 (Colo. App. 1991).

By failing to object to evidence introduced on a matter which is not pleaded, a party impliedly consents that the action should be tried in all respects as if the issue had been raised. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946).

Plaintiff implicitly consented to counterclaims by failing to timely object to defendant's continued prosecution of them. So, even though defendant did not reassert the counterclaims in an answer to the amended complaint, the counterclaims were not waived or abandoned. Mullins v. Med. Lien Mgmt., Inc., 2013 COA 134, 411 P.3d 798.

When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated as if the issues were raised in the pleadings. Kennedy v. Aerr Co., 833 P.2d 807 (Colo. App. 1991).

Counsel is not required to be on the alert to challenge every objectionable question or answer lest it be later made the basis of another claim than that which was intentionally and fairly tendered. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Where evidence tending to prove a matter is introduced at trial without an objection that it goes to issues beyond the scope of the pleadings, then such matters are properly before the court even though they are not pleaded. Motlong v. World Sav. & Loan Ass'n, 168 Colo. 540, 452 P.2d 384 (1969).

Where pleadings fail to raise an affirmative defense which must be specifically set forth in the pleadings under C.R.C.P. 8(c), but no objection is made to evidence introduced in regard to that issue, such issue may be treated as raised in the pleadings under section (b) of this rule. Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

In the absence of motion or objection when an issue not pleaded is thus presented, the pleadings become functus officio, and the parties are before the court to present such matter as they desire. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Where evidence raising an issue is received without objection, the issue is considered as if it had been raised in the pleadings. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

The issue will be so treated by the supreme court. Since an issue not raised by the pleadings is not fatal when considered in the trial without objection on anyone's part, it will be treated in the supreme court in all respects the same as if it had been raised in the pleadings. Hopkins v. Underwood, 126 Colo. 224, 247 P.2d 1000 (1952).

In the absence of motions or objections, any issue that the parties see fit to present may be considered and determined by the trial court. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Even where plaintiffs who were advised before trial of a tendered amendment to defendant's answer and counterclaim so as to set forth another defense made no objection thereto and one of the plaintiffs testified with reference to this defense without objection, the trial court erred in refusing to grant leave to defendant to so amend after all of the evidence had been

introduced. Rogers v. Funkhouser, 121 Colo. 13, 212 P.2d 497 (1949).

Where the amended complaint did not plead a certain matter, but the record disclosed that the defendant was put on notice of the claim for that matter as early as the pre-trial conference, then the trial court's admission of the evidence and, upon motion of the plaintiffs, grant of leave to amend the complaint to conform to the proof was in conformity with the discretion of section (b) of this rule. Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968).

Where the parties appear, cross-examine witnesses, introduce evidence, and fully participate in the hearing, they therefore have notice of the hearing and the issues involved, and by their full participation in the proceedings without objection or request for a continuance waive whatever deficiencies might exist in regards to notice of the hearing. Hassler & Bates Co. v. Pub. Utils. Comm'n, 168 Colo. 183, 451 P.2d 280 (1969).

A judgment based on issues not formed by the pleadings is not error where the issue is embraced in the stipulation of facts upon which the case is tried, and the complaint is not challenged in the trial court, since under section (b) of this rule such an issue must be treated in all respects as if it had been raised in the pleadings. Sinclair Ref. Co. v. Shakespeare, 115 Colo. 520, 175 P.2d 389 (1946).

Trial of an issue without objection constitutes trial by implied consent. To the extent that the issue of the defective condition of the brake system was not raised in the pleadings filed by the employee in a suit for injuries he sustained as he attempted to uncouple a locomotive, admission of evidence bearing on the issue without objection from the railroads constituted trial of the issue by implied consent. Tovrea v. Denver & Rio Grande Western Railroad Co., 693 P.2d 1016 (Colo. App. 1984).

Where special damages are not pleaded as required by C.R.C.P. 9(g), and defendant makes no objection to the evidence on which the court bases its findings as to damages no amendment is necessary, and a judgment giving both actual and special damages would stand. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

G. When Pleading Can be Amended.

Pleadings can be so amended either at trial or subsequent to judgment. Where evidence admitted without objection clearly establishes the right of plaintiffs to their claim, then under this rule plaintiffs can amend their complaint to conform to the proof either at the trial or subsequent to the judgment. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946).

The caption of the complaint is properly amended after the trial to read that the defendants were partners where one of the defendants admitted the partnership at that time. Bamford v. Cope, 31 Colo. App. 161, 499 P.2d 639 (1972).

IV. RELATION BACK.

This rule is identical to F.R.C.P. 15(c). Denver & R. G. W. R. R. v. Clint, 235 F.2d 445 (10th Cir. 1956).

Amended petition under this rule relates back to the date of the original petition. Stalford v. Bd. of County Comm'rs, 128 Colo. 441, 263 P.2d 436 (1953).

Amendment relates back to filing of original complaint. Where the claim asserted in the amended complaint arose out of the same conduct and occurrence set forth, or attempted to be set forth, in the original complaint, where the parties were the same, where the occurrence was the same, and where in both pleadings the same negligence was pleaded as the proximate cause of the accident, and where from the beginning plaintiff sought to recover damages, then, under section (c) of this rule, the amendment related back to the time of the filing of the original complaint. Denver & R. G. W. R. R. v. Clint, 235 F.2d 445 (10th Cir. 1956).

An amendment to a complaint is permitted to relate back only where a new party had timely knowledge of the original action and the original complaint provided fair and adequate notice of the new claim in the amended complaint. Maldonado v. Pratt, 2016 COA 171, 409 P.3d 630.

An amendment to a civil claim will not relate back to the original complaint under the relation-back test unless the new party receives notice of the institution of the action within the period provided by C.R.C.P. 4(m). Maldonado v. Pratt, 2016 COA 171, 409 P.3d 630.

Amended complaint which puts forth a contract claim based on the same facts as the original tort claim related back to original complaint and was not barred by the statute of limitation. Roper v. Spring Lake Dev. Co., 789 P.2d 483 (Colo. App. 1990).

Section (c) is not applicable to proceedings to review banking board chartering decisions. Columbine State Bank v. Banking Bd., 34 Colo. App. 11, 523 P.2d 474 (1974).

The doctrine of relation back is not applicable to a petition for further relief because such a petition is not an amended pleading. Subryan v. Regents of Univ. of Colo., 789 P.2d 472 (Colo. App. 1989).

Section (c) applies only to the amendment of a pleading in an ongoing action and not to the filing of a new complaint in a new case. In case where second complaint filed by plaintiff

was in fact an original complaint, rather than an amended pleading that related back to the first complaint, plaintiff could not avail himself of the relation-back doctrine, and trial court properly dismissed plaintiff's second complaint as untimely filed. Kelso v. Rickenbaugh Cadillac Co., 262 P.3d 1001 (Colo. App. 2011).

The doctrine of relation back cannot be used to validate an otherwise invalid notice of lis pendens. The validity of a notice of lis pendens is determined when it is recorded. Brossia v. Rick Constr., L.T.D., 81 P.3d 1126 (Colo. App. 2003).

Substituted plaintiff's claim relates back where no prejudice to defendant. If the adverse party has had sufficient notice of the disputed occurrence and related institution of legal action so as to obviate any prejudice which might arise from the assertion of a substituted plaintiff's claim, then the substitution is allowed to relate back. Travelers Ins. Co. v. Gasper, 630 P.2d 97 (Colo. App. 1981).

Whenever an amended pleading or complaint arises out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. Halliburton v. Pub. Serv. Co., 804 P.2d 213 (Colo. App. 1990).

Relation back did not apply where plaintiff sued an uninsured motorist for negligence and later added the plaintiff's insurer based on a separate transaction or conduct arising from the plaintiff's contract of uninsured motorist coverage. In this situation there was no mistake of identity, only a failure to abide by the applicable statute of limitations. Trigg v. State Farm Mut. Auto. Ins. Co., 129 P.3d 1099 (Colo. App. 2005).

The doctrine of relation back applies to amendments to water applications so long as the requirements of this rule do not conflict with the provisions of the Water Right Determination and Administration Act. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

For an amendment to a water application to relate back to the date of the original water application, the claims in the amendment must arise from the conduct, transaction, or occurrence set forth in the original water application in order to insure that interested parties had notice of the claims in the amendment from the date of the original application. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Where the source, amount, and uses of water claimed in the amendments to the original water application were the same as those claimed in the amendment to such water application, the amendment related back to the date of the original water application, even though the amended application requested two water diversions and the original application requested a minimum stream flow. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Amendments made to conditional water rights application found to relate back to original application because the amendments related to the conduct, transaction, or occurrence set forth in original application and all interested parties had notice of the amending party's intent to appropriate a certain amount of water from a river. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Rule inapplicable to certiorari complaint filed under C.R.C.P. 106. Because invoking the relation-back doctrine of section (c) to rescue a certiorari complaint, filed pursuant to C.R.C.P. 106, would undermine the important public policies of expediting resolution of challenges to zoning and annexation proceedings and of removing municipal planning and individual properties from a cloud of uncertainty, when the original complaint fails to state a claim for relief, section (c) of this rule has no application to the proceedings or to any further pleadings which may be filed. Richter v. City of Greenwood Village, 40 Colo. App. 310, 577 P.2d 776 (1978).

Amended pleading states timely claim for judicial review because of relation back. Although a motion to amend is filed approximately one month after the 30-day period prescribed by § 24-4-106 (4) has expired, leave to amend should be granted under section (a) of this rule and because the amended pleading relates back to the date on which the original petition was filed, the pleading, as amended, states a timely claim for judicial review. Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n, 620 P.2d 1051 (Colo. 1980).

Where the sole amendment required to bring petitioner's original petition within the State Administrative Procedure Act was the substitution of a reference to § 24-4-106 for the mistaken reference to C.R.C.P. 106(a)(4), and the pleading, if so amended, would state a claim for judicial review identical in all substantive respects to that stated in plaintiff's original petition, the amendment ''relates back'' to the original petition's filing date. People v. District Court, 200 Colo. 65, 612 P.2d 87 (1980).

An amendment which adds a party plaintiff must meet the requirements of section (c) in order for it to relate back to an earlier pleading. It is only if the addition or change in the identity of the plaintiff constitutes a mere change in the plaintiff's capacity or status, or if it consists of the substitution of a real party in interest to a previously asserted claim, that such an amendment may be deemed to relate back for limitation purposes. Ebrahimi v. E.F. Hutton & Co., Inc. 794 P.2d 1015 (Colo. App. 1989).

Replacing a "John Doe" caption with a party's real name amounts to "changing a party" within the meaning of section (c), and

thus will only relate back if all conditions specified in the rule have been satisfied. Marriott v. Goldstein, 662 P.2d 496 (Colo. App. 1983), overruled on other grounds, Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985); Medina v. Schmutz Mfg. Co., 677 P.2d 953 (Colo. App. 1983), overruled on other grounds, Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985).

By holding that replacing a ''John Doe'' caption with a party's real name amounts to changing a party, it is implicitly held that a ''John Doe'' pleading allowed by C.R.C.P. 10(a) does not operate to toll the statute of limitations against unidentified defendants. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

Replacing "John Doe" caption with parties' real names does not relate back where the defendants were not named as parties within the period provided by law for commencing the action against them. Brown v. Teitelbaum, 830 P.2d 1081 (Colo. App. 1991).

Section (c) is meant to allow changes only where they result from an error such as misnomer or misidentification. Relation back is generally permitted in order to correct a misnomer where the proper party is already before the court and the effect is to merely correct the name under which the party is sued. Accordingly, a plaintiff's ignorance or misunderstanding about who is liable for her injury is not a ''mistake'' as to the defendant's identity. Lavarato v. Branney, 210 P.3d 485 (Colo. App. 2009).

A complaint in the district court seeking to challenge an administrative ruling concerning attorney fees entered subsequent to a decision on the merits must be filed within 30 days after the ruling and does not relate back if filed more than 30 days after such ruling. Allen Homesite Group v. Colo. Water Quality Control Comm'n, 19 P.3d 32 (Colo. App. 2000).

Notice within the period provided by law for commencing the action in section (c) includes the reasonable time allowed for service of process. Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985); Defelice v. Johnson, 931 P.2d 548 (Colo. App. 1996).

Service of process must be had within a reasonable time. A gap of 116 days between the original filing and notice is reasonable because it falls within the appropriate time for service of process, thus relation back is appropriate. Garcia v. Schneider Energy Servs., Inc., 2012 CO 62, 287 P.3d 112.

Relation back not to circumvent statute of limitations. The doctrine of relation back in section (c) does not permit a party to maintain a claim for libel filed after the statute of limitations in § 13-80-102 has run. Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100 (Colo. App. 1981).

When a motion to amend is filed after the applicable statute of limitations had run, the petitioner may not claim the benefits of the relation-back provisions of section (c). Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

Amended complaint did not relate back to initial, timely complaint where new defendant did not have notice until four months after expiration of statute of limitations. O'Quinn v. Wedco Technology, 752 F. Supp. 984 (D. Colo. 1990).

Amended complaint did not relate back to initial complaint where the new defendants did not receive notice until after the expiration of the statute of limitations. Brown v. Teitelbaum, 830 P.2d 1081 (Colo. App. 1991); Currier v. Sutherland, 215 P.3d 1155 (Colo. App. 2008), aff'd, 218 P.3d 709 (Colo. 2009).

Amended complaint did not relate back where there was no evidence that the new defendants, shooter's parents, had actual notice of the lawsuit before the end of the limitations period and court could not reasonably infer that son notified parents of the lawsuit prior to the end of the limitations period. Maldonado v. Pratt, 2016 COA 171, 409 P.3d 630.

Where plaintiff's first amended complaint was untimely, and the untimeliness was jurisdictional in nature, section (c) of this rule does not supply the necessary ''relation back'' of the amended complaint to the date on which the initial complaint was filed so as to make the amended complaint timely. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976).

Filing of an amended complaint that merely reiterates a claim already stated in the original complaint cannot be used to alter or avoid the requirement of strict compliance with the seven-year adverse possession statute. The alleged separate and distinct claim raised in the amended complaint was supported by the factual claims raised in the original complaint, therefore the amended complaint related back to the original. Peters v. Smuggler-Durant Mining Corp., 930 P.2d 575 (Colo. 1997).

Omission of a party's name from a Colorado anti-discrimination act charging document should be considered under the relation-back doctrine in section (c). Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272, rev'd on other grounds, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

The administrative law judge did not err when he denied respondents' motion to dismiss because the three requirements for application of the relation-back doctrine were satisfied. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272, rev'd on other grounds, __ U.S. __, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

Applied in Shepherd v. Wilhelm, 41 Colo. App. 403, 591 P.2d 1039 (1978); Best v. La Plata Planning Comm'n, 701 P.2d 91 (Colo. App. 1984); Wilson v. Goldman, 699 P.2d 420 (Colo. App. 1985); Maurer v. Young Life, 751 P.2d 653 (Colo. App. 1987).

V. SUPPLEMENTAL PLEADINGS.

Annotator's note. Since section (c) of this rule is similar to § 80 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Facts occurring subsequent to the commencement of an action should be presented by supplemental pleadings and not by amendment to the original proceedings. Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 (1893).

Matters occurring after the issues are made by the original pleadings cannot be considered or embraced in a decree unless brought into the case by supplemental pleadings. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Where leave was granted to file a supplemental petition and a petition was filed in which additional defendants were named, this so-called supplemental petition was partly an amendment to the original because it was not confined to facts which occurred after the action was commenced. Thomas v. Mahin, 76 Colo. 200, 230 P. 793 (1924).

There is no prejudice to the rights of defendant in allowing the allegation to be made by pleading styled an "amendment to the complaint", instead of denominating it a supplemental complaint, where the allegations are sufficient in substance. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

An objection that a claim for rent accruing after the commencement of the action could not have been brought into the case by amendment, but only by supplemental complaint, was held insufficient. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

Where defendant filed an amendment to an answer, but termed it a "supplemental answer", the court denied leave to file this so-called supplemental answer because a judgment on the pleadings, which had been entered, does not permit amendment of the pleadings. Kingsbury v. Vreeland, 58 Colo. 212, 144 P. 887 (1914); Lamon v. Zamp, 81 Colo. 90, 253 P. 1056 (1927); McLaughlin v. Niles Co., 88 Colo. 202, 294 P. 954 (1930).

One of the reasons for requiring a party to file a supplemental pleading to enable him to rely upon matters that have accrued since the filing of his previous pleading, is that he should enable his adversary to take issue as to such new matters. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

This rule provides reasonable notice to the opposite party. Harms v. Harms, 120 Colo. 212, 209 P.2d 552 (1949).

It follows that the opposite party must be afforded an opportunity to tender a pleading and thereby be prepared for the opportunity to meet the issue on the trial and not be surprised to his injury. Harms v. Harms, 120 Colo. 212, 209 P.2d 552 (1949).

Rule 16. Case Management and Trial Management

(a) Purpose and Scope. The purpose of this Rule 16 is to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures. This Rule shall govern case management in all district court civil cases except as provided herein. This Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, and other similar expedited proceedings, unless otherwise ordered by the court or stipulated by the parties. This Rule 16 also shall not apply to civil actions that are governed by Simplified Procedure under C.R.C.P. 16.1, except as specifically provided in Rule 16.1. The disclosures and information required to be included in both the Case Management and Trial Management Orders interrelate to discovery authorized by these rules. The right of discovery shall not constitute grounds for failing to timely disclose information required by this Rule, nor shall this Rule constitute a ground for failing to timely disclose any information sought pursuant to discovery.

(b) Case Management Order. Not later than 42 days after the case is at issue and at least 7 days before the case management conference, the parties shall file, in editable format, a proposed Case Management Order consisting of the matters set forth in subsections (1)-(17) of this section and take the necessary actions to comply with those subsections. This proposed order, when approved by the court, shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule or unless modified upon a showing

of good cause. Use of the ''Proposed Case Management Order'' in the form and content of Appendix to Chapters 1 to 17A, form (JDF 622), shall comply with this section.

(1) At Issue Date. A case shall be deemed at issue when all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct. The proposed order shall state the at issue date.

(2) Responsible Attorney. The responsible attorney shall mean plaintiff's counsel, if the plaintiff is represented by counsel, or if not, the defense counsel who first enters an appearance in the case. The responsible attorney shall schedule conferences among the parties, and prepare and submit the Proposed Case Management Order and Trial Management Order. The proposed order shall identify the responsible attorney and provide that attorney's contact information.

(3) Meet and Confer. No later than 14 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other in person, by telephone, or video conference about:

(A) the nature and basis of the claims and defenses;

(B) the matters to be disclosed pursuant to C.R.C.P. 26(a)(1);

(C) the Proposed Case Management Order;

(D) mutually agreeable dates for the case management conference; and

(E) based thereon shall obtain from the court a date for the case management conference.

The proposed order shall state the date of and identify the attendees at any meet and confer conferences.

(4) Description of the Case. The proposed order shall provide a brief description of the case and identification of the issues to be tried. The description of the case and identification of the issues to be tried shall consist of not more than one page, double-spaced, per side.

(5) Pending Motions. The proposed order shall list all pending motions that have been filed and are unresolved. The court may decide any unresolved motion at the case management conference.

(6) Evaluation of Proportionality Factors. The proposed order shall provide a brief assessment of each party's position on the application of any factors to be considered in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1).

(7) Initial Exploration of Prompt Settlement and Prospects for Settlement. The proposed order shall confirm that the possibility of settlement was discussed, describe the prospects for settlement and list proposed dates for any agreed upon or court-ordered mediation or other alternative dispute resolution.

(8) Proposed Deadlines for Amendments. The proposed order shall provide proposed deadlines for amending or supplementing pleadings and for joinder of additional parties, which unless otherwise provided by law, shall be not later than 105 days (15 weeks) after the case is at issue, and shall provide a deadline for identification of non-parties at fault, if any, pursuant to C.R.S. §13-21-111.5.

(9) Disclosures. The proposed order shall state the dates when disclosures under C.R.C.P. 26(a)(1) were made and exchanged and describe any objections to the adequacy of the initial disclosures.

(10) Computation and Discovery Relating to Damages. If any party asserts an inability to disclose fully the information on damages required by C.R.C.P. 26(a)(1)(C), the proposed order shall include a brief statement of the reasons for that party's inability as well as the expected timing of full disclosure and completion of discovery on damages.

(11) Discovery Limits and Schedule. Unless otherwise ordered by the court, discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Discovery may commence as provided in C.R.C.P. 26(d) upon service of the Case Management Order. The deadline for completion of all discovery, including discovery responses, shall be not later than 49 days before the trial date. The proposed order shall state any modifications to the amounts of discovery permitted in C.R.C.P. 26(b)(2), including limitations of awardable costs, and the justification for such modifications consistent with the proportionality factors in C.R.C.P. 26(b)(1).

(12) Subjects for Expert Testimony. The proposed order shall identify the subject areas about which the parties anticipate offering expert testimony; whether that testimony would be from an expert defined in C.R.C.P. 26(a)(2)(B)(I) or in 26(a)(2)(B)(II); and, if more than one expert as defined in C.R.C.P. 26(a)(2)(B)(I) per subject per side is anticipated, the proposed order shall set forth good cause for such additional expert or experts consistent with the proportionality factors in C.R.C.P. 26(b)(1) and considering any differences among the positions of multiple parties on the same side as to experts.

(13) Proposed Deadlines for Expert Disclosures. If any party desires proposed deadlines for expert disclosures other than those in C.R.C.P. 26(a)(2)(C), the proposed order shall explain the justification for such modifications.

(14) Oral Discovery Motions. The proposed order shall state whether the court does or does not require discovery motions to be presented orally, without written motions or briefs, and may include such other provisions as the court deems appropriate.

(15) Electronically Stored Information. If the parties anticipate needing to discover a significant amount of electronically stored information, the parties shall discuss and include in the proposed order a brief statement concerning their agreements relating to search terms to be used, if any, and the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs. If the parties are unable to agree, the proposed order shall include a brief statement of their positions.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties' best estimate of the time required for probable completion of discovery and of the length of the trial. The court shall include the trial date in the Case Management Order, unless the court uses a different trial setting procedure.

(17) Other Appropriate Matters. The proposed order shall describe other matters any party wishes to bring to the court's attention at the case management conference.

(18) Entry of Case Management Order. The proposed order shall be signed by lead counsel for each party and by each party who is not represented by counsel. After the court's review and revision of any provision in the proposed order, it shall be entered as an order of the court and served on all parties.

(c) Pretrial Motions. Unless otherwise ordered by the court, pretrial motions, including motions in limine, shall be filed no later than 35 days before the trial date, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging the admissibility of expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial.

(d) Case Management Conference.

(1) The responsible attorney shall schedule the case management conference to be held no later than 49 days after the case is at issue, and shall provide notice of the conference to all parties.

(2) Lead counsel and unrepresented parties, if any, shall attend the case management conference in person, except as provided in subsection (d)(3) of this Rule. The court may permit the parties and/or counsel to attend the conference and any subsequent conferences by telephone. At that conference, the parties and counsel shall be prepared to discuss the proposed order, issues requiring resolution, and any special circumstances of the case.

(3) If all parties are represented by counsel, counsel may timely submit a proposed order and may jointly request the court to dispense with a case management conference. In the event that there appear to be no unusual issues, that counsel appear to be working together collegially, and that the information on the proposed order appears to be consistent with the best interests of all parties and is proportionate to the needs of the case, the court may dispense with the case management conference.

(e) Amendment of the Case Management Order. A party wishing to extend a deadline or otherwise amend the Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2)(F).

(f) Trial Management Order. No later than 28 days before the trial date, the responsible attorney shall file a proposed Trial Management order with the court. Prior to trial, a Trial Management Order shall be entered by the Court.

(1) Cases with Unrepresented Parties. If any unrepresented party will be participating in the trial, the responsible attorney shall promptly file a Notice to Set Trial Management conference after all disclosures have been served and discovery has been completed and the court shall conduct a Trial Management conference on the record and issue a Trial Management Order pursuant to subsection (f)(4) of this Rule. The responsible attorney shall submit a proposed Trial Management Order prior to the conference by filing the same with the Court and serving a copy thereof on all other parties.

(2) All Parties Represented by Counsel.

(A) If all parties are represented by counsel, lead counsel for each party shall confer with each other to develop jointly a proposed trial management order. Plaintiff's counsel shall be responsible for scheduling conferences among counsel and preparing and filing the proposed trial management order.

(B) Not later than 42 days before the trial date, each counsel shall exchange a draft of the lists of witnesses and exhibits required in subsections (f)(3)(VI)(A) and (B) of this Rule together with a copy of each documentary exhibit to be listed pursuant to subsection (f)(3)(VI)(B) of this Rule.

(C) To the extent possible, counsel shall agree to the contents of the proposed Trial Management Order. Any matter upon which all counsel cannot agree shall be designated as ''disputed'' in the proposed order and the proposed trial management order shall contain specific alternative provisions upon which agreement could not be reached. The proposed Trial Management Order shall be signed by lead counsel for each party and shall include a place for the court's approval.

(D) If there are any disputed matters or if any counsel believes that it would be helpful to conduct a Trial Management conference, the filing of the proposed Trial Management order shall be accompanied by a Notice to Set Trial Management conference, stating the reasons why such a conference is requested.

(3) Form of Trial Management Order. The proposed Trial Management Order shall contain the following matters under the following captions and in the following order:

I. STATEMENT OF CLAIMS AND DEFENSES. The parties shall set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as ''withdrawn'' or ''resolved.''

II. STIPULATED FACTS. The parties shall set forth a plain, concise statement of all facts which the trier of fact shall accept as undisputed. If the matter is scheduled for a jury trial, a proposed jury instruction containing these undisputed facts shall be submitted as provided in section (g) of this Rule.

III. PRETRIAL MOTIONS. The parties shall list any pending motions.

IV. TRIAL BRIEFS. The parties shall indicate whether trial briefs will be filed, including a schedule for their filing. Trial briefs shall be filed no later than 14 days before the trial date.

V. ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT. Each claiming party shall set forth a detailed description of the categories of damages or other relief sought and a computation of any economic damages claimed.

VI. IDENTIFICATION OF WITNESSES AND EXHIBITS—JUROR NOTEBOOKS. Each party shall provide the following information:

(A) Witnesses. Each party shall attach to the proposed trial management order separate lists containing the name, address, telephone number and the anticipated length of each witness' testimony, including cross examination, (i) of any person whom the party ''will call'' and (ii) of any person whom the party ''may call'' as a witness at trial. When a party lists a witness as a ''will call'' witness, the party does not have to call the witness to testify, but must ensure that the witness will be available to testify at trial if called by any party without the necessity for any other party to subpoena the witness for the trial. For each expert witness, the list shall also indicate whether the opposing party accepts or challenges the qualifications of a witness to testify as an expert as to the opinions

expressed. If there is a challenge, the list shall be accompanied by a resume setting forth the basis for the expertise of the challenged witness. Where appropriate, the court may order the parties to provide written notice to the other parties and to the court of the order in which the parties expect to present their witnesses.

(B) Exhibits. Each party shall attach to the proposed trial management order a list of exhibits including physical evidence which the party intends to introduce at trial. Unless stipulated by the parties, each list shall assign a number (for plaintiff or petitioner) or letter (for defendant or respondent) designation for each exhibit. Proposed excerpted or highlighted exhibits shall be attached. If any party objects to the authenticity of any exhibit as offered, such objection shall be noted on the list, together with the ground therefor. If any party stipulates to the admissibility of any exhibit, such stipulation shall be noted on the list. Records of regularly conducted activity to be offered pursuant to CRE 902(11) and (12) may be supported by use of Forms 37 and 38 in the Appendix to Chapters 1 to 17A, Forms. On or before the trial date, a set of the documentary exhibits shall be provided to the court.

(C) Juror Notebooks. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t) and at the Trial Management conference or other date set by the Court make a joint submission to the Court of items to be included in the juror notebook. By agreement of the parties or in the discretion of the Court, important exhibits may be highlighted or excerpted and may be included in juror notebooks.

(D) Deposition and Other Preserved Testimony. If the preserved testimony of any witness is to be presented the proponent of the testimony shall provide the other parties with its designations of such testimony at least 28 days before the trial date. Any other party may provide all other parties with its designations and shall do so at least 14 days before the trial date. The proponent may provide reply designations and shall do so at least 7 days before the trial date. A copy of the preserved testimony to be presented at trial shall be submitted to the court and include the proponent's and opponent's anticipated designations of the pertinent portions of such testimony or a statement why designation is not feasible at least 3 days before the trial date. If any party wishes to object to the admissibility of the testimony or to any tendered question or answer therein, it shall be noted, setting forth the grounds therefor.

VII. TRIAL EFFICIENCIES AND OTHER MATTERS. If the anticipated length of the trial has changed, the parties shall so indicate. The parties shall also include any other matters which are appropriate under the circumstances of the case or directed by the court to be included in the proposed Trial Management Order. The parties shall confirm that they have considered ways in which the use of technology can simplify the case and make it more understandable. In all cases where a jury trial will be held, the parties shall confer regarding the amount of time requested for juror examination and provide their positions along with their reasons therefor.

(4) Approval of Trial Management Order. If a Notice to Set Trial Management Conference is filed or the Court determines that such a conference should be held, the Court shall set a trial management conference. The conference may be conducted by telephone. The court shall promptly enter the Trial Management Order.

(5) Effect of Trial Management Order. The Trial Management Order shall control the subsequent course of the trial. Modification to or divergence from the Trial Management Order, whether prior to or during trial, shall be permitted upon a demonstration that the modification or divergence could not with reasonable diligence have been anticipated. In the event of any ambiguity in the Trial Management Order, the Court shall interpret the Order in the manner which best advances the interests of justice.

(g) Jury Instructions and Verdict Forms. Counsel for the parties shall confer to develop jointly proposed jury instructions and verdict forms to which the parties agree. No later than 7 days prior to the date scheduled for commencement of the trial or such other time as the court shall direct, a set of the proposed jury instructions and verdict forms shall be filed with the courtroom clerk. The first party represented by counsel to demand a jury trial pursuant to C.R.C.P. 38 and who has not withdrawn such demand shall be responsible for filing the proposed jury instructions and verdict forms. If any jury instruction or verdict form is disputed, the party propounding the instruction or verdict form shall separately file

with the courtroom clerk a set of the disputed jury instructions and verdict forms. Each instruction or verdict form shall have attached a brief statement of the legal authority on which the proposed instruction or verdict form is based. Compliance with this Rule shall not deprive parties of the right to tender additional instructions or verdict forms or withdraw proposed instructions or verdict forms at trial. All jury instructions and verdict forms submitted by the parties shall be in final form and reasonably complete. The court shall permit the use of photocopied instructions and verdict forms, without citations, in its submission to the jury.

Source: Entire rule repealed April 14, 1994, effective January 1, 1995; entire rule adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (c)(VI) and (c)(VIII) amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and adopted February 13, 2002, effective July 1, 2002; entire rule amended and adopted November 6, 2003, effective July 1, 2004; (c) amended and effective June 28, 2007; (b)(9) amended by corrective order, effective November 5, 2007; (f)(3)VII. amended and effective September 16, 2010; (b)(3), (b)(4), (b)(5), (b)(7) to (b)(10), (c), (e), IP(f), (f)(2)(B), (f)(3)IV., (f)(3)VI.(D), and (g) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b) to (e) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015; (f)(3)(VI)(B) amended, adopted, and effective December 7, 2017.

Cross references: For disclosure and discovery, see chapter 4 (C.R.C.P. 26 to 37); for dismissal of actions, see C.R.C.P. 41; for amended pleadings, see C.R.C.P. 15; for instructions to jurors, see C.R.C.P. 51; for Colorado jury instructions, see C.R.C.P. 51.1.

COMMENTS

1995

History and Philosophy

[1] Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and the Colorado Standards for Case Management—Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

[2] In the past several years, a recognition by the organized Bar of increasing unprofessional conduct by some attorneys led to further study of problems in our civil justice system and new approaches to resolve them. New Federal Rules of Civil Procedure were developed to require extensive early disclosure and to limit discovery. The Colorado Bar Association's Professionalism Committee made recommendations concerning improvements of Colorado's case management and discovery rules.

[3] After substantial input through surveys, seminars and Bench/Bar committees, the Colorado Supreme Court appointed a special Ad Hoc Committee to study and make recommendations concerning Colorado's Civil Rules pertaining to case management, disclosure/discovery and motions practice. Reforms of Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, 121 § 1-11, 121 § 1-12, 121 § 1-15, and 121 § 1-19 were developed by this Committee.

[4] The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. Revisions to Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37 are patterned after December 1, 1993, revisions to Federal Rules of the same number, but are not in all respects identical. Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other to provide a differential case management/early disclosure/limited discovery system designed to resolve difficulties experienced with prior approaches. Changes to C.R.C.P. 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to interrelate with the case management/disclosure/discovery reform to improve motions practice. In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism.

Operation

[5] New Rule 16 and revisions of Rules 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, and 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to accomplish early purposeful and reasonably economical management of cases by the parties with Court supervision. The system is based on communication, including required early disclosure of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. Lead attorneys for each party are to communicate with each other in the spirit of cooperation in the preparation of both the Case and Trial Management Orders. Court Case Management Conferences are available where necessary for any reasonable purpose. The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.

[6] Rules 16 and 26 should work well in most cases filed in Colorado District Courts. However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure. The importance of economy is encouraged and fostered in a number of ways, including authorized use of the telephone to conduct in-person attorney and Court conferences.

[7] The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate ''hide-the-ball'' and ''hardball'' tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

[8] These Rules have been drafted to emphasize and foster professionalism and to deemphasize sanctions for non-compliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct.

(a)

The purpose and scope of Rule 16 are as set forth in subsection (a). Unless otherwise ordered by the Court or stipulated by the parties, Rule 16 does not mandatorily apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, Rule 120, or other expedited proceedings. Provisions of the Rule could be used, however, and Courts involved in those proceedings should consider their possible applicability to particular cases.

(b)

The ''Case Management Order'' is the central coordinating feature of the Rule 16 case management system. It comes at a relatively early but realistic time in the case. The Case Management Order governs the trial setting; contains or coordinates disclosure; limits discovery and establishes a discovery schedule; establishes the deadline for joinder of additional parties and amendment of pleadings; coordinates handling of pretrial motions; requires a statement concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

[9] Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order, which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, or if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.

[10] A time line is specified in C.R.C.P. 16(b) for the C.R.C.P. 26(a)(1) disclosures, conferring of counsel and submission of the proposed Case Management Order. The time line in section (b) is triggered by the ''at issue'' date, which is defined at the beginning of C.R.C.P. 16(b).

[11] Disclosure requirements of C.R.C.P. 26, including the duty to timely supplement and correct disclosures, together with sanction provisions of C.R.C.P. 37 for failure to make disclosure, are incorporated by reference. Because of mandatory disclosure, there should be substantially less need for discovery. Presumptive limitations on discovery are specified in C.R.C.P. 26(b)(2). The limitations contained in C.R.C.P. 26 and Discovery Rules 29, 30, 31, 32, 33, 34, and 36 are incorporated by reference and provision is made for discovery above presumptive limitations if, upon good cause shown (as defined in C.R.C.P. 26(b)(2)), the particular case warrants it. The system established by C.R.C.P. 16(b)(1)(IV) requires the parties to set forth and obtain Court approval of a schedule of discovery for the case, which includes the timing and number of particular forms of discovery

requests. The system established by C.R.C.P. 16(b)(1)(IV) also requires lead counsel for each of the parties to set forth the basis of and necessity for all such discovery and certify that they have advised their clients of the expenses and fees involved with each such item of discovery. The purpose of such discovery schedule and expense estimate is to bring about an advanced realization on the part of the attorneys and clients of the expense and effort involved in the schedule so that decisions can be made concerning propriety, feasibility, and possible alternatives (such as settlement or other means of obtaining the information). More stringent standards concerning the necessity of discovery contained in C.R.C.P. 26(b)(2) are incorporated into C.R.C.P. 16(b)(1)(IV). A Court should not simply ''rubber-stamp'' a proposed discovery schedule even if agreed upon by counsel.

[12] A Court Case Management Conference will not be necessary in every case. It is anticipated that many cases will not require a Court Case Management Conference, but such conference is available should the parties or the Court find it necessary. Regardless of whether there is a Court Case Management Conference, there will always be the Case Management Order which, along with the later Trial Management Order, should effectively govern the course of the litigation through the trial.

(c)

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

[13] As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial pro se.

[14] As with the Case Management Order procedure, many cases will not require a Court Trial Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.

[15] The Trial Management Order process will force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested. Both of those requirements should reduce the expenses associated with trial. In addition, the requirement that any party seeking damages define and itemize those damages in detail should facilitate preparation and trial of the case.

[16] Subsection (c)(IV), pertaining to designation of ''order of proof,'' is a new feature not contained in Federal or State Rules. To facilitate scheduling and save expense, the parties are required to specifically identify those witnesses they anticipate calling in the order to be called, indicating the anticipated length of their testimony, including cross-examination.

(d)

Provision is made in the C.R.C.P. 16 case management system for an orderly advanced exchange and filing of jury instructions and verdict forms. Many trial courts presently require exchange and submission of a set of agreed instructions during the trial. C.R.C.P. 16(d) now requires such exchange, conferring, and filing no later than three (3) days prior to the date scheduled for the commencement of the trial (or such other time as the Court otherwise directs).

2015

[17] The previous substantive amendment to Rule 16(b) established presumptive discovery limits and procedures which caused filing of detailed Case Management Orders and appearing before a judge to become rare. While this reduced lawyers' time in preparing detailed orders, it also resulted in judges not being involved in pretrial case management.

[18] Among the key principles adopted by the Federal Advisory Committee on Rules of Civil Procedure, as well as the Civil Access Pilot Project (''CAPP''), is that cases move more efficiently if judges are involved directly and early in the process. (*See also, ''Working Smarter, Not Harder: How Excellent Judges Manage Cases*,'' at 7-20 (2014), *available at http://www.actl.com*).

[19] Particularly in conjunction with the principle that discovery should be in proportion to the genuine needs of the case, it was deemed important for judges, in addition to litigants, to be involved early in the pretrial process in deciding how much discovery was appropriate. Both judges and lawyers have noted that some lawyers have a financial incentive not to limit

discovery. Perhaps more significant was the recognition that many lawyers engage in ''over discovery'' because of the fear (justifiable or not) that failing to engage in every conceivable means of discovery until a judge orders one to ''stop!'' could expose a trial lawyer to subsequent expensive malpractice litigation. These problems are greatly alleviated with the intervention of trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case.

[20] CAPP required in-person initial case management conferences with the judge. These conferences followed submission of a report from the parties which included information relevant to the evaluation of proportionality as well as how the case should be handled. The analysis of CAPP reflects that this practice was widely liked by both lawyers and judges. It is desirable that there be an official order arising from the case management conference reflecting the court's input and which, importantly, provides enforcement power. Thus, Rule 16(b) has completely rewritten the rule to include requiring a joint report to the court in the form of a proposed Case Management Order. It can be approved or modified by the court to become the official order. It is to be filed with the court not later than 42 days after the case is at issue, but at least 7 days before the case management conference.

[21] The new rule lists the required contents of the proposed Case Management Order and also provides a form that can be downloaded for preparation of the proposed order. Although at first glance the new rule appears somewhat onerous, most of the information sought is relatively easy to include and should be discussed by opposing counsel or parties, in any event, at the outset of the case.

[22] The joint report/proposed Case Management Order must contain the following information, which is unchanged from former Rule 16(b)(1)-(3): the ''at issue'' date; contact information for the ''responsible attorney''; and a description of the ''meet and confer'' discussions. The joint report must also provide:

- a brief description of the case from each side, and of the issues to be tried (one page per side);
- a list of pending, unresolved motions;
- an evaluation of the proportionality factors from C.R.C.P. 26(b)(1);
- a confirmation that the parties discussed settlement and description of prospects for settlement;
- proposed deadlines for amending the pleadings;
- the dates when disclosures were made and any objections to those disclosures;
- an explanation of why, if applicable, full disclosure of damages has not been completed and when it will be;
- subjects for expert testimony with a limit of only one expert per side per subject unless good cause is established consistent with proportionality;
- acknowledgement that oral discovery motions may be required by the court;
- provision for electronic discovery when significant electronic discovery is anticipated;
- estimated time to complete discovery and length of trial so the court can set trial at the case management conference; and
- a catchall for other appropriate matters.

[23] The former provisions in Rule 16(c) related to Modified Case Management Orders are repealed as moot but are replaced with the deadlines for pretrial motions presently contained in Rule 16(b)(9).

[24] Rule 16(d) is rewritten to require personal or telephonic attendance at the case management conference by lead counsel. In anticipation that judges will not want (or need) to hold in person case management conferences in all cases, Rule 16(d)(3) allows the court to dispense with a case management conference if it is satisfied that the lawyers are working together well and the joint report contemplates appropriate and proportionate pretrial activity. However, the rule recommends that case management conferences always be held if one or more of the parties is self-represented. This gives the court the opportunity to try to keep the case and self-represented party focused and on track from the beginning.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Pre-Trial in Colorado in Words and at Work'', see 27 Dicta 157 (1950). For article, ''Some Comments on Pre-Trial'', see 28 Dicta 23 (1951). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''Pleadings and Motions: Rules 7-16'', see 23 Rocky Mt. L. Rev. 542 (1951). For article, ''Expert Witnesses'', see 24 Rocky Mt. L. Rev. 418 (1952). For article, ''Pre-Trial Procedure — Should It Be Abolished in Colorado?'', see 30 Dicta 371 (1953). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For

article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For Note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964). For comment on Glisan v. Kurth appearing below, see 36 U. Colo. L. Rev. 568 (1964). For article, ''Selecting Cases for Mediation'', see 17 Colo. Law. 2007 (1988). For article, ''Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure'', see 23 Colo. Law. 2467 (1994). For article, ''Common Pitfalls in Complying with C.R.C.P. 16 and 26 When Drafting Case Management Orders'', see 26 Colo. Law. 39 (March 1996). For article, ''Rules 16 and 16.2: Reality Check 1998'', see 27 Colo. Law. 45 (March 1998). For article, ''Civil Rules 16 and 26: Pretrial Procedure and Discovery Revisited and Revised'', see 30 Colo. Law. 9 (December 2001). For article, ''Comment on the Amendments to C.R.C.P. 16: An Opportunity to Enjoy Practicing Law'', see 31 Colo. Law. 23 (April 2002). For article, ''A Modest Proposal: The Rule 3(a) Waiver Agreement'', see 46 Colo. Law. 23 (Mar. 2017).

Annotator's note. Some of the following annotations refer to cases decided under C.R.C.P. 16 as it existed prior to the 1994 repeal and readoption of that rule, effective January 1, 1995. Former C.R.C.P. 16 provided for pre-trial conferences and pre-trial orders rather than case management orders and trial management orders.

This rule is the authority under which trial courts promulgate local pre-trial rules and hold pre-trial conferences. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

The rule is not a mere technicality and compliance is mandatory. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

This rule provides that the court may direct the attorneys to appear before it for a conference to consider certain matters, and having done so, then the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, which limits the issues for trial to those not disposed of by admissions or agreement of counsel, and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955).

Effective use of the pre-trial conference can, and does, contribute much in meeting the problems of mounting congestion in the trial courts. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

To make pre-trial procedure effective, appellate interference with the trial court in this area must be kept at a minimum. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

In the application of the pre-trial rule, the court must be careful that devotion to the task does not lead it to deprive a litigant of his right to a trial. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

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

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

Denial of a jury trial for failure to comply with section (d) was not an appropriate remedy and a right to a jury trial may only be lost for the reasons cited in C.R.C.P. 39(a). Wright v. Woller, 976 P.2d 902 (Colo. App. 1999).

''Lone Pine orders'', where a trial court orders plaintiffs to present prima facie evidence supporting their claims after initial disclosures, but before other discovery commences, or risk having their case dismissed, are prohibited under state law. While the supreme court revised this rule to create a ''differential case management/early disclosure/limited discovery system'', these revisions are not so substantial as to effectively overrule other supreme court holdings. Although portions of this rule and C.R.C.P. 26 may afford trial courts more discretion than they previously had, that discretion is not so broad as to allow courts to issue Lone Pine orders. And, notably, the state's version of this rule does not include the language relied upon by federal courts when issuing Lone Pine orders. Existing procedures under the Colorado rules of civil procedure sufficiently protect against meritless claims, and, therefore, a Lone Pine order was not required solely on that basis. Strudley v. Antero Res. Corp., 2013 COA 106, 350 P.3d 874, aff'd, 2015 CO 26, 347 P.3d 149.

Applied in In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972); Clark v. District Court, 668 P.2d 3 (Colo. 1983); Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977 (Colo. App. 2011).

II. DISCLOSURE.

Liberal policy regarding supplementing disclosure certificate. Just as C.R.C.P. 15 has been held to reflect the policy of liberally allowing amendments to pleadings, so too should a similar policy be followed with respect to supplementing disclosure certificates. Consoli-

dated Hardwoods v. Alexander Const., 811 P.2d 440 (Colo. App. 1991).

Absent a showing of prejudice, a trial court abuses its discretion in not permitting amendment to a disclosure statement where the request is made more than 80 days prior to trial and relates to a matter that was previously known but was erroneously not included in the disclosure certificate. Consolidated Hardwoods v. Alexander Const., 811 P.2d 440 (Colo. App. 1991).

When a trial court's actions substantially tip the balance in an effort to avoid prejudice and delay and as a result unreasonably deny a party his or her day in court, the reviewing court must overturn the decision of the trial court. J.P. v. District Court, 873 P.2d 745 (Colo. 1994).

The district court abused its discretion in denying the petitioner's motions to endorse witnesses and freezing discovery. J.P. v. District Court, 873 P.2d 745 (Colo. 1994).

Trial court abused its discretion when, as a sanction for filing a disclosure certificate signed by plaintiff's former attorney's paralegal rather than the plaintiff herself, the court limited the witnesses the plaintiff could call to the defendant and herself. Defendants did not suffer any prejudice as a result of the improper signing of the certificate since the filing served its purpose of timely informing them of the evidence plaintiff intended to present at trial. Keith v. Valdez, 934 P.2d 897 (Colo. App. 1997).

If one party elicits opinions from another party's expert witness which are beyond the scope of the testimony described in the disclosure statement and are not of the kind which would impeach such testimony, the witness will be considered, for the purposes of the disclosure statement requirements, as the witness of the party eliciting the opinions. Freedman v. Kaiser Fund Health Plan, 849 P.2d 811 (Colo. App. 1992).

An objection on the grounds that a party has not adequately disclosed the basis for and summary of each expert witness opinion must be made within a reasonable time. Perkins v. Flatiron Structures Co. 849 P.2d 832 (Colo. App. 1992).

The purpose of the disclosure mandated by the rule is to provide parties with adequate time to prepare by obtaining relevant evidence. Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

Sanctions for failure to comply with disclosure rules rest in the discretion of the trial court and should not be disturbed absent an abuse of discretion. Such sanctions, which may include witness preclusion, should commensurate with the seriousness of the violation. Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

Applied in People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

III. CASE MANAGEMENT ORDER.

This rule commands that a trial court shall make an order which recites the action taken at the pre-trial conference, and pursuant thereto, requires the trial court to direct the preparation of an order containing what transpired at the conference, and how the results of such conference shall control the subsequent course of the proceedings. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

The pre-trial order controls the subsequent course in the action, unless the court modifies the same at the trial to prevent manifest injustice. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955); Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967); Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

Order must fully recite any action taken relative to amendments allowed to the pleadings. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

Case reinstated where a delay reduction order required both the filing of a proposed case management order and setting the case for trial within 30 days; held that the issuance of case management order then extended deadline for setting of trial another 30 days. Becker v. District Court for Arapahoe County, 969 P.2d 700 (Colo. 1998).

This rule contains no language limiting its application to the first trial only of an action; accordingly, it will govern second trial in absence of showing that orders and stipulation made at pre-trial conference will work manifest injustice. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

Disputed issues should not be resolved. In the absence of agreement or admissions by the parties, the trial court should not resolve disputed issues in a pre-trial order. Cunningham v. Spring Valley Estates, Inc., 31 Colo. App. 77, 501 P.2d 746 (1972), aff'd, 181 Colo. 435, 510 P.2d 336 (1973).

Assent is assumed, absent objection. It is assumed, in the absence of an objection, that a pre-trial order is made in cooperation with, and by assent of, the parties. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955).

In the absence of an objection to the pre-trial order, or the part thereof with which counsel present do not agree, the order precludes any further challenge of the questions determined at the pre-trial conference. Ferguson v. Hurford,

132 Colo. 507, 290 P.2d 229 (1955); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967).

In the absence of an objection, all matters determined at the pre-trial conference have the force and effect of a stipulation of the parties as to the correctness thereof. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967); Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969).

Pretrial order, if not objected to, controls introduction of evidence at trial. Great W. Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331 (Colo. App. 1981).

When a party violates a court's pretrial order at trial, the opposing party must contemporaneously object to preserve the issue for appeal. People v. Dinapoli, 2015 COA 9, 369 P.3d 680.

The court errs in going beyond remaining issues. Where there is no objection to the pre-trial order, the court itself does not thereafter in any manner ''modify'' the pre-trial order, and the issue is never injected into the case on the basis of any expressed or implied consent of the parties, the trial court errs in going beyond the issues which according to the pre-trial order are the only issues remaining. Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969).

The court errs in giving instructions inconsistent with stipulations of pre-trial order. Where a pre-trial conference order, duly signed and to which no objection is made by either party, stipulates to a certain fact, which dispenses with the necessity of proof, it is error for the trial court to instruct the jury on a fact situation in a manner wholly inconsistent with the stipulation. Allison v. Trustee, 140 Colo. 392, 344 P.2d 1077 (1959).

In the absence of agreement between the parties affected, an issue cannot be resolved against one of them by the order made upon the pre-trial conference. Marsh v. Warren, 126 Colo. 298, 248 P.2d 825 (1952).

Where there is nothing in the pre-trial order which contemplates judgment against certain individuals thought to be jointly and severally liable with the defendant and their liability is never an issue in the case, there is no error in the trial court's failure to enter a joint judgment to include them. Lewis v. Martin, 30 Colo. App. 342, 492 P.2d 877 (1971).

Under this rule witnesses not listed at the pre-trial conference have been permitted to testify, and documents not listed in the pre-trial order have been admitted into evidence where such modifications of the pre-trial order were necessary to prevent injustice. Francisco v. Cascade Inv. Co., 29 Colo. 516, 486 P.2d 447 (1971).

Wide discretion is vested in trial court to allow nonlisted witnesses to testify. As purpose of such pre-trial disclosure of witnesses is to enable all parties to prepare for trial, wide discretion is vested in the trial court to determine whether a witness who has not been listed on the pre-trial order and whose name has not been disclosed to the opposing party may testify. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972); Wood v. Rowland, 41 Colo. App. 498, 592 P.2d 1332 (1978).

The failure to list surveillance films and the surveillant at the pre-trial stage, or to make them known prior to trial, does not mean that the defendants are conclusively prohibited from having the desired evidence admitted, but are simply taking a risk that the trial court in its discretion might refuse to modify the pre-trial order. Crist v. Goody, 31 Colo. App. 496, 507 P.2d 478 (1972).

Such a modification will be refused unless it is determined by the court to be necessary ''to prevent manifest injustice''. Crist v. Goody, 31 Colo. App. 496, 507 P.2d 478 (1972).

Where no actual prejudice would result by the admission of additional exhibits, the court should permit a modification of the list of exhibits in the pre-trial order and the admission of the exhibits in evidence in order to prevent manifest injustice. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

Where a document is not within the purview of the pre-trial order, but is in the possession of the defendant before the trial, it would be impossible to conclude that there is any prejudice incident to its reception in evidence. Landauer v. Juey, 143 Colo. 76, 352 P.2d 302 (1960).

A change in counsel is not sufficient in and of itself to justify vitiating a pre-trial conference order. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

A "local" rule of a district court relating to pre-trial procedure requiring counsel to approve a pre-trial order as to form and content is neither contrary to, in conflict with, nor in excess of authority granted by this rule. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Provision of local rule does not deny a party due process. The provision of a ''local'' rule requiring attorneys to approve a pre-trial order as to substance as well as to form does not deny a party due process of law. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

The approval of the "substance" of a pre-trial order under a "local" rule of court is neither an approval by counsel of the legal effect of the order nor of the application of substantive law which may appear in said pre-trial order, but rather, is an approval only of a recital of what transpired at the pre-trial confer-

ence. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Where the procedures prescribed in a "local" rule of a district court are in lieu of a pre-trial conference, the district court has the same power to modify a list of exhibits and other documents prepared pursuant to the local rule, as it has to modify a pre-trial order. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

The provision of a "local" rule does not preclude review by writ of error of matters duly objected to or reserved matters ruled upon a pre-trial conference. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Trial court did not err in basing its damages award upon a second stipulation between the parties as to the amount of monthly rental loss even though the amount conflicted with amount specified in trial management order where stipulation entered into after entry of order. Razi v. Schmitt, 36 P.3d 102 (Colo. App. 2001).

Applied in Brown v. Hollywood Bar and Cafe, 942 P.2d 1363 (Colo. App. 1997).

IV. TRIAL MANAGEMENT ORDER.

Failure to include a claim for attorney fees in the trial management order is not a waiver of the claim. Attorney fees are neither costs nor damages, but a hybrid of each. Roberts v. Adams, 47 P.3d 690 (Colo. App. 2001).

A party is not required to call each witness on its witness list. Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Trial court did not abuse its discretion when it permitted defendants to withdraw their expert witnesses. Defendants did not have an obligation to make expert witnesses available at trial to testify because defendants had designated them as ''may call'' witnesses, not ''will call'' witnesses. Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Court applies a balancing test to determine whether a party may call opposing party's withdrawn expert. There is a presumption that a party may not call opposing party's withdrawn expert witness unless that party timely endorses the opposing party's expert. The balancing test weighs whether the expert's testimony would be cumulative; whether exclusion would result in unfair prejudice; and whether the opposing party failed to endorse its own expert. Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Rule 16.1. Simplified Procedure for Civil Actions

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

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

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

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

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

(d) Motion for Exclusion from Simplified Procedure. Simplified Procedure shall apply unless, no later than 42 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a motion, signed by both the party and its counsel, if any, establishing good cause to exclude the case from the application of Simplified Procedure.

(1) Good cause shall be established and the motion shall be granted if a defending party files a statement by its attorney or, if unrepresented, by the party, that ''In compliance

with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000'' or

(2) The trial court, in its discretion, may determine other good cause for exclusion, considering factors such as the complexity of the case, the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit.

(e) Election for Inclusion Under this Rule. In actions excluded from Simplified Procedure by subsection (b)(2), within 42 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule.

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

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

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

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

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

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

(1) Required Disclosures.

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

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

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

(ii) ***Employment Actions.*** In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure, and shall produce all

documents which reflect or reference the claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the defending party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks.

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

(2) Disclosure of Expert Witnesses. The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(b)(4), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure of expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 49 days before trial. The parties shall be limited to one expert witness per side retained pursuant to C.R.C.P. 26(a)(2)(B)(I), unless the trial court authorizes more for good cause shown.

(3) Mandatory Disclosure of Trial Testimony. Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse parties or hostile witnesses a party intends to call at trial, written disclosure of the expected subject matters of the witness' testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 49 days before trial.

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

(A) Each party may take a combined total of not more than six hours of depositions noticed by the party;

(B) Not more than five requests for production of documents may be served by each party; and

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

(5) Depositions for Obtaining Documents and for Trial. In addition to depositions allowed under subsection (k)(4)(A) of this Rule:

(A) Depositions may be taken for the sole purpose of obtaining and authenticating documents from a non-party; and

(B) A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4) and (7), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial without being subject to the six-hour limit on depositions in subsection (k)(4)(A) of this Rule. Unless authorized by the court or stipulated to by the parties, such a deposition shall be taken at least 21 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the preservation deposition.

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

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

(8) Juror Notebooks and Jury Instructions. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

(I) Changed Circumstances. In a case under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of Simplified Procedure and enter such orders as are appropriate under the circumstances. Except in cases under subsection (e) of this Rule, if, more than 42 days after the case is at issue, any party discloses damages against another party in excess of $100,000 - including actual damages, penalties and punitive damages, but excluding allowable attorney fees, interest and costs - that defending party may move to have the case removed from Simplified Procedure and the motion shall be granted unless the claiming party stipulates to a limitation of damages against the defending party, excluding allowable attorney fees, interest and costs, of $100,000. The stipulation must be signed by the claiming party and, if the claiming party is represented, by the claiming party's attorney.

Source: Entire rule added and adopted November 6, 2003, effective July 1, 2004; (k)(1)(C) corrected January 6, 2004, nunc pro tunc November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004; (k)(1)(A) corrected June 6, 2005, nunc pro tunc November 6, 2003, effective July 1, 2004; (e), (g), (h), (k)(1)(A), (k)(1)(B)(iii), (k)(2), (k)(3), (k)(4), and (k)(6) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (f) and (h) amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015; entire rule amended, adopted, and comment added April 12, 2018, effective for cases filed on or after September 1, 2018.

COMMENTS

2018

[1] Rule 16.1, which established Simplified Procedure, took effect in 2004 to enhance the application of Rule 1's admonition that the civil rules be interpreted to provide just, speedy, and inexpensive determination of cases and to increase access to the courts and justice system, particularly for cases seeking damages of less than $100,000. As originally established, the application of Simplified Procedure was completely voluntary and parties could opt out without stating any reason or justification. A substantial majority of cases opted out of Simplified Procedure, minimizing its ability to advance its important justification and goals. However, lawyers and judges who have used Simplified Procedure strongly approve of it. *See* Gerety, ''Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1'', 40 *The Colorado Lawyer* 23, 25 (April 2011).

[2] As a result, several significant revisions have been made to Rule 16.1. First, with the exception of several unique forms of civil actions, Simplified Procedure applies presumptively to all civil lawsuits.

[3] Excluded from Simplified Procedure are cases seeking damages from any single defending party of at least $100,000 (not including reasonable allowable attorney fees, interest and costs). This exclusion can be met in the mandated Civil Cover Sheet to be filed in all applicable civil cases if the attorney or unrepresented party executes a certification in the Cover Sheet as set forth in Rule 16.1(b)(2). This certification

allows a party or the party's attorney to reasonably estimate the value of the case, but always subject to the requirements of Rule 11.

[4] Cases can also be exempted after the case is in progress if one of the parties discovers that the claimant's damages may exceed $100,000 and requests transfer of the case out of Simplified Procedure.

[5] Trial courts may exclude cases from Rule 16.1 even though the claims do not seek money damages reaching the $100,000 threshold after consideration of the factors contained in Rule 16.1(d)(2). Thus, cases with small or even no monetary damages that challenge the constitutionality of laws or procedures, seek declaratory judgments or injunctions, or raise other important and complex legal issues may be excluded from Simplified Procedure.

[6] Another important change in Simplified Procedure is that the previous cap on damage awards of $100,000 in Simplified Procedure cases has been removed.

[7] Simplified Procedure now requires disclosures of persons, documents, damages and insurance under Rule 26 and disclosure of proposed testimony from witnesses and experts. It also allows up to 6 hours of depositions per party and, if needed, additional preservation depositions; up to five requests for production of documents; inspection of property and things; and relevant medical examinations.

[8] Because of the limited discovery, it is particularly important to the just resolution of cases under Simplified Procedure, that parties honor the requirements and spirit of full disclosure. Parties should expect courts to enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.

ANNOTATION

Law reviews. For article, ''Back to the Future New Rule 16.1: Simplified Procedure for Civil Cases Up to $100,000'', see 33 Colo. Law. 11 (May 2004). For article, ''Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1'', see 40 Colo. Law. 23 (April 2011). For article, ''Revised Rule 16.1 Makes Simplified Procedure Mandatory for Most Cases'', see 47 Colo. Law. 20 (Aug.-Sept. 2018).

Civil case cover sheet is an inadequate basis for establishing the jurisdictional amount for diversity jurisdiction under 28 U.S.C. § 1332. Harding v. Sentinel Ins. Co., 490 F. Supp. 2d 1134 (D. Colo. 2007); Baker v. Sears Holdings Corp., 557 F. Supp. 2d 1208 (D. Colo. 2007); Holladay v. Kone, Inc., 606 F. Supp. 2d 1296 (D. Colo. 2009).

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) Purpose and Scope. Family members stand in a special relationship to one another and to the court system. It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible. To that end, this Rule contemplates management and facilitation of the case by the court, with the disclosure requirements, discovery and hearings tailored to the needs of the case. This Rule shall govern case management in all district court actions under Articles 10, 11 and 13 of Title 14 of the Colorado Revised Statutes, including post decree matters. The Child Support Enforcement Unit (CSEU) shall be exempted under this Rule unless the CSEU enters an appearance in an ongoing case. Upon the motion of any party or the court's own motion, the court may order that this Rule shall govern juvenile, paternity or probate cases involving allocation of parental responsibilities (decision-making and parenting time), child support and related matters. Any notice or service of process referenced in this Rule shall be governed by the Colorado Rules of Civil Procedure.

(b) Active Case Management. The court shall provide active case management from filing to resolution or hearing on all pending issues. The parties, counsel and the court shall evaluate each case at all stages to determine the scheduling of that individual case, as well as the resources, disclosures/discovery, and experts necessary to prepare the case for resolution or hearing. The intent of this Rule is to provide the parties with a just, timely and cost effective process. The court shall consider the needs of each case and may modify its Standard Case Management Order accordingly. Each judicial district may adopt a Standard Case Management Order that is consistent with this Rule and takes into account the specific needs and resources of the judicial district.

(c) Scheduling and Case Management for New Filings.

(1) Initial status conferences/Stipulated Case Management Plans.

(A) Petitioner shall be responsible for scheduling the initial status conference and shall provide notice of the conference to all parties. Each judicial district shall establish a procedure for setting the initial status conference. Scheduling of the initial status conference shall not be delayed in order to accomplish service.

(B) All parties and counsel, if any, shall attend the initial status conference, except as provided in subsection (c)(1)(C) or (c)(1)(D). At that conference, the parties and counsel shall be prepared to discuss the issues requiring resolution and any special circumstances of the case. The court may permit the parties and/or counsel to attend the initial conference and any subsequent conferences by telephone.

(C) If both parties are represented by counsel, counsel may submit a Stipulated Case Management Plan signed by counsel and the parties. Counsel shall also exchange Mandatory Disclosures and file a Certificate of Compliance. The filing of such a plan, the Mandatory Disclosures and Certificate of Compliance shall exempt the parties and counsel from attendance at the initial status conference. The court shall retain discretion to require a status conference after review of the Stipulated Case Management Plan.

(D) Parties who file an affidavit for entry of decree without appearance with all required documents before the initial status conference shall be excused from that conference.

(E) The initial status conference shall take place, or the Stipulated Case Management Plan shall be filed with the court, as soon as practicable but no later than 42 days from the filing of the petition.

(F) At the initial status conference, the court shall set the date for the next court appearance. The court may direct one of the parties to send written notice for the next court appearance or may dispense with written notice.

(2) Status conference procedures.

(A) At each conference the parties shall be prepared to discuss what needs to be done and determine a timeline for completion. The parties shall confer in advance on any unresolved issues.

(B) The conferences shall be informal.

(C) Family Court Facilitators may conduct conferences. Family Court Facilitators shall not enter orders but may confirm the agreements of the parties in writing. Agreements which the parties wish to have entered as orders shall be submitted to the judge or magistrate for approval.

(D) The judge or magistrate may enter interim orders at any status conference either upon the stipulation of the parties or to address emergency circumstances.

(E) A record of any part of the proceedings set forth in this section shall be made if requested by a party or by order of the court.

(F) The court shall either enter minute orders, direct counsel to prepare a written order, or place any agreements or orders on the record.

(3) Emergency matters/evidentiary hearings/temporary orders.

(A) Emergency matters may be brought to the attention of the clerk or the Family Court Facilitator for presentation to the court. Issues related to children shall be given priority on the court's calendar.

(B) At the request of either party or on its own motion, the court shall conduct an evidentiary hearing, subject to the Colorado Rules of Evidence, to resolve disputed questions of fact or law. The parties shall be given notice of any evidentiary hearing. Only a judge or magistrate may determine disputed questions of fact or law or enter orders.

(C) Hearings on temporary orders shall be held as soon as possible. The parties shall certify on the record at the time of the temporary orders hearing that they have conferred and attempted in good faith to resolve temporary orders issues. If the parties do not comply with this requirement, the court may vacate the hearing unless an emergency exists that requires immediate court attention.

(4) Motions.

(A) Motions related to the jurisdiction of the court, change of venue, service and consolidation, protection orders, contempt, motions to amend the petition or response,

withdrawal or substitution of counsel, motions to seal the court file or limit access to the court file, motions in limine related to evidentiary hearings, motions for review of an order by a magistrate, and post decree motions may be filed with the court at any time.

(B) All other motions shall only be filed and scheduled as determined at a status conference or in an emergency upon order of court.

(d) Scheduling and Case Management for post-decree/modification matters. Within 49 days of the date a post decree motion or motion to modify is filed, the court shall review the matter and determine whether the case will be scheduled and resolved under the provisions of (c) or will be handled on the pleadings or otherwise.

(e) Disclosure.

(1) Parties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case. The court requires that, in the discharge of this duty, a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party. This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2.

(2) A party shall, without a formal discovery request, provide the Mandatory Disclosures, as set forth in the form and content of Appendix to Chapters 1 to 17A, Form 35.1, C.R.C.P., and shall provide a completed Sworn Financial Statement and (if applicable) Supporting Schedules as set forth in the form and content of Appendix to Chapters 1 to 17A, Form 35.2 and Form 35.3, C.R.C.P, to the other party within 42 days after service of a petition or a post decree motion involving financial issues. The parties shall exchange the required Mandatory Disclosures, the Sworn Financial Statement and (if applicable) Supporting Schedules by the time of the initial status conference to the extent reasonably possible.

(3) A party shall, without a formal discovery request, also provide a list of expert and lay witnesses whom the party intends to call at a contested hearing or final orders. This disclosure shall include the address, phone number and a brief description of the testimony of each witness. This disclosure shall be made no later than 63 days (9 weeks) prior to the date of the contested hearing or final orders, unless the time for such disclosure is modified by the court.

Unless otherwise stipulated or ordered by the court and subject to the provisions of subsection (g) of this Rule, the disclosure of expert testimony shall be governed by the provisions of C.R.C.P. 26(a)(2)(B). The time for the disclosure of expert or lay witnesses whom a party intends to call at a temporary orders hearing or other emergency hearing shall be determined by the court.

(4) A party is under a continuing duty to supplement or amend any disclosure in a timely manner. This duty shall be governed by the provisions of C.R.C.P. 26(e).

(5) If a party does not timely provide the Mandatory Disclosure, the court may impose sanctions pursuant to subsection (j) of this Rule.

(6) The Sworn Financial Statement, Supporting Schedules (if applicable) and child support worksheets shall be filed with the court. Other mandatory disclosure documents shall not be filed with the court.

(7) A Certificate of Compliance shall accompany the Mandatory Disclosures and shall be filed with the court. A party's signature on the Certificate constitutes certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the Mandatory Disclosure is complete and correct as of the time it is made, except as noted with particularity in the Certificate of Compliance.

(8) Signing of all disclosures, discovery requests, responses and objections shall be governed by C.R.C.P. 26(g).

(9) A Court Authorization For Financial Disclosure shall be issued at the initial status conference if requested, or may be executed by those parties who submit a Stipulated Case Management Plan pursuant to (c)(1)(C), identifying the persons authorized to receive such information.

(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclo-

sure of all material assets and liabilities. If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities. The provisions of C.R.C.P. 60 shall not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph shall not limit other remedies that may be available to a party by law.

(f) Discovery. Discovery shall be subject to active case management by the court consistent with this Rule.

(1) Depositions of parties are permitted.

(2) Depositions of non-parties upon oral or written examination for the purpose of obtaining or authenticating documents not accessible to a party are permitted.

(3) After an initial status conference or as agreed to in a Stipulated Case Management Plan filed pursuant to (c)(1)(E), a party may serve on each adverse party any of the pattern interrogatories and requests for production of documents contained in the Appendix to Chapters 1 to 17A Form 35.4 and Form 35.5, C.R.C.P. A party may also serve on each adverse party 10 additional written interrogatories and 10 additional requests for production of documents, each of which shall consist of a single question or request.

(4) The parties shall not undertake additional formal discovery except as authorized by the court or as agreed in a Stipulated Case Management Plan filed pursuant to (c)(1)(C). The court shall grant all reasonable requests for additional discovery for good cause as defined in C.R.C.P. 26(b)(2)(F). Unless otherwise governed by the provisions of this Rule additional discovery shall be governed by C.R.C.P. Rules 26 through 37 and C.R.C.P. 121 section 1-12. Methods to discover additional matters shall be governed by C.R.C.P. 26(a)(5). Additional discovery for trial preparation relating to documents and tangible things shall be governed by C.R.C.P. 26(b)(3).

(5) All discovery shall be initiated so as to be completed not later than 28 days before hearing, except that the court shall extend the time upon good cause shown or to prevent manifest injustice.

(6) Claims of privilege or protection of trial preparation materials shall be governed by C.R.C.P. 26(b)(5).

(7) Protective orders sought by a party relating to discovery shall be governed by C.R.C.P. 26(c).

(g) Use of Experts. If the matter before the court requires the use of an expert or more than one expert, the parties shall attempt to select one expert per issue. If they are unable to agree, the court shall act in accordance with CRE 706, or other applicable rule or statute.

(1) Expert reports shall be filed with the court only if required by the applicable rule or statute.

(2) If the court appoints or the parties jointly select an expert, then the following shall apply:

(A) Compensation for any expert shall be governed by the provisions of CRE 706.

(B) The expert shall communicate with and submit a draft report to each party in a timely manner or within the period of time set by the court. The parties may confer with the expert to comment on and make objections to the draft report before a final report is submitted.

(C) The court shall receive the expert reports into evidence without further foundation, unless a party notes an objection in the Trial Management Certificate. However, this shall not preclude either side from calling an expert for cross-examination, and voir dire on qualifications. Unless otherwise ordered by the court, a reasonable witness fee associated with the expert's court appearance shall be tendered before the hearing by the party disputing the expert's findings.

(3) Nothing in this rule limits the right of a party to retain a qualified expert at that party's expense, subject to judicial allocation if appropriate. The expert shall consider the report and documents or information used by the court appointed or jointly selected expert and any other documents provided by a party, and may testify at a hearing. Any additional documents or information provided to the expert shall be provided to the court appointed or jointly selected expert by the time the expert's report is submitted.

(4) The parties have a duty to cooperate with and supply documents and other information requested by any expert. The parties also have a duty to supplement or correct information in the expert's report or summary.

(5) Unless otherwise ordered by the court, expert reports shall be provided to the parties 56 days (8 weeks) prior to hearing. Rebuttal reports shall be provided 21 days thereafter. If an initial report is served early, the rebuttal report shall not be required sooner than 35 days (5 weeks) before the hearing.

(6) Unless otherwise ordered by the court, parental responsibility evaluations and special advocate reports shall be provided to the parties pursuant to the applicable statute.

(7) The court shall not give presumptive weight to the report of a court appointed or jointly selected expert when such report is disputed by one or both parties.

(8) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Such trial preparation relating to experts shall be governed by C.R.C.P. 26(b)(4).

(h) Trial Management Certificates.

(1) If both parties are not represented by counsel, then each party shall file with the court a brief statement identifying the disputed issues and that party's witnesses and exhibits including updated Sworn Financial Statements and (if applicable) Supporting Schedules, together with copies thereof, mailed to the opposing party at least 7 days prior to the hearing date or at such other time as ordered by the court.

(2) If at least one party is represented by counsel, the parties shall file a joint Trial Management Certificate 7 days prior to the hearing date or at such other time as ordered by the court. Petitioner's counsel (or respondent's counsel if petitioner is pro se) shall be responsible for scheduling meetings among counsel and parties and preparing and filing the Trial Management Certificate. The joint Trial Management Certificate shall set forth stipulations and undisputed facts, any requests for attorney fees, disputed issues and specific points of law, lists of lay witnesses and expert witnesses the parties intend to call at hearing, and a list of exhibits, including updated Sworn Financial Statement, Supporting Schedules (if applicable) and proposed child support work sheets. The parties shall exchange copies of exhibits at least 7 days prior to hearing.

(i) Alternative Dispute Resolution.

(1) Nothing in this Rule shall preclude, upon request of both parties, a judge or magistrate from conducting the conferences as a form of alternative dispute resolution pursuant to section 13-22-301, C.R.S. (2002), provided that both parties consent in writing to this process. Consent may only be withdrawn jointly.

(2) The provisions of this Rule shall not preclude the parties from jointly consenting to the use of dispute resolution services by third parties, or the court from referring the parties to mediation or other forms of alternative dispute resolution by third parties pursuant to sections 13-22-311 and 313, C.R.S. (2002).

(j) Sanctions. If a party fails to comply with any of the provisions of this rule, the court may impose appropriate sanctions, which shall not prejudice the party who did comply. If a party attempts to call a witness or introduce an exhibit that the party has not disclosed under subsection (h) of this Rule, the court may exclude that witness or exhibit absent good cause for the omission.

Source: Entire rule adopted May 5, 1995, effective July 1, 1995, for all cases filed on or after that date; committee comment approved May 5, 1995, effective July 1, 1995; entire rule and committee comment repealed and replaced September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005; (e), (f), (h), and committee comment amended and adopted February 9, 2006, effective March 1, 2006; (c)(1)(E), (d), (e)(2), (e)(3), (f)(5), (g)(5), and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (g)(5) amended and effective February 8, 2013.

COMMITTEE COMMENT
(C.R.C.P. 16.2)

DISCLOSURES
This Rule is premised upon an expectation that regular status conferences will be conducted informally, that the parties will provide all necessary disclosures and that formal discovery, if authorized, will be tailored to the specific issues of the case. Disclosure of expert testimony and the signing of disclosures and discovery responses will be governed by C.R.C.P. 26 as specifically incorporated into section (e) of new Rule 16.2.

RULE 26.2
The current Rule 26.2 will be repealed. Disclosure of expert testimony and the signing of disclosures and discovery responses will be governed by C.R.C.P. 26 as specifically incorporated into section (e) of new Rule 16.2. Relevant provisions of C.R.C.P. 26 that relate to any additional discovery authorized by the court or stipulated to by the parties under sections (f) and (g) of the new Rule have been incorporated into new Rule 16.2. It is the intent of the committee that relevant caselaw under Rule 26.2 or Rule 26 will have precedential value. The pattern interrogatories and pattern requests for production of documents will also be modified to be consistent with new Rule 16.2.

APPENDICES AND FORMS
The Supreme Court approved the mandatory disclosures, sworn financial statement and supporting schedules forms referenced in 16.2(e)(2), and inclusion of these forms in the Appendix to Chapters 1 to 17A of the Colorado Rules of Civil Procedure. Rule 16.2 requires compliance with the mandatory disclosures, and completion of the sworn financial statement form and supplemental schedule (if applicable) submitted with this Rule to achieve the disclosure intended by the Rule. The court also approved the amended pattern interrogatories (Form 35.4) and pattern requests for production (Form 35.5). The court further approved the form of the Stipulated Case Management Plan, an associated Order referenced in 16.2(c)(1)(C), and the Court Authorization for Financial Disclosure, referenced in 16.2(e)(9), which forms now have JDF numbers.

SETTLEMENT CONFERENCES
Rule 121, Section 1-17 has been amended to permit a judge or magistrate to conduct a settlement conference or utilize other alternative dispute resolution techniques under Rule 16.2(i).

ANNOTATION

Law reviews. For article, ''Everything You Want to Know About the New Domestic Rules'', see 24 Colo. Law. 1795 (1995). For article, ''Rules 16 and 16.2: Reality Check 1998'', see 27 Colo. Law. 45 (March 1998). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002). For article, ''New Rule 16.2: A Brave New World'', see 34 Colo. Law. 101 (January 2005). For article, ''Complex Financial Issues in Family Law Cases'', see 37 Colo. Law. 53 (October 2008). For article, ''The Motion in Limine: Use in Domestic Relations Cases'', see 43 Colo. Law. 47 (March 2014). For article, ''Divorce in the Land of Startups'', see 43 Colo. Law. 47 (December 2014). For article, ''CRCP 16.2 Mandatory Disclosure in Domestic Cases'', see 45 Colo. Law. 59 (Sept. 2016).

This section imposes the same duty of active case management on courts hearing domestic relations matters that C.R.C.P. 26 imposes on district courts in other civil cases. In re Gromicko, 2017 CO 1, 387 P.3d 58.

District courts must take an active role in managing discovery when a person or entity from whom discovery is sought objects to the scope of that discovery. In such a case, the district court must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs. In making such a determination, the court should, at a minimum, consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F). In re Gromicko, 2017 CO 1, 387 P.3d 58.

Where hearing on removal issue is set in shorter time frame than envisioned by C.R.C.P. 26.2, then the 60-day time limit for the disclosure of expert witness testimony set forth in that rule cannot be met and the more general provisions of that rule must yield to the provisions of this rule, which contain specific provisions for post-decree and modification matters subject to a shortened time schedule. In re Woolley, 25 P.3d 1284 (Colo. App. 2001).

Court properly balanced its obligation to accord mother due process against its need to efficiently manage the case when it denied mother's last minute request to call 40 witnesses without providing prior notice to father. In re Hatton, 160 P.3d 326 (Colo. App. 2007).

Five-year retention provision in section (e)(10) applies only to disclosures made in connection with marital dissolution cases filed after January 1, 2005, the effective date of this rule as repealed and replaced. The five-year retention provision applies only to disclosures made pursuant to the new rule for the purposes of resolving new cases or new post-

decree motions filed after the effective date of the rule. Disclosures made before January 1, 2005 were not subject to the heightened disclosure duties of the new rule and are therefore not subject to the retention provision. Even in cases where post-decree motions alleging improper asset disclosure are filed after January 1, 2005, trial court does not have jurisdiction to modify property divisions based on such disclosures filed under the old rule. In re Schelp, 228 P.3d 151 (Colo. 2010).

Five-year jurisdictional limitation in section (e)(10) does not limit a court's jurisdiction to rule on timely motions if the five-year period expires before the ruling. In re Runge, 2018 COA 23M, 415 P.3d 884.

Application of this rule to wife's post-decree motion does not constitute retrospective legislation in accordance with art. II, § 11, of the state constitution. In re Roberts, 194 P.3d 443 (Colo. App. 2008), rev'd on other grounds sub nom. In re Schelp, 228 P.3d 151 (Colo. 2010).

Husband's omission of the value of his marital portion of his pension materially affected the division of assets. Trial court correctly reopened permanent orders and awarded wife entire marital portion of husband's pension. In re Schelp, 194 P.3d 450 (Colo. App. 2008), rev'd on other grounds, 228 P.3d 151 (Colo. 2010).

Husband's failure to disclose mandatory financial information regarding his company violates section (e), even though wife subsequently entered into a memorandum of understanding. Duty is on husband to report all required financial information without the other spouse having to request it. In re Hunt, 2015 COA 58, 353 P.3d 911.

Wife's motion to reopen property division after entering a memorandum of understanding should be granted because husband's violation of disclosure requirements affected the division of assets. In re Hunt, 2015 COA 58, 353 P.3d 911.

Child support is not a "liability", the omission or nondisclosure of which materially affects the division of assets or liabilities under section (e)(10). In re Roddy, 2014 COA 96, 338 P.3d 1070.

Five-year reach-back provision in section (e)(10) applies only to assets and liabilities, not maintenance or income for the purpose of determining maintenance. The rule does not allow a redetermination of maintenance. In re Dadiotis, 2014 COA 28, 343 P.3d 1017.

Five-year jurisdictional limitation in section (e)(10) applies where husband's motion to modify the final decree was filed about six-and-one-half years later. Fritsche v. Thoreson, 2015 COA 163, 410 P.3d 630.

A movant may make allegations based on information and belief. In re Durie, 2018 COA 143, __ P.3d __.

And has the right to conduct discovery to support the motion. In re Durie, 2018 COA 143, __ P.3d __.

Wife initially entitled to limited discovery to pierce corporate veil. In deciding proper scope of discovery for wife's claim that corporation is husband's alter ego, trial court should have considered factors set forth in Leonard v. McMorris, 63 P.3d 323 (Colo 2003), relating to making alter ego determinations. Trial court required to engage in active case management and erred in denying corporation's motion to quash subpoena without tailoring discovery to that reasonable and necessary to establish alter ego relationship. If relationship established, wife may be entitled to further discovery. In re Gromicko, 2017 CO 1, 387 P.3d 58.

Wife not required to plead in dissolution petition claim seeking to pierce corporate veil. In re Gromicko, 2017 CO 1, 387 P.3d 58.

Plausibility standard governing motions to dismiss under C.R.C.P. 12(b)(5) does not apply to wife's motion pursuant to this rule. The plausibility standard set forth in Warne v. Hall, 2016 CO 50, 373 P.3d 588, does not apply to wife's motion to reopen the property division provisions of the parties' separation agreement because wife's motion is not a pleading. In re Runge, 2018 COA 23M, 415 P.3d 884; In re Durie, 2018 COA 143, 415 P.3d 884.

Particularity requirement of C.R.C.P. 9(b) does not apply to motions under section (e)(10) of this rule. In re Durie, 2018 COA 143, __ P.3d __.

A district court must determine under the preponderance of evidence standard whether a movant is entitled to relief. In re Durie, 2018 COA 143, __ P.3d __.

Wife did not allege a sufficient basis for the trial court to allocate misstated or omitted assets under section (e)(10). In re Runge, 2018 COA 23M, 415 P.3d 884.

CHAPTER 3

Parties

ANALYSIS BY RULE

CHAPTER 3

PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

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

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

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

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

II. REAL PARTY IN INTEREST.

A. In General.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Who Is Real Party in Interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Action by Executor or Trustee or in Contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CAPACITY TO SUE OR BE SUED.

A. In General.

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

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

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

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

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

B. Married Women.

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

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

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

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

C. Partnerships or Unincorporated Associations.

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

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

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

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

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

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

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

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

D. Injury or Death of Child.

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

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

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

Since either or both may sue, the defendant cannot be affected or prejudiced whichever course they may take; the grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a single suit. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

IV. INFANTS OR INCOMPETENT PERSONS.

A. In General.

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

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

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

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

B. Sue or Defend.

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

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

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

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

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

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

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

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

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

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

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

C. Appointment of Guardian.

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

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

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

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

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

It would be an abuse of discretion not to appoint a guardian ad litem in those situations in which the spouse (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own

interest. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

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

Rule 18. Joinder of Claims and Remedies

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

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

ANNOTATION

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

I. GENERAL CONSIDERATION.

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

II. JOINDER OF CLAIMS.

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

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

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

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

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

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

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

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

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

Diverse parties in a foreclosure action can join in requesting a common receiver, if they feel their own interests can best be served thereby. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

This rule specifically authorized the inclusion of counterclaims in replies to counter-

claims, the analogous federal rules having been so interpreted by federal courts. T. L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

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

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

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

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

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

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

III. JOINDER OF REMEDIES.

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

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

Rule 19. Joinder of Persons Needed for Just Adjudication

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

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

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

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

In litigation concerning a transfer of a conservation easement tax credit, joinder of a transferee who is represented by its tax matters representative is not required. Kowalchik v. Brohl, 2012 COA 49, 411 P.3d 681.

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

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

Applied in Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956); Howard v. First Nat'l Bank of Denver, Inc., 354 F.2d 217 (10th Cir. 1966); Union P. R. R. v. State, 166 Colo. 307, 443 P.2d 375 (1968); Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968); Hennigh v. Bd. of County Comm'rs, 168 Colo. 128, 450 P.2d 73 (1969); F.R. Orr Constr. Co. v. Ready Mixed Concrete Co., 28 Colo. App. 273, 472 P.2d 193 (1970); Bashor v. Northland Ins. Co., 29 Colo. App. 81, 480 P.2d 864 (1970), aff'd, 177 Colo. 463, 494 P.2d 1292 (1972); Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970); Jones v. Adkins, 34 Colo. App. 196, 526 P.2d 153 (1974); Stalos v. Booras, 34 Colo. App. 252, 528 P.2d 254 (1974); Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977); Erger v. District Court, 198 Colo. 369, 599 P.2d 917 (1979); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981); Creditor's Serv.,

Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); Mitchell v. District Court ex rel. Eighth Judicial Dist., 672 P.2d 997 (Colo. 1983); Durango & Silverton Narrow Gauge v. Wolf, 2013 COA 118, 411 P.3d 793.

II. JOINED IF FEASIBLE.

A. In General.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Illustrative Cases.

In action for breach of contract against a subdivision developer in which certain plaintiffs held property in subdivision as joint tenants with their spouses, spouses were indispensable parties. Seago v. Fellett, 676 P.2d 1224 (Colo. App. 1983).

And any error resulting from a failure to insist upon joinder of a spouse who is a co-

owner, when the record shows that a party had and rejected a clear opportunity to insist upon joinder at trial, is invited error. Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

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

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

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

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

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

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

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

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

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

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

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

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

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

In a situation in which a court has been asked to determine the disposition of escrowed money, as a pragmatic matter, the money is there and there is a duty on the part of

the judiciary, once asked, to reach a decision on the merits; and to do so means that the trial court must sua sponte join the parties necessary to a determination as to who gets the money. City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976).

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

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

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

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

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

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

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

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

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

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

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

III. DETERMINATION BY COURT.

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

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

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

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

The definition of "indispensable parties" by the U.S. supreme court is: Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

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

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

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

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

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

Beneficiaries of a trust are not indispensable parties where the trust is a party to the action and is represented by the trustee. In such a case the beneficiaries' absence does not ''impair or impede'' a complete adjudication of the parties' rights. Francis v. Aspen Mtn. Condo. Ass'n, 2017 COA 19, 401 P.3d 125.

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

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

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

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

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

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

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

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

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

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

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

because, whether the court required a location and extent review, as the district sought, or an amendment to the PUD, which the county believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs, 205 P.3d 487 (Colo. App. 2008), aff'd on other grounds, 221 P.3d 1063 (Colo. 2009).

Court erred in dismissing case for failure to join a party under this rule, the defendant's husband's estate did not need to be joined because complete relief could be accorded between plaintiff and defendant. The defendant was in possession of the life insurance proceeds at issue and the estate had no interest in those proceeds since they were not part of the estate assets. Scott v. Scott, 2018 COA 25, 428 P.3d 626.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective right to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(c) Parties Jointly or Severally Liable. Persons jointly or severally liable upon the same obligation or instrument, including the parties to negotiable instruments and sureties on the same or separate instruments, may all or any of them be sued in the same action, at the option of the plaintiff.

Cross references: For joinder of persons needed for just adjudication, see C.R.C.P. 19.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980).

It is within sound discretion of trial court to drop or strike parties, and decision will not be reversed on appeal unless abuse is shown. Corbin by Corbin v. City and County of Denver, 735 P.2d 214 (Colo. App. 1987).

Applied in M & G Engines v. Mroch, 631 P.2d 1177 (Colo. App. 1981); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); W.R. Hall Constr. Co. v. H.W. Moore Equip. Co., 661 P.2d 1183 (Colo. App. 1982).

II. PERMISSIVE JOINDER.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945).

This rule relates to joinder of parties and has no application to misjoinder of claims. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

This rule relates to multiple plaintiffs and defendants in actions involving common questions of law or fact. Jernigan v. Lakeside Park Co., 136 Colo. 141, 314 P.2d 693 (1957).

There must be such a common question among defendants. Section (a) of this rule requires, in order that a joinder of multiple parties

and claims may be sustained, that there shall be a common question of law or fact among the defendants as well as among the plaintiffs. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

It is no longer necessary that each plaintiff have an interest in claims of the other plaintiffs before joining in a common suit with them. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956); Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

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

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

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

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

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

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

III. SEPARATE TRIALS.

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

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

IV. PARTIES JOINTLY OR SEVERALLY LIABLE.

A. In General.

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

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

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

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

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

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

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

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

A stranger cannot become a surety without such consent within the meaning of this rule, which, in this respect, applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and

promissory notes as well as sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. Kruschke v. Quatsoe, 49 Colo. 312, 112 P. 769 (1910).

Where an action is dismissed as to the principal and continued as to the surety, it is the same as though the action in the first instance had been brought by the obligee against the surety only, and this is permitted by this rule. McAllister v. People, 28 Colo. 156, 63 P. 308 (1900).

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

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

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

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

B. Joint and Several Obligations.

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

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

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

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

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

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

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

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

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

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

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

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

Holder may sue indorser after obtaining judgment against maker. Under this rule the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser without prejudice, and obtains judg-

ment against the maker may afterwards sue the indorser. Hamill v. Ward, 14 Colo. 277, 23 P. 330 (1890).

Obligee on appeal bond may sue surety with or without principal. The obligee in a bond given on appeal may, if he so elects, sue the surety thereon without joining the principals, or having joined them and not having procured service of summons upon them, may proceed against the defendant served as if he were the only defendant. Lux v. McLeod, 19 Colo. 465, 36 P. 246 (1894).

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

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

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

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

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

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

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

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

Rule 21. Misjoinder and Nonjoinder of Parties

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

ANNOTATION

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

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

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

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

The latter result can be accomplished by an assignment of the right of action to the person who actually prosecutes it, inasmuch as assignments for collection have long been recognized as valid in Colorado, and the assignee thereof is the real party in interest and

entitled to prosecute the claim. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

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

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

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

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

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

Rule 22. Interpleader

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

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

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

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

ANNOTATION

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

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

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

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

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

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

Rule 23. Class Actions

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Disposition of Residual Funds.

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

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

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

ANNOTATION

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

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

A designation of an action as a class action does not make it so when the facts show

otherwise. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

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

Failure to qualify under one of the subsections of section (b) is grounds for denial. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005); Town of Breckenridge v. Egencia, LLC, 2018 COA 8, __ P.3d __.

Determination of whether requirements met within discretion of trial court. The determination of whether an action does or does not meet the requirements of a class action is within the discretion of the trial court. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974); State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

Need for class certification under section (b)(3) is permissible, but not dispositive, when common questions of law or fact predominate. State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997).

The decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion. Friends of Cham. Music v. City & County of Denver, 696 P.2d 309 (Colo. 1985); Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

Where trial court conducts rigorous analysis of the evidence in making its class certification decision, the trial court did not abuse its discretion in making its decision. State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

A trial court's determination whether the action should be accorded class treatment may not be set aside, unless that determination constitutes ''clear error''. Berco Res., Inc. v. Louisiana Land & Exploration Co., 805 P.2d 1132 (Colo. App. 1990); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

Because a trial court's decision to decertify a class is equivalent to a decision to deny class certification in the first instance, whether to decertify the class also lies within the trial court's discretion. Benzing v. Farmers Ins. Exch., 179 P.3d 103 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 812 (Colo. 2009).

Prior partial certifications are not determinative. The court is not required to certify a class for claims that had been previously certified in a partial settlement context against other settling defendants. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

Trial court may act sua sponte to create subclasses. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

Trial court is given broad discretion regarding whether to certify a class action under this rule and that decision will not be disturbed unless clearly erroneous and an abuse of discretion. Trial court determination that plaintiffs failed to demonstrate typicality is clearly not erroneous. Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860 (Colo. App. 1995); Buckley Powder Co. v. State, 924 P.2d 1133 (Colo. App. 1996), aff'd in part and rev'd in part on other grounds, 945 P.2d 841 (Colo. 1997).

However, no review of the validity of the certification of a class is necessary where all reasonable steps to provide the ''best notice practicable'' to members of the class as required by section (c)(2) have not been taken, resulting in the decertification of the class. Friends of Cham. Music v. City & County of Denver, 696 P.2d 309 (Colo. 1985).

Trial court abused discretion in certifying plaintiff's class as appropriate where no detailed findings were made which would have delineated the class or subclass with respect to each issue, especially in light of the large class and wide range of issues presented. Goebel v. Colo. Dept. of Insts., 764 P.2d 785 (Colo. 1988).

Trial court abused discretion in certifying two classes because it failed to rigorously analyze or even take into account defendant's evidence, offered to rebut class-wide inferences of causation, that the causation and amount of any damages to plaintiffs could only be determined by independent examination of each plaintiff's purchase transaction. Garcia v. Medved Chevrolet, Inc., 263 P.3d 92 (Colo. 2011).

Where the trial court failed to recognize its obligation to provide damages due to its misreading of the McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18 (1990), decision, the trial court must reconsider its reliance on that decision as a justification for denying class certification. State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997).

Source of determination of maintainability of class action. Where the complaint lacks sufficient factual material upon which to make a decision as to whether a class action is to be maintained, the trial court may consider affidavits and exhibits, but, absent a timely request to provide the court with further information in the form of affidavits, discovery, or evidence, the

trial court may determine this issue based upon allegations of the complaint alone. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

The determination of an action's class status may require more than a review of the pleadings; its resolution may well demand consideration of the nature of the evidence that will be presented. Thus, it is generally better practice for a trial court to hold an evidentiary hearing upon the question of class certification. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

A trial court must rigorously analyze the evidence presented and determine that each requirement of this rule is met in order to certify a class. A trial court may consider factual or legal disputes, including expert disputes, to the extent necessary to determine whether the requirements have been met, but may not resolve factual or legal disputes to screen out or prejudge the merits of the case. Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011); Maxwell v. United Servs. Auto. Ass'n, 2014 COA 2, 342 P.3d 474.

There is often an overlap between the class certification decision and the merits of the case, particularly in the context of the predominance inquiry under section (b)(3). Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011); Maxwell v. United Servs. Auto. Ass'n, 2014 COA 2, 342 P.3d 474.

The trial court is precluded only from resolving a factual or legal dispute that goes solely to the merits of the case, while considering the issues to the extent necessary to satisfy itself that the requirements of this rule have been met. Maxwell v. United Servs. Auto. Ass'n, 2014 COA 2, 342 P.3d 474.

Focus is whether the proof presented at trial will be predominantly common to the class or primarily individualized. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Class representatives need only establish a nexus between their claims or defenses and the common questions of fact or law that unite the case. Members of class may have varying damages amounts and still establish the typicality requirement. Devora v. Strodtman, 2012 COA 87, 282 P.3d 528.

Existence of a common nucleus of operative fact is the standard used by many courts. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Where plaintiff alleged misconduct by insurer in charging higher premiums than stated in policy, the fact that the insurer used at least seven different types of policies, with varying statements of the amounts and payment schedules for premiums, precluded class certification. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Early determination of feasibility of class action is preferred so that ample notice may be given to members of the class to appear in the action, seek exclusion from the class, or object to the representation by the plaintiffs, and, so that, if certification is properly denied, applicable statutes of limitations will not have run. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Actual size of defined class is significant factor in the determination that the class is sufficiently large to render joinder impracticable and mere speculation as to size is insufficient. Kniffin v. Colo. W. Dev. Co., 622 P.2d 586 (Colo. App. 1980).

Sections (c) and (d) grant to a trial court substantial discretion to create subclasses with respect to separate issues or to enter other orders designed to manage the litigation. Thus, to the extent that a fraud claim alleged by plaintiffs could be asserted only by those condominium unit owners to whom a specific representation was made, the court, after receipt of evidence upon the matter, could either refuse class action treatment with respect to that claim or create a separate class for its assertion, depending upon the nature of any alleged representation and the number of present unit owners to whom it was allegedly made. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Creation of smaller class or of subclasses is an option if the original definition of a class is too broad; however, the burden is on the plaintiff not the court to suggest these alternatives. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

In a class action under this rule where the interests sought to be represented are not in full harmony with the plaintiff, he cannot maintain a class action in their behalf. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955); Darnall v. City of Englewood, 740 P.2d 536 (Colo. App. 1987); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

Very nature of "habeas corpus" forfends class actions. Although ''habeas corpus'' is a civil proceeding, this rule of civil procedure, providing for class actions, does not apply; the very nature of ''habeas corpus'' proceedings forfends class actions. Riley v. City & County of Denver, 137 Colo. 312, 324 P.2d 790 (1958).

Under this rule, in order to qualify persons as members of a class, there must be some status or relationship in common between them which arises out of circumstances other than that of conducting business under a common

name as an unincorporated association. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Class properly confined to geographical parameters originally pleaded. Goebel v. Colo. Dept. of Insts., 830 P.2d 1036 (Colo. 1992).

Members who make up an unincorporated association do not, by the bare fact of common membership, constitute a "class" within the meaning of this rule. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

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

As to the third part of the test, while an association may generally obtain declaratory or injunctive relief without joining its members, any litigation designed to obtain damages on their behalf would normally require the member's presence. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Class action may be maintained by an association of public employees seeking declaratory judgment pertaining to longevity pay increases. Colo. Ass'n of Pub. Employees v. Colo. Civil Serv. Comm'n, 31 Colo. App. 369, 505 P.2d 54 (1972).

Burden of establishing that action should proceed as class action on party seeking. In any application to proceed as a class action, the burden of establishing that an action should proceed as a class action is on the party seeking to utilize the class action. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974); Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979); Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

In class actions the courts have broad discretion to shape and administer judicial relief. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

A party requesting class action certification has the burden of proving that all the requisites of this rule have been satisfied. Kniffin v. Colo. W. Dev. Co., 622 P.2d 586 (Colo. App. 1980).

A class action advocate bears the burden of demonstrating that the claims being asserted may properly be accorded class action treatment. Before a plaintiff may have one or more of its claims treated as class claims it must initially demonstrate that the numerosity, commonality, typicality, and adequacy of representation requirements of section (a) are met. Berco Res., Inc. v. Louisiana Land & Exploration Co., 805 P.2d 1132 (Colo. App. 1990).

Plaintiffs had the burden of demonstrating the propriety of a class action. However, if the plaintiffs make an initial demonstration that a class action is appropriate under section (b)(3), then defendants cannot rely only upon the general allegations of a pleading to argue that common issues do not predominate over individual ones. They must, at the least, describe in some detail the nature of the evidence that they intend to produce upon the issue, so that the court may render an informed judgment upon the predominance of common legal or factual issues over individual ones. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

A "predominant" issue need not be one that is determinative of a defendant's liability. Rather, when one or more of the central issues in the action are common to the class and can be said to predominate, the action is proper under section (b)(3), even though other matters will have to be tried separately. Thus, resolution of common issues need not guarantee a conclusive finding on liability. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Individual issues regarding applicable statute of limitations do not necessarily defeat class certification. Named plaintiffs in a class action may demonstrate ignorance or reliance on a class-wide basis necessary to toll the statute of limitations using circumstantial evidence that is common to the class. Patterson v. BP Am. Prod. Co., 240 P.3d 456 (Colo. App. 2010), aff'd, 263 P.3d 103 (Colo. 2011).

Ignorance and reliance elements of fraudulent concealment may be inferred from circumstantial evidence, enabling plaintiffs to establish a theory of fraudulent concealment on a class-wide basis with evidence common to the class. BP Am. Prod. Co. v. Patterson, 263 P.3d 103 (Colo. 2011); Maxwell v. United Servs. Auto. Ass'n, 2014 COA 2, 342 P.3d 474.

Trial court failed to consider, in class certification issue, whether claims for damages were appropriate for class and if so whether notice to individual class members was required. Goebel v. Colo. Dept. of Insts., 764 P.2d 785 (Colo. 1988).

Litigants should be afforded opportunity to present evidence as to whether class action is maintainable, which implies sufficient discovery; however, a plaintiff may not rely on the theory that discovery and an evidentiary hearing are a matter of right, without making a minimal showing as to the requirements of this rule. Levine v. Empire Sav. & Loan Ass'n, 197 Colo. 293, 592 P.2d 410 (1979).

Once excluded from a class action, such excluded members are not to be included within any judgment of the court, whether ad-

verse or favorable. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

Generally, only a named class member may challenge settlement agreement. Absent intervention, an unnamed class member does not have standing to appeal the approval of a settlement agreement and plan of allocation. However, an unnamed class member who has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Where certain plaintiffs in a 42 U.S.C. § 1983 class action are dismissed because they have no claims under § 1983, and such plaintiffs are not representatives of a class of persons who may have claims under § 1983 and remain in the action, they cannot represent the class on appeal. Casados v. City & County of Denver, 924 P.2d 1192 (Colo. App. 1996).

Disallowance of discovery after dismissal. The trial court, after dismissing a class action, does not abuse its discretion in declining to allow discovery when that request is made for the first time in a motion for rehearing. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Where plaintiffs fail to request right to amend complaint for the purpose of demonstrating that their class action should be maintained, either prior to a trial court ruling on a motion to dismiss or in a motion for rehearing filed thereafter, they are precluded from raising that issue on appeal. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Trial court's approval of settlement for fundamental fairness must balance at least: The strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Helen G. Bonfils Found. v. Denver Post Employees Stock Trust, 674 P.2d 997 (Colo. App. 1983).

Extent of court's discretion in approving settlements summarized in Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Same legal principles apply in appellate review of total settlement, as between defendants and the class as a whole, and of an agreement for allocation of the settlement proceeds among class members. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Settlement needs not benefit all class members equally. However, a court may refuse to approve a settlement when a disparity of benefits to be received among the class members evidences either substantive unfairness or inadequate representation. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Evaluation of a proposed settlement or allocation plan is a fact-specific inquiry. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

No error in approval of settlement plan. Where the trial court considered all factors when weighing the fairness of a proposed settlement and, based upon all considerations, approved the settlement plan, there was no error. Helen G. Bonfils Found. v. Denver Post Employees Stock Trust, 674 P.2d 997 (Colo. App. 1983).

Defendant required to assist plaintiff in sending notice of the class action to the members of the class. Although the costs of sending notices of a class action lawsuit to the members of the class usually are borne by the plaintiff, there are situations where the defendant is better able to perform the mailing and incur the associated costs. The district court did not abuse its discretion when it required the defendant to send the notices since the defendant makes periodic mailings to class members and such notices could be included at insubstantial expense to the defendant. Mountain States v. District Court, 778 P.2d 667 (Colo. 1989), cert. denied, 493 U. S. 893, 110 S. Ct. 519, 107 L. Ed. 2d 520 (1989).

Four elements must be addressed prior to issuing a restraint on future communications during the pre-certification period. Several factors guide the trial court in considering the formulation of restrictions on future communication by a defendant to putative class members, including the: (1) Severity and likelihood of perceived harm; (2) precision with which the order is drawn; (3) availability of a less onerous alternative; and (4) duration of the order. Air Commc'n & Satellite Inc. v. EchoStar Satellite Corp., 38 P.3d 1246 (Colo. 2002).

Applicability of statutes of limitation and repose under federal tolling doctrines. As long as a party seeking to act as a class representative does not commence a new, separate suit as class representative, but merely seeks to mintain the currently pending and timely filed action as a class action and act as class representative, a statute of repose that would otherwise constitute a defense as to that party, disqualifying the party as a class representative, does not apply. Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994).

The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223 (10th Cir. 2008) (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)).

Class actions for injunctive relief certified under section (b)(2) do not preclude individual actions for damages. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Section (b)(2) is applicable where the relief sought is predominantly injunctive or declaratory, and does not apply where the primary claim is for damages. If the primary claim is for injunctive or declaratory relief and damages are also requested, the case can proceed as a section (b)(2) action without notice to class members if the damages claim can be characterized as incidental in nature. Goebel v. Colo. Dept. of Insts., 764 P.2d 785 (Colo. 1988).

Due process, as well as the requirements of the claim preclusion doctrine, must be satisfied before a class action can bind class members for a class judgment. While courts have held that due process is satisfied in class actions for injunctive relief when class members are adequately represented, minimal due process requires both notice and adequate representation in class claims for monetary damages since there is a property right at stake. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Because section (b)(3) includes due process safeguards necessary to preclude class members from bringing individual suits for damages and section (b)(2) lacks such safeguards, section (b)(2) was not intended to certify actions that preclude individual suits for damages. Section (b)(2), which authorizes class actions for injunctive relief and lacks notice and other procedural requirements, reflects that due process may only require adequate representation to bind class members to judgments for injunctive relief. In contrast, section (b)(3), which governs class actions for damages and imposes specific notice requirements, embodies due process requirements necessary to bind class members to judgments for monetary relief. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Federal cases under Fed.R.Civ.P. 23 are persuasive because C.R.C.P. 23 is virtually identical to the federal rule. Goebel v. Dept. of Insts., 764 P.2d 785 (Colo. 1988); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994); Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Failure strictly to comply with section (c)(3) does not preclude appellate review of the judgment. A failure of such compliance is merely a clerical defect correctable under C.R.C.P. 60(a). Any such defect does not toll the time for filing a notice of appeal. Goodwin v. Homeland Cent. Ins. Co., 172 P.3d 938 (Colo. App. 2007).

Class certification for fifty-five home rule cities seeking to impose taxes, interest, and penalties on online travel companies inappropriate under section (b)(2) because cities were primarily seeking monetary damages. Town of Breckenridge v. Egencia, LLC, 2018 COA 8, __ P.3d __.

Common questions do not predominate over fifty-five home rule cities with material differences in municipal accommodation tax ordinances that wish to be granted class action status to impose taxes, interest, and penalties on online travel companies. Class action is not the superior available method for the fair and efficient resolution of this issue under section (b)(3). Town of Breckenridge v. Egencia, LLC, 2018 COA 8, __ P.3d __.

Applied in City & County of Denver v. Gushurst, 120 Colo. 465, 210 P.2d 616 (1949); Mar-Lee Corp. v. Steele, 145 Colo. 447, 359 P.2d 364 (1961); Hoper v. City & County of Denver, 173 Colo. 390, 479 P.2d 967 (1971); Rodgers v. Atencio, 43 Colo. App. 268, 608 P.2d 813 (1979); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981); Cottrell v. City & County of Denver, 636 P.2d 703 (Colo. 1981); Ackmann v. Merchants Mtg. & Trust Corp., 645 P.2d 7 (Colo. 1982); In re Brandt v. Indus. Comm'n, 648 P.2d 676 (Colo. App. 1982); Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982); Bancroft-Clover Water & San. Dist. v. Metro. Denver Sewage Disposal Dist. No. 1, 670 P.2d 428 (Colo. App. 1983); Elk River Assocs. v. Huskin, 691 P.2d 1148 (Colo. App. 1984); Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011); Garcia v. Medved Chevrolet, Inc., 263 P.3d 92 (Colo. 2011); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011); Patterson v. BP Am. Prod. Co., 2015 COA 28, 360 P.3d 211; EnCana Oil & Gas (USA), Inc. v. Miller, 2017 COA 112, 405 P.3d 488.

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having

failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Cross references: For actions by shareholders, see § 7-107-402, C.R.S.

ANNOTATION

The purpose underlying the requirements of this rule is to avoid the possibility of a multiplicity of lawsuits against corporations by individual stockholders or small groups of stockholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

This rule avoids multiple suits by condominium unit owners against the condominium association or against the wrongdoers. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Courts have generally been careful to regard the derivative suit as an extraordinary remedy, which is available to the shareholder, as the corporation's representative, only when there is no other road to redress. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

The purpose of a derivative action is to recover sums owed the corporation. O'Malley v. Casey, 42 Colo. App. 85, 589 P.2d 1388 (1979).

The fact that a shareholder is a judgment creditor of the corporation does not automatically render such shareholder ineligible to maintain a derivative action. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

The requirements of this rule are mandatory. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

This rule encourages corporation rather than shareholders to sue. The purpose of this rule is to encourage the corporation itself, rather than the shareholders in its behalf, to sue for redress of corporate claims. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Stockholder may maintain a personal action only if actions of third party that injure corporation result from a violation of a duty owed to him as a stockholder and cause injury unique to himself and not suffered by other stockholders. Security Nat'l Bank v. Peters, Writer, & Christensen, Inc., 39 Colo. App. 344, 569 P.2d 875 (1977); Nicholson v. Ash, 800 P.2d 1352 (Colo. App. 1990); Kim v. Grover C. Coors Trust, 179 P.3d 86 (Colo. App. 2007).

This rule does not preclude derivative suit by corporation with only one minority stockholder. Clemons v. Wallace, 42 Colo. App. 17, 592 P.2d 14 (1978).

Compliance must be shown on face of complaint. In order to pursue a shareholder's derivative action, compliance must be shown on the face of the complaint. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where it is obvious from the face of the complaint that the requisite demand upon shareholders was not made and no explanation for the lack of demand is offered, an action by the stockholder will not lie. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Redress must first be sought from the directors. Courts will not interfere with the internal affairs and management of a corporation on the complaint of an individual stockholder or a small group of stockholders, unless it appears from the allegations of the complaint that all efforts to obtain redress from the directors have been exhausted or would have been futile. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Redress must then be sought from stockholders. When a stockholder or group of stockholders has exhausted all efforts to obtain redress from the directors, or where such efforts would have been futile, the stockholder must then make demand upon and seek relief from the stockholders of the corporation. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Record was insufficient to allow the trial court to conclude as a matter of law that plaintiffs were required to make a demand upon over 8,000 shareholders before they filed their complaint. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

Demands for desired action need not be made by shareholder plaintiffs upon directors allegedly involved as wrongdoers. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971); Hirsch v. Jones Intercable, Inc., 984 P.2d 629 (Colo. 1999).

A demand need be made only upon the directors who are in office at the time suit is commenced. A substantial change in membership of the board after suit is filed does not give rise to a requirement that a new demand for action be made. A contrary result would be overly burdensome to plaintiffs. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

Where it is demonstrated that making demand on shareholders in connection with nonratifiable wrongs of directors would involve unreasonable expense and effort, there is considerable authority that this would outweigh the merits of making the demand and that the demand therefore should be excused under such circumstances. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Demand upon shareholders is excused when the allegations in plaintiff's complaint are of such a nature and are stated with sufficient particularity as to indicate that such demand would be futile. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where directors and controlling shareholders are antagonistic, a demand upon them is presumptively futile and no demand need be made. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where the number of shareholders is not pled as an excuse, nor is it accompanied by any allegation regarding unreasonable costs of making the demand, a court will not determine whether thousands of shareholders do, or do not, formulate a valid basis for an excuse in making demand on them. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

That the shareholders could not ratify the alleged wrongs because of the illegal nature of the wrongs is not an acceptable reason or a valid excuse for not making a demand on the shareholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

The purpose of making demand on the shareholders is to inform them of the alleged nonratifiable wrongs, to seek their participation in available courses of action such as the removal of the involved directors and the election of new directors who will seek the redress required in the circumstances, or to secure shareholder approval of an action for damages to the corporation caused by the alleged wrongdoing directors. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Where plaintiffs allege that the defendant directors frustrated their attempt to secure a shareholders list by unreasonable restrictions, this is not a valid excuse for not making demand on the stockholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

A shareholder or member must make demand on all claims or suit barred. A corporate shareholder or member cannot, consistent with the requirements of this rule, make a demand upon the corporation as to certain claims, and then attempt to sue derivatively on other claims. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Summary judgment for failure of complaint to allege demand is error. Where the fact of the futility of a shareholder demand is placed in issue by the depositions and exhibits in the court file, it is error to grant summary judgment on the ground that plaintiff's complaint fails to allege the demand for shareholder relief required by this rule. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

A complaint that specifically alleges that a demand was made by one plaintiff on the board of directors to require the president of the corporation to pay sums which he received as a premium for stock sold and that such demand was refused is sufficient not only to plead the demand, but also to set forth the reasons why another plaintiff was excused from making a second demand for the same action. Allegations that the board of directors breached a duty of care owed to the corporation and its shareholders was sufficient to establish reason for plaintiff's failure to make further demands. Greenfield v. Hamilton Oil Corp., 760 P.2d 664 (Colo. App. 1988).

Dismissal of complaint for lack of verification was error. While the original complaint, as filed, had not been verified, where a notarized verification of the complaint, which had been signed and verified by plaintiff on November 21, 1972, was filed with the court on May 16, 1975, and defendant had failed to raise the issue until some two and one-half years after the complaint was filed, defendant waived the defect. Hence, the trial court erred in dismissing plaintiff's complaint on the ground that the verification required by this rule was lacking. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Summary dismissal of complaint based on special litigation committee recommendations was error. There is no basis to dismiss a claim asserted by plaintiffs in a derivative action where the ultimate decision to seek dismissal of such action was not made by the special litigation committee, but was a decision adopted by those persons who, as defendants in the litigation, had a vital personal interest in that decision. Greenfield v. Hamilton Oil Corp., 760 P.2d 664 (Colo. App. 1988).

Private settlements prevented. The provision that ''[t]he action shall not be dismissed or

compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs'' was intended to prevent private settlements between a plaintiff shareholder and the defendants. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

An out-of-court settlement by a corporation involved in a derivative suit is not prevented. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

The standard for the evaluation by trial courts of settlements in derivative suits under this rule is whether the agreement is fair, adequate, and reasonable. The standard is the same as the standard for settlements of class action suits under C.R.C.P. 23 because the court is charged with guarding the interests of those who are not parties to the agreement. Thomas v. Rahmani-Azar, 217 P.3d 945 (Colo. App. 2009).

And the standard of review of a trial court's decision to approve a settlement is for an abuse of discretion, as it is with appellate review of class action settlements. Thomas v. Rahmani-Azar, 217 P.3d 945 (Colo. App. 2009).

Particularity required by rule lacking. The general allegation that the plaintiffs ''have diligently endeavored, over several years past, to have the Board of Managers of the defendant Association and the Association membership as a whole prosecute and resolve the claims involved in this action, but said efforts have been unavailing'', completely lacks the particularity required by this rule. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

The mere fact that plaintiffs were represented by the same counsel as other plaintiffs was not sufficient to establish that they were "fronts" for a conflicting interest. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

For factors to be considered in a derivative action brought by a limited partner, see Moore v. 1600 Downing St., Ltd., 668 P.2d 16 (Colo. App. 1983).

Applied in Neusteter v. District Court, 675 P.2d 1 (Colo. 1984); Collie v. Becknell, 762 P.2d 727 (Colo. App. 1988).

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Cross references: For service and filing of pleadings and other papers, see C.R.C.P. 5.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J., 67 (1964).

This rule is a duplicate of the same numbered federal rule. Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963).

It must be liberally construed to avoid a multiplicity of suits, so that all related controversies should as far as possible be settled in one action. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

The rules of intervention are to be liberally construed so that all related controversies may be settled in one action. City of Delta v. Thompson, 37 Colo. App. 205, 548 P.2d 1292 (1975); Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001).

The legal concept of intervention is based upon the natural right of a litigant to protect himself from the consequences of an action against one in whose cause he has an interest, or by the result of which he may be bound. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955); Mauro ex rel. Mauro v. State Farm Mut., 2013 COA 117, 410 P.3d 495.

An existing or pending suit is prerequisite to intervention. Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Where a party is permitted intervention, it is immaterial whether the intervention is allowed under section (a) or (b) of this rule. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

This distinction is important only where a motion to intervene is denied, in which case it becomes important to determine whether a party seeking intervention is in fact a necessary party. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

If he is not a necessary party, his only recourse upon suing out his appeal is to assert that the trial court abused its discretion in denying permissive intervention. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

An order for intervention does no more than add a new party plaintiff. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

An order for intervention is not final, and no appeal from it lies. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Intervenor, however, cannot be substituted for defendant. While an intervenor may join either plaintiff or defendant in the principal action, or may oppose both, he cannot, without the consent of plaintiff, be substituted in the place or stead of defendant. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Intervenor is bound by forfeiture judgment where indemnity agreement. Under a contract by which intervenors agreed to indemnify a surety company against loss, they unquestionably would be bound by a judgment of forfeiture. Allison v. People, 132 Colo. 156, 286 P.2d 1102 (1955).

Where intervention is permitted by the trial court, its ruling will not be disturbed absent an abuse of discretion. Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

No abuse of discretion when motion for intervention denied because it was filed four days before trial. Supporting factual affidavit was not submitted and plaintiff had little opportunity to investigate the allegations. Andrikopoulos v. Minnelusa Co., 911 P.2d 663 (Colo. App. 1995), aff'd on other grounds, 929 P.2d 1321 (Colo. 1996).

The determination of the timeliness of a motion to intervene is a matter that rests within the sound discretion of the trial court, which must weigh the lapse of time in light of all the circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case. Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

Generally, intervention by a new party is not permitted at the appellate stage of litigation. Cerveny v. City of Wheat Ridge, 888 P.2d 339 (Colo. App. 1994).

The adequacy of an applicant's representation may bar the right to intervene. Benham v. Manufacturers & Wholesalers Indem. Exch., 685 P.2d 249 (Colo. App. 1984).

The intervention standards of this rule have no application to a criminal case, and, therefore, department of corrections may not intervene in such a case. People v. Ham, 734 P.2d 623 (Colo. 1987).

This rule had no application in a proceeding under the children's code, as the code itself expressly contemplates the active partici-

pation of interested parties. People in Interest of M.D.C.M., 34 Colo. App. 91, 522 P.2d 1234 (1974).

Rule as basis for jurisdiction. See Bd. of County Comm'rs v. Anderson, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 188 Colo. 337, 534 P.2d 1201 (1975); In re Crabtree, 37 Colo. App. 149, 546 P.2d 505 (1975).

Applied in Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979); O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); Sec. State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981); Margolis v. District Court, 638 P.2d 297 (Colo. 1981); People of Dept. of Soc. Serv. In Interest of A.E.V., 782 P.2d 858 (Colo. App. 1989).

II. INTERVENTION OF RIGHT.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''Civil Procedure'', which discusses a Tenth Circuit decision dealing with intervention of right, see 65 Den. U. L. Rev. 434 (1988).

An order denying intervention is appealable if intervention is a matter of right. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Standard of review. A de novo standard of review should apply when reviewing a trial court's denial of a motion to intervene as a matter of right under the substantive requirements of section (a)(2) because such requirements concern questions of law. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Standard of review is de novo when considering whether the applicant has an interest related to the subject of the litigation, whether that interest may be impaired or impeded if intervention is not allowed, and whether the present parties adequately represent that interest. Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001); Mauro ex rel. Mauro v. State Farm Mut., 2013 COA 117, 410 P.3d 495.

It is the duty of courts to respect the integrity of the issues raised by the pleadings between the original parties and to prevent the injection of new issues by intervention. Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970).

Intervention under section (a)(2) of this rule must be predicated upon both of the factors referred to therein, i.e., that the intervenor's interest is or may be inadequately represented and that he would or might be bound by a judgment in the action. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

An applicant for intervention of right under section (a)(2) must show both that the representation of his interest by existing parties is or might be inadequate and that the applicant is or might be bound by the judgment in action. Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974); Int'l Broth. of Elec. v. Denver Metro., 880 P.2d 160 (Colo. App. 1994).

All three elements of the rule — a property interest, an impairment of the ability to protect it, and inadequate representation — must be present before a right to intervene arises. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978); Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987); United Airlines, Inc. v. Schwesinger, 805 P.2d 1209 (Colo. App. 1991); Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996); Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001).

Neither element, standing alone, is sufficient. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974).

If either factor is missing, there is no absolute right of intervention. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974).

A party permitted to intervene pursuant to section (a)(2) of this rule is not necessarily indispensable pursuant to C.R.C.P. 19. Section (a)(2) provides for intervention when the applicant claims an interest relating to the property or transaction that is the subject of the action and he or she is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest. Although language of this rule and C.R.C.P. 19 are similar, rule 19 involves a two-step analysis: (1) Whether the party is necessary within the meaning of C.R.C.P. 19(a); and (2) whether the party is indispensable based on the factors of C.R.C.P. 19(b). Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

Because a grandparent may institute a new proceeding for visitation under § 19-1-117, regardless of prior child custody orders, disposition of a paternity action does not necessarily impair or impede his or her ability to protect the interest in visitation. Thus, both factors of section (a)(2) of this rule are not met and the court was justified in denying intervention. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

The interest in the litigation that an intervenor must show is an interest in the subject

matter of the litigation. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

It is not sufficient for him to show that he has an independent right of action against the defendant based on grounds like those asserted by the plaintiff. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

Flexible standard applies when determining a party's interest. A formalistic approach should not be used. The interest factor, unlike the practical harm and inadequate representation factors, should be viewed as a prerequisite rather than as a determinative criterion for intervention. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

"Interest" element looks merely to what interest is claimed by the intervenor, not whether he or she will ultimately be successful. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Where intervenor differed with class representatives on definition of ''loss'' that would qualify intervenor to share in proposed settlement, all three elements of this rule were present and intervention should have been granted. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

The timeliness of the intervention is a threshold question that must be answered before the adequacy of the elements is addressed. Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987); Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

Timeliness of an attempted intervention is to be gathered from all the circumstances in the case. The point of progress in the lawsuit is only one factor to be considered and is not, in itself, determinative. Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987).

Abuse of discretion occurred when trial court denied city's motion to intervene pursuant to section (a)(1) where the totality of the circumstances indicated that city was not notified of the court's ruling because it was no longer a party to the underlying suit nor included on the certificates of service, there was no basis on which to request intervention until the court issued its ruling, and the city's request was ancillary to the underlying case. Lattany v. Garcia, 140 P.3d 348 (Colo. App. 2006).

Lack of an attached pleading is not fatal where the person seeking intervention does not assert a ''claim or defense'' in the usual sense, and the basis of the person's contentions appears in the motion itself. Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001).

Cost of pursuing a separate action is not "impairment" of a party's interest within meaning of this rule. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Where investors possessed a private right of action that was not affected by res judicata, collateral estoppel, or stare decisis, their interests would be neither impaired nor impeded for purposes of section (a)(2) of this rule if they were denied intervention in an enforcement action by the securities commissioner. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Where the party seeking intervention could not opt out of a judgment prohibiting the named applicant "or any other person" from claiming wastewater returns as replacement credit, and could not bring an independent challenge to the water court's interpretation of a stipulation, the party should have been granted the right to intervene. Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401 (2011).

Even though the applicant might be bound by the judgment, he cannot intervene as of right if he is in fact adequately represented by the existing parties to the action. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963); In re Application for Underground Water Rights, 2013 CO 53, 304 P.3d 1167.

The most important inquiry in determining the adequacy of representation does not involve an analysis of the courtroom strategy of the representative but rather is concerned with how the interest of the absentee compares with the interest of the representative. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

The presumption that representation is adequate because of an identity of interests can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

A showing that the representative stands alone in his opinions about how the litigation should be conducted may be evidence of a divergence of interests between the representative and those he represents and may therefore be evidence of inadequacy. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

Failure of the personal representative to appeal a ruling sustaining a claim against the estate did not constitute inadequate representation. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or if he fails because of nonfeasance in his duty of representation. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Although a taxpayer may bring an action in the first instance against a municipality and its officers in some situations, such as where the corporate officers fail or refuse to prosecute or defend an action, this is different, however, from a situation where litigation is already in progress, being prosecuted or defended, or both, by the proper corporate officers. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

In the absence of such factors as fraud, collusion, bad faith, and the like, a taxpayer cannot intervene as a matter of absolute right. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Taxpayers and ratepayers do not have an absolute right to intervene. Taxpayers and ratepayers have not fared very well in their efforts to secure an absolute right of intervention, inasmuch as representation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Defrauded investors' interests were adequately represented by securities commissioner, who is the official designated to enforce laws to protect investors from fraud. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Taxpayer has standing to raise legitimacy of governmental access to bank records. Once the court allows intervention in a § 39-21-112 proceeding, it follows that a taxpayer with an expectation of privacy in his bank records has standing to raise the legitimacy of governmental access to the records in a motion to quash the subpoena for the records. Charnes v. DiGiacomo, 200 Colo. 94, 612 P.2d 1117 (1980).

Where it does not appear that intervenors are parties to an alleged contract between plaintiff and defendants upon which right of recovery in the action proper is premised, nor does it appear the defendants are apprised of the existence of an alleged contract between plaintiff and intervenors, which is the basis of intervenors' claim against plaintiff, an application for leave to intervene is properly denied. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, moves to intervene individually and on behalf of other stockholders similarly situated, presents to the trial court a petition to have the judgment set aside, asks for leave to file an answer, and requests that the case be decided on the merits — it appearing from the petition that he was not a party to the original proceeding, would be prejudiced by the judgment if it were permitted to stand, and that he had good defense to the action — the petition should be granted, since a denial thereof constitutes prejudicial, reversible error. Brown v. Deerksen, 163 Colo. 194, 429 P.2d 302 (1967).

Rezoning dispute permits intervention. Intervention as a matter of right is permitted in a rezoning dispute. Dillon Cos. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973).

Insurer has a right to intervene in action between its insured and an uninsured motorist if insurer can show that its interests are or might be inadequately represented. Briggs v. Am. Family Mut. Ins. Co., 833 P.2d 859 (Colo. App. 1992).

When an insurer can show that representation of its interest is or might be inadequate in an action between the insured and an uninsured motorist, it has the right to intervene in an action between the two and to have full adjudication of all issues at a single trial. Briggs v. Am. Family Mut. Ins. Co., 833 P.2d 859 (Colo. App. 1992).

Intervention was properly granted to subcontractor whose presence was necessary in action for disclosure of documents to present evidence establishing that disclosure of redacted material would be injurious to its competitive position in the industry. International Broth. of Elec. v. Denver Metro., 880 P.2d 160 (Colo. App. 1994).

Intervention should have been granted where insurance company sought to challenge the terms of a protective order regarding discovery that would have affected its recordkeeping, business practices, and compliance with state and federal insurance regulations. The fact that the insurer's attorney represented individual defendants on the underlying liability issues did not mean that the insurer's interests with regard to the protective order would be adequately represented. Mauro ex rel. Mauro v. State Farm Mut., 2013 COA 117, 410 P.3d 495.

Section 19-1-117 does not confer an unconditional right to intervene in a paternity action under section (a)(1) or as of right under section (a)(2). Because the statute requires a grandparent to rebut the presumption that the parent's decision regarding visitation is in the child's best interest, it does not give rise to an absolute right to visitation. Because the statute does not vest a grandparent with an absolute right to visitation and issues concerning grandparent visitation are not inherent in a paternity action, there is no absolute or unconditional right for a grandparent to intervene in a pater-

nity action. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

Grandparents may intervene as a matter of right under section (a) in a dependency and neglect proceeding at any time after adjudication. Denial of grandparents' motion was a final appealable order. People ex rel. O.C., 2012 COA 161, 312 P.3d 226, aff'd, 2013 CO 56, 308 P.3d 1218.

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947); Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

III. PERMISSIVE INTERVENTION.

Where intervention is permissive only, the application is addressed to the discretion of the court. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955); Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Permissive intervention is a matter of right within discretion of court. It is a matter which rests within the discretion of the trial court as to whether a petition for intervention should be granted where there is no showing upon which the intervention of petitioners should be granted as a matter of right. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Order denying intervention is not of that final character which furnishes a basis for appeal. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Order not final unless applicant has no other means of protecting his rights. An order refusing intervention is not a final and appealable order unless the applicant has no other adequate means of protecting his rights. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Denial of intervention appealable if court abuses its discretion. If intervention is permissive only, denial thereof is not appealable unless a trial court abuses its discretion. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

It can seldom, if ever, be shown that a trial court has abused its discretion in denying a permissive right to intervene. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Where permission to intervene is granted by a trial court, such a ruling may be reviewed only after entry of final judgment in the action and then only for possible abuse of judicial discretion. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Intervention is frequently denied even though common questions of law or fact are presented, if in addition collateral or extrinsic issues would be brought in by an intervenor. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Allowance of intervention is not error although the rights of the parties might have been worked out without the presence of the intervenor, where such participation did no harm and made a more comprehensive decree possible. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Trial court did not abuse its discretion in allowing child's stepfather to intervene in an action for child support payment, because there were common questions involved in the dispute and the stepfather had been assigned the right to collect past-due child support. In re Paul, 978 P.2d 136 (Colo. App. 1998).

Trial court did not abuse its discretion when it granted intervention. The intervening party to the case was the only party that had an interest in seeking the release of documents at issue in the case and the other party clearly indicated on the record that its interest was not aligned with the intervening party's interest. CF&I Steel, L.P. v. Air Pollution Control Div., 77 P.3d 933 (Colo. App. 2003).

Court did not abuse its discretion when it denied permissive intervention by grandparent for visitation. If, however, intervention would be in the child's best interest or would further judicial economy, intervention into a paternity action by a grandparent may be allowed at the court's discretion. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

This rule plainly dispenses with any requirement that an intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown. Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963).

Intervention under this rule proper for suspended attorney's former wife who was assignee of right to fees under divorce decree and sought to intervene as ''real party in interest'' in dispute over three-way division of contingent fee. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Intervention by attorney general. The attorney general's argument on the appropriateness of his permissive intervention under section (b)(2) of this rule failed to recognize the statutory language directing his appearance for the state of Colorado only ''when required to do so by the governor or the general assembly''. Gillies v. Schmidt, 38 Colo. App. 233, 556 P.2d 82 (1976).

Intervention by department of social services in paternity action. Where the interest of the department of social services in a support obligation owed to a dependent child is contingent on the outcome of a paternity action under § 19-6-110 (now § 19-4-110), it was improper to allow it to intervene as a party to the action. However, such action was harmless since the department could have enforced its interest derived from the paternity proceeding in a separate proceeding following entry of the order determining paternity. J.E.S. v. F.F., 762 P.2d 703 (Colo. App. 1988).

This rule does not permit intervention in a criminal case for civil relief absent exceptional circumstances. No exceptional circumstances existed to allow a sheriff to intervene in a first degree murder case to seek financial relief for housing the defendant. People v. Hood, 867 P.2d 203 (Colo. App. 1993).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947); Clung v. Griffith, 127 Colo. 315, 255 P.2d 973 (1953).

IV. PROCEDURE.

This rule requires that a motion to intervene shall be filed and that it shall be accompanied by a pleading. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Intervening party's failure to file a pleading with his motion does not compel reversal in light of the fact that defendant did not make a timely objection. In re Paul, 978 P.2d 136 (Colo. App. 1998).

One who does not file petition is a mere interloper. A party, complete stranger to an action, who without leave of court files a motion to restrain an action and who does not file a petition to intervene in the action pursuant to this rule is a mere interloper who acquires no rights by such unauthorized action, unless objections thereto are waived. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

This rule specifies that the motion shall set forth the grounds for intervention while the pleading shall state the claim of the intervenor, each being distinct from the other. A motion is not a pleading, although the two have similar formal parts and even though certain defenses may be raised by motion. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Motions for intervention filed after judgment or after a decision is rendered on appeal are viewed with disfavor, and the moving party has a heavy burden to show facts or circumstances which justify intervention at that late date. Spickard v. Civil Serv. Comm'n, 33 Colo. App. 426, 523 P.2d 149 (1974).

Courts view motions for intervention after judgment or after a decision is rendered on appeal with a jaundiced eye because it is assumed that intervention at this point will either prejudice the rights of the existing parties to the litigation, or substantially interfere with the orderly processes of the court. Spickard v. Civil Serv. Comm'n, 33 Colo. App. 426, 523 P.2d 149 (1974).

Abuse of discretion is the appropriate standard for review of a trial court's conclusion as to whether a would-be intervenor has satisfied the procedural requirements of section (c). Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

A trial court does not err in permitting intervention after judgment has been entered where the intervenors file their motion to intervene before judgment is entered. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

The fact that a default judgment is entered before the court's determination of the intervenors' motion does not cause the court to lose jurisdiction in the case. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

Although creditor did not strictly comply with this rule, creditor's complaint stated the grounds and facts upon which creditor sought intervention, together with creditor's claims. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Because defendant was given a full opportunity to respond to the allegations of creditor's complaint in intervention, any failure by creditor to comply precisely with this rule was not to the detriment of defendant's substantial rights. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Creditor's complaint in intervention sufficient even though complaint did not cite to the Colorado Uniform Fraudulent Transfer Act (CUFTA) or expressly allege a CUFTA claim. Because defendant's opening statement at trial demonstrated that defendant was aware of the substance of creditor's claim, defendant suffered no prejudice as a result of creditor's pleading. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Rule 25. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties

in the manner provided in Rule 4 for the service of process, and may be served in any county. Suggestion of death upon the record is made by service of a statement of the fact of death as provided herein for the service of the motion and by filing of proof thereof. If the motion for substitution is not made within 91 days (13 weeks) after such service, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in section (a) of this Rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a)(1) of this Rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial right of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

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

Cross references: For service of process, see C.R.C.P. 4; for service and filing of pleadings and other papers, see C.R.C.P. 5.

ANNOTATION

I. General Consideration.
II. Death.
III. Transfer of Interest.
IV. Public Officers.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Pleadings, Rules 7 to 25'', see 28 Dicta 368 (1951). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958).

Annotator's note. Since this rule is similar to §§ 15 and 290 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Applied in In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); B.C. Inv. Co. v. Throm, 650 P.2d 1333 (Colo. App. 1982); Garcia v. Title Ins. Co. of Minnesota, 712 P.2d 1114 (Colo. App. 1985).

II. DEATH.

This rule does not define the causes that survive. Clapp v. Williams, 90 Colo. 13, 5 P.2d 872 (1931).

This rule merely provides that, if the cause survives, the action shall not abate. Clapp v. Williams, 90 Colo. 13, 5 P.2d 872 (1931).

Trial court had personal jurisdiction over estate after plaintiffs amended complaint to name estate and estate's special administrator as defendants instead of deceased, non-existent defendant before any answer had been filed in the case. This cured the defect in personal jurisdiction contained in the original complaint. Currier v. Sutherland, 218 P.3d 709 (Colo. 2009).

An action involving the death of a party shall remain in abeyance a reasonable time until a representative can be appointed and qualified, who may be substituted and the suit proceed to judgment. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

An action does not abate by the death of a party, if the cause survives or continues. Wil-

liams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

This rule authorizes substitution of a proper party where a defendant dies and the claim against him is not extinguished by his death. Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

Section (a)(1) of this rule mandates personal service of suggestion of death on nonparty successors or personal representatives in accordance with C.R.C.P. 4. Where suggestion of death was not personally served upon daughters of decedent involved in negligence lawsuit, 90-day time limit for substitution was not triggered. Therefore, trial court improperly dismissed lawsuit for failure to substitute parties. Sawyer ex rel. Sawyer v. Kindred Nursing Ctrs. W., LLC, 225 P.3d 1161 (Colo. App. 2009).

The provisions of section (a)(1) of this rule for substitution of parties are procedural. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972).

Survival of actions and substitution of parties are function of the substantive law. This rule does not attempt to state what actions survive the death of a party nor does it attempt to designate the ''proper parties'' who may be substituted, as this is a function of the substantive law. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972).

In case of the death of a party, the court may, on motion, allow the action to be continued by his representative or successor in interest. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

The rule that an administrator cannot be joined in his capacity as administrator with codefendants in their individual capacity does not apply where an administrator is substituted in place of a deceased defendant, who died during the pendency of the action. Morgan v. King, 27 Colo. App. 539, 63 P. 416 (1900).

The "proper party" is the administrator of decedent's estate. Mills v. Saunders, 30 Colo. App. 462, 494 P.2d 1309 (1972).

This rule plainly recognizes the duty resting on litigants to make substitution of an administrator or executor for a party litigant who dies while a case is pending. Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956).

Action against deceased cannot be further prosecuted until administrator is substituted. Where a suit does not abate by reason of death, it cannot be further prosecuted against the estate of deceased or any liability on that account established against it until his legal representative, the administrator of the estate, is substituted as a party defendant. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1939).

It is the duty of administrator to defend. Where an action commenced against deceased does not abate by reason of his death, it becomes the duty of the administrator to defend under this rule where he is properly made a party defendant. Morgan v. King, 27 Colo. 539, 63 P. 416 (1900).

Until the administrator is made a party defendant, the action commenced against deceased remains in abeyance. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

An administrator is not required to take notice of pendency or defend until made a party thereto. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

An attorney for a deceased defendant has a duty to notify the court and the other parties in the action that his client has died. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

This rule does not require notification of identity of representative. There is nothing in this rule which could reasonably be a basis for requiring that notification of the death of a defendant should include the identity of the deceased defendant's executor, administrator, or representative. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

The plaintiff's attorney who receives notification of the defendant's death has the responsibility to promptly initiate the necessary inquiries to determine the identity of a person to be substituted for the deceased defendant and to file a motion for substitution. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

Burden is on plaintiffs to show excusable neglect to file motion for substitution. Where the issue is whether the failure to file a motion for substitution within the required 90 days under the facts is the result of excusable neglect, the burden is clearly on the plaintiffs to show that the failure to comply was due to excusable neglect. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

An intervenor is not required to move for revivor after such substitution. When substitution of parties is made and the legal representatives appear in the action, there can be perceived no valid reason why an intervenor therein, who supports the side of the party bringing about the revival and who originally intervened at the behest of the adverse party, should be required separately to additionally

move for a revivor as a condition precedent to the final adjudication of the mutual controversy with the common adversary. Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

Lien may be enforced by substituting executor. If a valid lien existed during the lifetime of deceased, it might be enforced, under this rule, by the substitution of his executor as a party defendant, and the subsequent rendition of a judgment against him in his representative capacity in favor of the plaintiff. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

This rule does not apply to lien which became vested upon entry of divorce decree. This rule has no application where plaintiff is seeking to enforce against specific real property deeded by the deceased to defendant a lien which became vested upon entry of a divorce decree. Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

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

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

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

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

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

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

III. TRANSFER OF INTEREST.

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

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

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

IV. PUBLIC OFFICERS.

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

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

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

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

CHAPTER 4

Disclosure and Discovery

ANALYSIS BY RULE

CHAPTER 4

DISCLOSURE AND DISCOVERY

Law reviews: For article, ''A Modest Proposal: The Rule 3(a) Waiver Agreement'', see 46 Colo. Law. 23 (Mar. 2017).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

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

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

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

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

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

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

(2) Disclosure of Expert Testimony.

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

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

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve

giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Trial Preparation: Experts.

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

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

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

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

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

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

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

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

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

resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENTS

1995

SCOPE

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

2002

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differ-

ences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

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

FEDERAL COMMITTEE NOTES

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

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

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

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

2001 COLORADO CHANGES

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

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

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until

preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

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

2015

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

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

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

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

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

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a ''brief *description* of the *specific* information that each individual is known or believed to possess.'' Under the prior rule, disclosures of persons with discoverable information identifying ''the subjects of information'' tended to identify numerous persons with the identification of ''X is expected to have information about and may testify relating to the facts of this case.'' The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

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

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

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

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

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

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''An Upjohn Update'', see 11 Colo. Law. 2137 (1982). For article, ''The Search for Truth Continued: More Disclosure, Less Privilege'', see 54 U. Colo. L. Rev. 51 (1982). For article, ''The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel'', see 54 U. Colo. L. Rev. 67 (1982). For article, ''Attorney-Client Privilege — the Colorado Law'', see 12 Colo. Law. 766 (1983). For comment, ''Colorado's Approach to Searches and Seizures in Law Offices'', see 54 U. Colo. L. Rev. 571 (1983). For article, ''Sequestration of Deponents in Civil Litigation'', see 15 Colo. Law. 1028 (1986). For article, ''New Role for Nonparties in Tort Actions — The Empty Chair'', see 15 Colo. Law. 1650 (1986). For article, ''Work-Product and

Attorney-Client Privileges in Colorado'', see 16 Colo. Law. 15 (1987). For article, ''The Role of Expert Psychological Testimony on Eyewitness Reliability'', see 16 Colo. Law. 469 (1987). For article, ''Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure'', see 23 Colo. Law. 2467 (1994). For article, ''Common Pitfalls in Complying with C.R.C.P. 16 and 26 When Drafting Case Management Orders'', see 26 Colo. Law. 39 (March 1996). For article, ''Civil Rules 16 and 26: Pretrial Procedure and Discovery Revisited and Revised'', see 30 Colo. Law. 9 (December 2001). For article, ''Professionalism and E-Discovery: Considerations Post-Zubulake'', see 41 Colo. Law. 65 (June 2012).

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

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

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

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

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

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

"Lone Pine orders", where a trial court orders plaintiffs to present prima facie evidence supporting their claims after initial disclosures, but before other discovery commences, or risk having their case dismissed, are prohibited under state law. While the supreme court revised C.R.C.P. 16 to create a ''differential case management/early disclosure/limited discovery system'', these revisions are not so substantial as to effectively overrule other supreme court holdings. Although portions of this rule and C.R.C.P. 16 may afford trial courts more discretion than they previously had, that discretion is not so broad as to allow courts to issue Lone Pine orders. And, notably, the state's version of C.R.C.P. 16 does not include the language relied upon by federal courts when issuing Lone Pine orders. Existing procedures under the Colorado rules of civil procedure sufficiently protect against meritless claims, and, therefore, a Lone Pine order was not required solely on that basis. Strudley v. Antero Res. Corp., 2013 COA 106, 350 P.3d 874, aff'd, 2015 CO 26, 347 P.3d 149.

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

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

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

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

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

The 2015 amendment to section (a)(2)(B) that expert testimony "shall be limited to matters disclosed in detail in the [expert] report" does not create mandatory exclusion of expert testimony. Instead, the harm and proportionality analysis under C.R.C.P. 37(c) re-

mains the proper framework for determining sanctions for discovery violations. Rule 37(c)(1) works in conjunction with this rule to authorize the trial court to sanction a party for failing to comply with discovery requirements. Catholic Health v. Earl Swensson Assocs., 2017 CO 94, 403 P.3d 185.

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

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

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

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

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

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

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

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

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

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

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

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

Applied in Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Franco v. District Court, 641 P.2d 922 (Colo. 1982); Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938 (Colo. 1984); Leland v. Travelers Indem. Co. of Illinois, 712 P.2d 1060 (Colo. App. 1985); Watson v. Reg'l Transp. Dist., 762 P.2d 133 (Colo. 1988); Sunahara v. State Farm Mut. Auto. Ins. Co., 2012 CO 30M, 280 P.3d 649; Gonzales v. Windlan, 2014 COA 176, 411 P.3d 878.

II. METHODS.

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

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

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

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

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

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

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

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

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

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

III. SCOPE.

A. In General.

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

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

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

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

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

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

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

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

The plain language of section (b)(1) appears to create a two-tiered process of attorney-managed and court-managed discovery. Under the first tier, parties are permitted, as a matter of right, to seek discovery into any nonprivileged matter ''relevant to the claim or defense of any party''. Under the second tier, the court may permit broader discovery into ''any matter relevant to the subject matter involved in the action''. However, this rule does not explain the difference between discovery relevant to a ''claim or defense'' and discovery relevant to the ''subject matter''. And, attempts to define the specific contours of this distinction may only encourage additional contention among litigants. DCP Midstream, LP v.

Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187.

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

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

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

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

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

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

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

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

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

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

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

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

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

A refusal to answer interrogatories may be the basis of reversing a favorable judgment. Where the correctness of a ruling of a trial court denying the right to have a party answer interrogatories can be reviewed by writ of error, a party refusing to answer such interrogatories does so at his peril, since such refusal may be the basis for reversal of a favorable judgment. Denver & Rio Grande W. R. R. v. District Court, 141 Colo. 208, 347 P.2d 495 (1959).

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

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

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

Limited discovery on the issue of falsity is appropriate in a defamation suit where the materials may contain information relevant to

the issue of falsity and are admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. Living Will Ctr. v. NBC Subsidiary, 857 P.2d 514 (Colo. App. 1993).

B. Materials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Petitioner may obtain discovery. Even if an insurance company demonstrates that the requested documents constitute trial preparation materials, a petitioner nevertheless may obtain discovery upon a showing of substantial need of the materials in the preparation of his case and an inability without undue hardship to obtain the substantial equivalent of the requested information by other means. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

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

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

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

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

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

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

C. Experts.

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

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

The rule allows discovery of attorney work product shared with a testifying expert witness, provided the expert witness considers the work product in forming an opinion. A communication is discoverable even if the expert did not rely on it in forming his or her opinion; the expert need only consider the communication in developing the opinion. An expert considers documents or materials for purposes of the rule

where the expert reads or reviews them before or in connection with forming the opinion, even if the expert does not rely upon or ultimately rejects them. Gall v. Jamison, 44 P.3d 233 (Colo. 2002).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trial court did not abuse its discretion in precluding the testimony of a standard of care expert witness when the disclosing party failed to identify the prior trials and depositions at which the witness testified. Prior to the deposition of the expert witness, the disclosing party provided only dates and attorneys' names to the discovering party, thus shifting the burden to identify the case names and depositions at which the expert testified from the disclosing party to the discovering party, therefore, the preclusion of the witness was justified.

Svendsen v. Robinson, 94 P.3d 1204 (Colo. App. 2004).

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

Trial court did not abuse its discretion in concluding that father was not prejudiced by inadequate disclosures under section (a) when father did not argue how he was prejudiced by the defects in the department's expert disclosures and all parties stipulated that all experts endorsed by any party were qualified as experts in their listed areas of expertise. People in Interest of S.L., 2017 COA 160, 421 P.3d 1207.

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

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

Failure to produce a timely formal written report that contains the qualifications of the expert witness and a complete statement describing the substance of all opinions to be expressed does not result in prejudice to defendant when defendant was aware of all the information summarized in the report long before the trial. Saturn Sys., Inc. v. Militare, 252 P.3d 516 (Colo. App. 2011).

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

D. Other Illustrative Cases.

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

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

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

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

Certain factors shall be considered where official information privilege claimed for police files. In a litigation arising from allegations of police misconduct, when the official information privilege is claimed for files and reports maintained by a police department, concerning the incident on which the allegations of misconduct are based, or about the officers involved in the incident, the trial court has the advantage of the following formulation of factors to be considered in applying the privilege: (1) The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6)

whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

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

Tripartite balancing inquiry undertaken when right to confidentiality is invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980); Corbetta v. Albertson's, Inc., 975 P.2d 718 (Colo. 1999).

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

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

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

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

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

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

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

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

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

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

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

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

Prima facie proof of triable issue on liability for punitive damages is necessary to dis-

cover information relating to the defendant's financial status. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By binding plaintiff to the damage computations listed in plaintiff's initial disclosure statement merely because plaintiff did not designate the computations as estimates, the trial court effectively imposed a settlement on plaintiff and improperly involved the court in the settlement process. The trial court overemphasized plaintiff's failure to state that the initial disclosure of damages was an estimate, neglected to view the initial disclosures in the context of being information "now known and reasonably available," and was insufficiently attentive to the importance of an early exchange of information and the resulting need to update information under this rule. Absent some indication plaintiff tried to mislead the

defendants or the court in plaintiff's initial disclosure or tried to frustrate the settlement process, plaintiff not required to accept an offer limited to plaintiff's initial disclosures. By granting the defendants' joint motion for judgment for a specific amount of damages over the objection of plaintiff, the court abused its discretion. Morgan v. Genesee Co., 86 P.3d 388 (Colo. 2004).

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

Affidavit did not place privileged communications at issue and, therefore, did not result in an implied waiver of the attorney-client privilege. The mere denial of an allegation in an affidavit does not waive the attorney-client privilege. The affidavit did not concern any privileged information. And the affidavit was not in support of any claim or defense that depends on privileged information or attorney advice. State Farm Fire & Cas. Co. v. Griggs, 2018 CO 50, 419 P.3d 572.

IV. PROTECTIVE ORDERS.

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

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

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

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

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

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

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

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

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

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

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

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

A three-part balancing inquiry must be undertaken by the trial court when the right to confidentiality is invoked. This inquiry entails determining whether the party seeking to prevent disclosure has a legitimate expectation

that the information will not be disclosed, whether the state interest in facilitating the truth-seeking process through litigation is sufficiently compelling to overcome the asserted privacy interests, and whether disclosure can occur in a less intrusive manner. Williams v. District Court, 866 P.2d 908 (Colo. 1993).

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

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

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

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

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

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

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

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

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

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

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

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

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

Balancing standard required for protective order relating to physician-patient privilege. Trial court abused its discretion when it failed to balance the petitioners' interests in confiden-

tial communications with their therapists with the competing interest of the defendant in obtaining sufficient evidence to contest the damage claims for mental suffering and emotional distress. Bond v. District Court, 682 P.2d 33 (Colo. 1984).

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

V. SUPPLEMENTATION.

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

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

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

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

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

Rule 26.1. Special Provisions Regarding Limited and Simplified Discovery

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

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

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

Rule 26.3. Limited Monetary Claim Actions

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

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) **Petition; Order; Notice.** A person who desires to perpetuate his own testimony or that of other persons may file in a district court a petition verified by his oath (or, if there be more than one petitioner, then by the oath of at least one of them) stating either: (1) That the petitioner expects to be a party to an action in a court in this state and, in such case, the name of the persons who he expects will be adverse parties; or (2) that the proof of some facts is necessary to perfect the title to property in which petitioner is interested or others similarly situated may be interested or to establish any other matter which it may hereafter become material to establish, including marriage, divorce, birth, death, descent or heirship, though no action may at any time be anticipated, or, if anticipated, the expected adverse parties to such action are unknown to petitioner. The petition shall also state the names of the witnesses to be examined and their places of residence and a brief outline of the facts

expected to be proved, and if any person named in the petition as an expected adverse party is known to the petitioner to be an infant or incompetent person the petition shall state such fact. If the expected adverse parties are unknown, it shall be so stated. The court shall make an order allowing the examination and directing notice to be given, which notice, if the expected adverse parties are named in the petition, shall be personally served on them in the manner provided in Rule 4(e) and, if the expected adverse parties are stated to be unknown, and if real property is to be affected by such testimony a copy of such notice shall be served on the county clerk and recorder, or his deputy, of the county where the property to be affected by such testimony or some part of such property is situated but in any event said notice shall be published for not less than two weeks in some newspaper to be designated by the court making the order in such manner as may be designated by such court. If service of said notice cannot with due diligence be made, in the manner provided in Rule 4(e), upon any expected adverse party named in the petition, the court may make such order as is just for service upon him by publication or otherwise and shall appoint, for persons named in the petition as expected adverse parties who are not served in the manner provided in Rule 4(e), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the witness. Such notice shall state the title of the proceeding, including the court and county in which it is pending, the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected by such testimony. Any notice heretofore given which contains the above required matters shall be deemed sufficient. Any personal service required by the provisions hereof shall be made at least 14 days before the testimony is taken. If any person named in the petition as an expected adverse party is stated in any paper filed in such proceeding to be an infant or incompetent person, the provisions of Rule 17(c) apply, but no guardian ad litem need be appointed for any expected adverse party whose name is unknown.

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

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

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

(b) After Judgment or After Appeal. If an appeal of a judgment is pending, or, if none is pending, then at any time within 35 days from the entry of such judgment, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in such court. The motion shall show: (1) The names and addresses of the persons to be examined and the substance of the testimony, so far as known, which he

expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in trial courts.

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article on Colorado Rules of Civil Procedure concerning depositions, discovery, and pretrial procedure, see 21 Rocky Mt. L. Rev. 38 (1948). For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record'', see 34 Dicta 7 (1957). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For comment on Rozek v. Christen appearing below, see 36 U. Colo. L. Rev. 565 (1964). For article, ''Determination of Heirship by Special Proceedings and Temporary Conservatorship'', see 14 Colo. Law. 1781 (1985). For article, ''Alternative Depositions: Practice and Procedure'', see 19 Colo. Law. 57 (1990). For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (March 2004).

Under the common law, depositions could not be taken in cases to be filed, pending, or at all. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

At common law, in actions at law, it was deemed the right of the parties to have witnesses produced and examined viva voce and the right to take depositions was unknown; litigants, therefore, were obliged to resort to chancery or to procure the consent of the adverse party, which the court could compel by deferring the trial or by refusing to render judgment. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

Subsequently, statutes were enacted empowering common-law courts to authorize the taking of depositions. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

Such subsequent statutes must be strictly complied with. Statutory provisions for taking of depositions are generally considered in derogation of the common law, and, although they are to be liberally construed, such statutes must be strictly or substantially complied with. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

Applied in Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. BEFORE ACTION.

A. Petition; Order; Notice.

Statutory or rule authority for perpetuating testimony has since territorial days continuously been available in Colorado. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

Present authority for perpetuating testimony supplants the ancient chancery equitable procedures, inherent in the use of which is the element of good faith, seeking justice. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

This rule takes the place of the equitable bill in "memoriam sui perpetuam", the origin of which has been traced to canon law, which,

taking hold of men's consciences, extended its right to all cases in which it was important in the interest of justice to register testimony which would otherwise be lost, the object being to preserve evidence, to assist courts, to prevent future litigation, and especially to secure and preserve such testimony as might be in danger of being lost before the matter to which it related could be made the subject of investigation. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

In a proceeding to perpetuate testimony,a court of equity will not entertain the bill if it is possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate the testimony, and it must appear that the testimony may be lost by delay. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

"Absolute rights" are not granted by this rule, which conditions exercise of the right on many expressed factors: Going to court; paying a docket fee; preparing, verifying, and filing a petition containing certain material; notifying others; and the implied condition that one who seeks justice shall proceed in good faith in efforts to attain his goal. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

The right to take depositions in "perpetuam memoriam" as provided by this rule is conditioned on proceeding in good faith to avail oneself of the privileges of the rule. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

A petitioner to perpetuate testimony fails to comply with the provisions of this rule where he does not state in unequivocal language that "he expects to be a party to an action" in that he is not proceeding in good faith to avail himself of the privileges granted by the rule. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

Where the statement that the petitioner seeking to perpetuate testimony "expects to be a party" is followed by the statement that others will be named as adverse parties "in the event a complaint is filed", such is not such a direct and positive statement by petitioner as to constitute strict compliance with the requirements of this rule when considered in light of the party plaintiff provisions of C.R.C.P. 3. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

An application to perpetuate testimony must be made in good faith for the purpose of obtaining, preserving, and using material testimony, and a sham application must be denied. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

The taking of a deposition will not be permitted where it is evidence that applicant is not proceeding in good faith, as where the application is a ''fishing expedition'' to discover in advance of the trial what the witness will testify to. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

Where the record was convincing that petitioner was not proceeding in good faith to perpetuate testimony in an expected libel suit, but rather as a guise to embark upon a ''fishing expedition'' on matters wholly unrelated to libel and to conduct an inquisition designed to help resolve a ''political'' matter in a manner acceptable to petitioner, the court could not grant a petition under this rule. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

For cases construing former provisions as to perpetuation of testimony, see Darrow v. People ex rel. Norris, 8 Colo. 417, 8 P. 661 (1885); Levy v. Dwight, 12 Colo. 101, 20 P. 12 (1888).

B. How and When Used.

The deposition of a witness may be used by any party if the court finds that the witness is unavailable at the time of trial for any of the reasons listed in this rule. J. R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

In order that a deposition may be admitted into evidence, the party offering the deposition must make a sufficient showing of the unavailability of the deponent at the time of trial. J. R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

Where plaintiff failed to make any effort to establish the unavailability of a witness whose testimony comprised a deposition, the deposition should not have been admitted into evidence. J. R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

Rule 28. Persons Before Whom Depositions May Be Taken

(a) **Outside the State of Colorado.** Depositions outside the State of Colorado shall be taken only upon proof that notice to take deposition has been given as provided in these rules. The deposition shall be taken before an officer authorized to administer oaths by the laws of this state, the United States or the place where the examination is to be held, or before a person appointed by the court in which the action is pending. A person so appointed has the power to administer oaths and take testimony.

(b) **Disqualification for Interest.** No deposition shall be taken before a person who is

a relative or employee or attorney or counsel of any of the parties, or is financially interested in the action.

(c) **Commission or Letters Rogatory.** A commission or letters rogatory shall be issued when necessary, on application and notice, and on terms that are just and appropriate. It is not a requisite to the issuance of a commission or letters rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. Both a commission and letters rogatory may be issued in proper cases. Officers may be designated in the commission either by name or descriptive title. Letters rogatory may be addressed ''to the appropriate authority in (here name the appropriate place).'' The clerk shall issue a commission or letters rogatory in the form prescribed by the jurisdiction where the deposition is to be taken, such form to be prepared by the party seeking the deposition. The commission or letters rogatory shall inform the officer that the original sealed deposition shall be filed according to subsection (d) of this rule. Any error in the form or in the commission or letters rogatory is waived unless an objection is filed and served before the time fixed in the notice.

(d) **Filing of the Deposition.** The officer transcribing the deposition shall file the original sealed deposition pursuant to C.R.C.P. 30(f)(1).

Cross references: For persons authorized to administer oaths or affirmations, see § 24-12-103, C.R.S.; for objections to admissibility, see C.R.C.P. 32(b).

COMMITTEE COMMENT

Commissions and letters rogatory are unnecessary when: (1) the deposition is being taken before an officer authorized to administer oaths in Colorado, (2) the Court has appointed a person under subsection (a), or (3) when the parties have stipulated to the person pursuant to C.R.C.P. 29.

The Federal Rules of Civil Procedure specifically define court-appointed persons or stipulated persons as ''officers'' under rules 30, 31 and 32. The Committee follows this principle but feels that it need not be specifically set forth in the Colorado rule.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''Taking Evidence Abroad for Use in Litigation in Colorado'', see 14 Colo. Law. 523 (1985). For article, ''Securing the Attendance of a Witness at a Deposition'', see 15 Colo. Law. 2000 (1986). For article, ''Alternative Depositions: Practice and Procedure'', see 19 Colo. Law. 57 (1990).

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

Applied in Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. OUTSIDE OF COLORADO.

Annotator's note. Since section (a) of this rule is similar to § 384 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

There is no way by which depositions of witnesses living out of the state can be taken except on due observance of the statutory course; any deviation from the statutory provisions on this subject is fatal, and the use of depositions erroneously taken constitutes an error for which a cause has to be reversed. Argentine Falls Silver Mining Co. v. Molson, 12 Colo. 405, 21 P. 190 (1889); Gibbs v. Gibbs, 6 Colo. App. 368, 40 P. 781 (1895).

A Colorado court does not have jurisdiction to compel a witness residing in a foreign

state to appear in the foreign jurisdiction and give testimony by deposition and to furnish his personal records at said hearing by virtue of a dedimus issued in Colorado and a subpoena duces tecum issued in the foreign state where the witness is not a party to the suit. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

This rule which provides for taking deposition outside of Colorado of nonresidents not parties to an action in Colorado or served within Colorado is subject to implied limitations of mutual compact or uniform act. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

No state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

The matter of lack of jurisdiction cannot be waived, and this defense may be raised at any stage of the proceedings. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Provisions for taking depositions outside the state under this rule do not apply to criminal proceedings. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

III. DISQUALIFICATION FOR INTEREST.

Law reviews. For article, ''The Federal Rules from the Standpoint of the Colorado Code'', see 17 Dicta 170 (1940).

Rule 29. Stipulations Regarding Discovery Procedure

Unless otherwise directed by the court, the parties may by written stipulation: (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify other procedures governing the timing of discovery, except that stipulations extending the time provided in C.R.C.P. Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

Source: Entire rule amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date.

Cross references: For stipulations extending time in interrogatories for responses to discovery, see C.R.C.P. 33; for stipulations extending time in the production of documents and things and entry upon land for inspection and other purposes for responses to discovery, see C.R.C.P. 34; for stipulations extending time in admissions for responses to discovery, see C.R.C.P. 36.

ANNOTATION

Law reviews. For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''A Deposition Primer, Part II: At the Deposition'', see 11 Colo. Law. 1215 (1982). For article, ''Taking Evidence Abroad for Use in Litigation in Colorado'', see 14 Colo. Law. 523 (1985).

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

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken. (1) Subject to the provisions of C.R.C.P. Rules 26(b)(2)(A) and 26(d), a party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by subpoena as provided in C.R.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(b)(1) and 26(b) if:

(A) A proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;

(B) The person to be examined already has been deposed in the case;

(C) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and be unavailable for examination within the state if the person's deposition is not taken before the expiration of such time period; or

(D) The person to be examined is confined in prison.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) Consistent with C.R.C.P. 121, sec. 1-12, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded, which, unless the court otherwise orders, may be by sound, sound-and-visual, or stenographic means. Unless the court otherwise orders, the party taking the deposition shall bear the cost of the recording.

(3) Any party may provide for a transcription to be made from the recording of a deposition taken by non-stenographic means. With reasonable prior notice to the deponent and other parties, any party may designate another method of recording the testimony of the deponent in addition to the method specified by the person taking the deposition. Unless the court otherwise orders, each party designating an additional method of recording the testimony of a deponent shall bear the cost thereof.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated pursuant to C.R.C.P. 28 and shall begin with a statement on the record by the officer that includes (a) the officer's name and business address; (b) the date, time, and place of the deposition; (c) the name of the deponent; (d) the administration of the oath or affirmation to the deponent; and (e) an identification of all persons present. If the deposition is recorded other than stenographically, items (a) through (c) shall be repeated at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording, the exhibits, or other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or

reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and C.R.C.P. Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by telephone or other remote electronic means is taken at the place where the deponent is to answer questions propounded to the deponent. The stipulation or order shall include the manner of recording the proceeding.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Colorado Rules of Evidence except CRE 103. The witness shall be put under oath or affirmation and the officer before whom the deposition is to be taken shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subsection (b)(2) of this Rule.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or in any other respect to the proceedings shall be noted by the officer upon the record of the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination. (1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule.

(2) (A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial is limited to one day of 6 hours. Upon the motion of any party, the court may limit the time permitted for the conduct of a deposition to less than 6 hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(B) Depositions of a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial are governed by C.R.C.P. 26(b)(4).

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall be notified by the officer that the transcript or recording is available. Within 35 days of receipt of such notification the deponent shall review the transcript or recording and, if the deponent makes changes in the

form or substance of the deposition, shall sign a statement reciting such changes and the deponent's reasons for making them and send such statement to the officer. The officer shall indicate in the certificate prescribed by subsection (f)(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. This certificate shall be set forth in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked ''deposition of (here insert name of witness)'' and shall promptly transmit it to the attorney who arranged for the transcript or recording. The receiving attorney shall store the deposition under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied by any party, except that: if the person producing the materials desires to retain the originals, the person may

(A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(g) Failure to Attend or to Serve Subpoena; Expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Source: (a), (b)(1) to (b)(4), (b)(7), (c), (d), (e), and (f) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(1) corrected and effective January 9, 1995; entire rule corrected and effective June 4, 2001; (d) amended and adopted November 15, 2001, effective January 1, 2002; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (d)(2) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For service of process, see C.R.C.P. 4; for subpoena for depositions, see C.R.C.P. 45(e); for sanctions for failing to make disclosure or cooperate in discovery, see C.R.C.P. 37; for production of documents and things, see C.R.C.P. 34; for protective orders, see C.R.C.P. 26(c); for award of expenses of motion, see C.R.C.P. 37(a)(4); for effect of errors and irregularities in depositions concerning completion and return thereof, see C.R.C.P. 32(d)(4).

COMMENTS

1995

[1] Revised C.R.C.P. 30 is patterned in part after Fed.R.Civ.P. 30 as amended in 1993 and now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

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

[3] Language in C.R.C.P. 30(c) and C.R.C.P. 30(f)(1) differs slightly from the language of Fed.R.Civ.P. 30(c) and Fed.R.Civ.P. 30(f)(1) to facilitate the taking of telephone depositions by eliminating the requirement that the officer recording the deposition be the person who administers the oath or affirmation.

2015

[4] Rule 30 is amended to reduce the time for ordinary depositions from 7 to 6 hours, so that they can be more easily accomplished in a normal business day.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Depositions of Parties on Oral Interrogatories, Within the State of Colorado'', see 10 Dicta 256 (1933). For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''A Deposition Primer, Part II: At the Deposition'', see 11 Colo. Law. 1215 (1982). For article, ''Securing the Attendance of a Witness at a Deposition'', see 15 Colo. Law. 2000 (1986). For article, ''Alternative Depositions: Practice and Procedure'', see 19 Colo. Law. 57 (1990). For formal opinion of the Colorado Bar Association on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990). For article, ''Organizational Avatars: Preparing CRCP 30(b)(6) Deposition Witnesses'', see 43 Colo. Law. 39 (December 2014).

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

Rules of civil procedure sanction use of all discovery methods and the frequency of use of these methods should not be limited unless there is a showing of good cause based on the particular circumstances of the case. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

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

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

It is in the trial court's discretion whether a video deposition will be ordered absent agreement between the parties. Such a deposition, while it may be desirable under certain circumstances, is a luxury not a necessity. Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993).

When choosing a subsection (b)(6) designee, companies have a duty to make a consci-

entious, good-faith effort to designate knowledgeable persons and to prepare them to fully and unevasively answer questions about the designated subject matter. The company should, if necessary, prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

Allowing a company to designate a witness under subsection (b)(6) who is unprepared or not knowledgeable would simply defeat the purpose of the rule and sandbag the opposition. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

Where a corporation designates a deponent pursuant to subsection (b)(6) who is unable to answer all the questions specified in the notice, a court may issue sanctions for failure to appear under C.R.C.P. 37. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

Nothing in the rule or its interpretation suggests that persons who are designated and testify under subsection (b)(6) will not bind their corporate principal. Nothing in the rule precludes a principal from offering contrary or clarifying evidence where its designee has made an error or has no knowledge of a matter. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

A corporation should be excused from sanctions and granted a protective order where it had no means available to prepare a subsection (b)(6) designee. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

Not being listed under section (b)(6) does not disqualify a person from testifying, but rather being listed under section (b)(6) mandates that the witness's testimony include certain subject matter and knowledge. Where county produced undesignated witnesses who were knowledgeable both as to the facts regarding the county and as to those at issue at trial, and defendant was aware of the witnesses and deposed them, trial court did not abuse its discretion in allowing their testimony. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Applied in Seymour v. District Court, 196 Colo. 102, 581 P.2d 302 (1978); Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Falzon v. Home Ins. Co., 661 P.2d 696 (Colo. App. 1982); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

II. WHEN MAY BE TAKEN.

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

III. NOTICE.

Law reviews. For article, "In Defense of H.B. 109 — Re-serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945).

Section (b)(4) is identical to its federal counterpart F.R.C.P. 30(b)(4). Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

Purpose of section (b)(4) is to facilitate less expensive procedures as an alternative to the high cost of stenographic recording. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

Motion and notice for which provision is made in this rule must be made and served prior to the time specified in the notice for the taking of the deposition. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

There was no "reasonable notice" within the meaning of this rule where the record disclosed that the party was given three days notice that the depositions were to be taken, the notice was served in Colorado, and the depositions were taken in Los Angeles. Nielsen v. Nielsen, 111 Colo. 344, 141 P.2d 415 (1943).

If, for good cause, a deposition should be taken in some place other than that mentioned in the notice, this matter should be called to the attention of the trial court by a motion filed and service thereof seasonably made on opposing counsel; otherwise, such objection is waived, and the place designated in the notice is definitely and finally fixed. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

Service of notice to take deposition on a party's attorney is sufficient notice pursuant to C.R.C.P. 5(b)(1). Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

A party is not entitled to a subpoena nor to a per diem allowance or mileage when he is noticed to appear for the taking of his deposition. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

Court has discretion in determining assessment of stenographic expense as cost. There is no provision authorizing the assessment, as costs, of stenographic expense incurred in the taking of a deposition for purposes of discovery, but if the testimony of the person whose deposition is taken is not available at the trial, and the deposition is offered in lieu thereof, then the court would have discretion in determining whether the expense of procuring the deposition should be assessed as costs

against the losing party. Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (1951).

Governmental officials of foreign state cannot be compelled to appear in Colorado to take depositions. Where the attorney general and tax commissioner of another state had been ordered to appear in Colorado for the purpose of taking depositions, the court could not compel them to so appear, and this fact is true even though the foreign state had brought the action in which defendant sought these depositions, inasmuch as no state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein; such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Showing of indigency unnecessary for application of section (b)(4) to inexpensive mode of deposition discovery. Application of section (b)(4) of this rule to an inexpensive mode of deposition discovery should not be conditioned on a showing of indigency, a showing of financial need, or economic disparity between the parties. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

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

Trial judge may properly deny motion for tape recorded depositions where the objecting party shows that there exists a potential for abuse or harassment of a witness or party or where the objecting party otherwise establishes a bona fide claim for protective orders under C.R.C.P. 26(c). Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

IV. MOTION TO TERMINATE OR LIMIT.

The taking of a deposition is not precluded by an application for writ of prohibition where an order to show cause is issued pursuant thereto by the supreme court; rather, only proceedings in the trial court are suspended by such an order, and not those in preparation of trial. And where the case is still pending and undetermined, an application for a writ of prohibition against the taking of a deposition would be denied as premature. Cox v. District Court, 129 Colo. 99, 267 P.2d 656 (1954).

Party desiring to protect trade secrets entitled to protective order. Taken together, section (d) of this rule and C.R.C.P. 26 establish that a party desiring to protect trade secrets is entitled to a protective order upon a showing of good cause. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

V. SUBMISSION TO WITNESS.

Annotator's note. Since section (e) of this rule is similar to § 378 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing this section have been included in the annotations to this rule.

Purpose of section (e), which requires submission of the deposition to the witness for examination, correction, and signature, is to provide verification of the deposition's content in order that the writing may be introduced as evidence of the witness's own words. Transamerica Ins. Co. v. Pueblo Gas & Fuel Co., 33 Colo. App. 92, 519 P.2d 1201 (1973).

Object of reading deposition to witness is to give opportunity to correct. The object of the requirement that the interrogatories and answers submitted to the witness on the taking of his deposition should be first carefully read to him before he signed is that the witness might know what the scrivener had written down, and he might, before his deposition is complete, have an opportunity to correct any errors or inaccuracies of statement which might have occurred. Cheney v. Woodworth, 13 Colo. App. 176, 56 P. 979 (1899).

The requirement that deposition be signed by witness can be waived by stipulation of counsel. Chipley v. Green, 7 Colo. App. 25, 42 P. 493 (1895).

Where parties stipulated with respect to the taking of a deposition that "the caption and all formalities are expressly waived", it was held that an irregularity as to the signature was waived by this stipulation. Chipley v. Green, 7 Colo. App. 25, 42 P. 493 (1895).

Section (e) inapplicable. Where proof of a contradictory statement was elicited from the mouth of the witness and not by introduction of the deposition into evidence, the safeguards for accuracy of the deposition as evidence, which are embodied in section (e), were inapplicable. Transamerica Ins. Co. v. Pueblo Gas & Fuel Co., 33 Colo. App. 92, 519 P.2d 1201 (1973).

VI. CERTIFICATION AND FILING.

This rule sets forth the mechanics applicable to certifying and filing depositions. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

After correction of the deposition and after it is signed, or following a refusal to sign it, the deposition is to be delivered to the officer who seals it promptly and files it with the court

in which the action is pending. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Officer's certificate is not required to state that deposition was "carefully" read to witness before signing. The requirement that in taking depositions the interrogatories and answers should be carefully read to the witness before signing does not require the certificate of the officer to state that they were "carefully" read to the witness before signing. A certificate that certified simply that the deposition was read to the witness before signing is sufficient, as it would be presumed that it was read with that care required. Cheney v. Woodworth, 13 Colo. App. 176, 56 P. 979 (1899) (decided under § 378 of the former code of civil procedure, which was replaced by rules of civil procedure in 1941).

Sham affidavit doctrine permits a court under certain circumstances to disregard an affidavit submitted by a party in response to a summary judgment motion where that affidavit contradicts the party's previous sworn deposition testimony. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

Contradictory affidavits should be considered in light of totality of the circumstances test. Affidavit that directly contradicts affiant's own earlier deposition testimony can be rejected as sham affidavit only if it fails to include an explanation for the contradiction that could be found credible by a reasonable jury. This determination cannot be limited to any set of factors, but must be considered in light of the totality of the circumstances, and such determination is a matter of law to be reviewed de novo. Andersen v. Lindenbaum, 160 P.3d 237 (Colo. 2007).

Where deposition was taken but not subscribed, certified, or filed pursuant to this rule, and was for that reason suppressed by the trial court notwithstanding agreement of counsel that it might be admitted for a limited purpose, such ruling, while erroneous, was not prejudicial. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice. (1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by the use of subpoena as provided in C.R.C.P. 45.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with C.R.C.P. 26(b)(2) if:

(A) a proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;

(B) the person to be examined already has been deposed in the case;

(C) a party seeks to take a deposition before the time specified in C.R.C.P. 26(d); or

(D) the person to be examined is confined in prison.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; and

(B) the name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, or a partnership, or association, or governmental agency in accordance with the provision of C.R.C.P. 30(b)(6).

(4) Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 14 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve re-cross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Source: (a) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (a)(2) and (3) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For subpoena for depositions, see C.R.C.P. 45(e); for taking of deposition of public or private corporation, partnership, association, or governmental agency, see C.R.C.P. 30(b)(6); for proceedings in taking depositions, see C.R.C.P. 30(c), (e), and (f); for notice of filing with depositions upon oral examination, see C.R.C.P. 30(f).

COMMENTS

1995

[1] Revised C.R.C.P. 31 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

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

ANNOTATION

Law reviews. For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''Alternative Depositions: Practice and Procedure'', see 19 Colo. Law. 57 (1990).

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

For purposes of discovery in negligence action by patient who was infected with the AIDS virus after a blood transfusion, patient-plaintiff was entitled to submit written questions to anonymous blood donor, but may not ask donor's name or address. Belle Bonfils Memorial Blood Center v. District Court, 763 P.2d 1003 (Colo. 1988).

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness;

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, or a governmental agency, which is a party, or a person designated under

Rule 30(b)(6) or 31(a) to testify on behalf thereof may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) That the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) [There is No Colorado (D).]

(E) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to C.R.C.P. 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(5) In lieu of reading text from a deposition, parties are encouraged to use stipulated written summaries of deposition testimony at any hearing or trial, and to present the testimony at any hearing or trial in a logical order.

(b) Objections to Admissibility. Subject to the provisions of Rules 28(b) and subsection (d)(3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this Rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) **As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to Taking of Deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the

conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 7 days after service of the last questions authorized.

(4) **As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

Source: IP(a) and (a)(3) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(5) added and adopted June 25, 1998, effective January 1, 1999; (d)(3)(C) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For substitution of parties, see C.R.C.P. 25; for deposition of party who is an officer, director, or managing agent of a public or private corporation, partnership, association, or governmental agency, see C.R.C.P. 30(b)(6) and 31(a); for notice requirement, see C.R.C.P. 30(b) and 31(a); for responsibilities of officer, see C.R.C.P. 30(f) and 31(b); for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31.

COMMITTEE COMMENT

Revised C.R.C.P. 32 is patterned after Fed.R.Civ.P. 32 as amended in 1993 with several exceptions: (1) there is no State Rule 32(l)(D) [pertaining to use of depositions of experts whether or not unavailable]; (2) there is a difference in what constitutes ''reasonable notice,'' which is instead contained in C.R.C.P. 121 section 1-12; and (3) there is no State Rule 32(e) [pertaining to offering of non-stenographic depositions].

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''A Deposition Primer, Part II: At the Deposition'', see 11 Colo. Law. 1215 (1982). For article, ''Using Depositions in the Courtroom'', see 39 Colo. Law. 49 (April 2010).

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

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. USE.

Annotator's note. Since section (a) of this rule is similar to §§ 378 and 379 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, and to C.R.C.P. 26(d) as it existed prior to the revision of Rules of Civil Procedure in 1970, relevant cases construing those sections and former rule 26 (d) have also been included in the annotations to this rule.

Section (a) is identical to F.R.C.P. 32(a). Schafer v. Nat'l Tea Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

This rule is an independent and alternative vehicle to C.R.E. 804(b)(1) for admitting deposition testimony into evidence in civil cases. Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000).

To be introduced into evidence under this rule, the deposition testimony must be of a nature that would itself be admissible if the deponent were present and testifying in court. In addition, the opposing party must have had reasonable notice of the deposition and either been present or represented at the taking of the deposition, and one of the five circumstances set forth in section (a) must be present. Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000).

Unless there are no viable alternatives, "appearance" by deposition is a wholly inadequate manner for the presentation of a party's case. Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

Should a party attempt to offer a portion of a deposition into evidence rather than call the adverse party as a witness, that party may do so, provided no other rules of evidence are violated and provided, prior to its admission, some showing of a legitimate purpose is made. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971); Scruggs v. Otteman, 640 P.2d 259 (Colo. App. 1981).

The burden of proof of unavailability is on the party offering the deposition, and the failure to carry the burden precludes the use of the deposition as evidence. Evans v. Century Cas. Co., 159 Colo. 596, 413 P.2d 457 (1966); J.R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

The burden of proof as to the unavailability of the witness is on the party offering the deposition in lieu of the testimony. Rowland v. Ditlow, 653 P.2d 61 (Colo. App. 1982).

In order that a deposition may be admitted into evidence, the party offering the deposition must make a sufficient showing of the unavailability of the deponent at the time of trial. Evans v. Century Cas. Co., 159 Colo. 596, 413 P.2d 457 (1966); J.R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

Admission of video depositions of available witnesses violated this rule but was harmless error where plaintiff failed to explain or make an offer of proof as to how live courtroom testimony of the deposed witnesses would have differed from their video depositions. Maloney v. Brassfield, 251 P.3d 1097 (Colo. App. 2010).

Question of sufficient evidence to establish absence is for court. The amount and kind of evidence to establish absence of the witness from the jurisdiction or beyond the 100-mile limit is a question for the determination of the trial court. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Deposition testimony held sufficient to establish whereabouts of deponent. Court erred in refusing to consider deposition testimony and disallowing deposition on grounds that competent evidence under rules of evidence had to prove whereabouts of deponent. Donley v. State, 817 P.2d 629 (Colo. App. 1991).

It cannot be said that a showing of unavailability by means of attempted subpoena is indispensable in connection with the 100-mile provision, since it is for the court to decide whether this rule has been complied with. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

This rule also allows a deposition to be offered if the party has been unable to procure attendance by subpoena, but this use, however, is an alternative to the 100-mile provision. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Deposition cannot be introduced as an admission. Colorado practice, unlike that under the federal rules, does not permit the introduction of a deposition as an admission. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Timely notice in a trial data certificate of the intent to call a witness by way of video deposition constitutes appropriate "application and notice" under this rule. Miller v. Solaglas California, Inc., 870 P.2d 559 (Colo. App. 1993).

A party is entitled to refer to a deposition which would serve to bring to the attention of a witness any prior statement which the witness had made looking to ultimate impeachment, notwithstanding the fact that section (d)(4) of this rule as to certifying and filing depositions has not been complied with. The question of the inadmissibility of the deposition is not a valid issue until such time as the party proposes to impeach the witness by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

When a deposition is not offered as substantive evidence, but rather is used to impeach by prior inconsistent statements, this rule does not operate to preclude the deposition from being so used. Schafer v. Nat'l Tea Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

Defendants cannot use deposition in argument for directed verdict or in their defense. Where defendants had taken the deposition of the plaintiff and were permitted to use it in an attempt to impeach him, the court properly refused defendants' request to use the deposition in connection with their argument for a directed verdict and as a part of their defense. Foster v. Howell, 122 Colo. 64, 220 P.2d 717 (1950).

Governmental officials of foreign states cannot be compelled to appear in Colorado to take depositions. Despite the fact that section (a)(2) of this rule states, in relevant part,

that: ''The depositions of ... an officer, director, or managing agent of a ... (governmental agency which is a party) ... may be used by an adverse party ...'', it has been held that the attorney general and tax commissioner of another state could not be compelled to appear in Colorado for the purpose of taking depositions, and that this fact was true even though the foreign state had brought the action in which defendant sought their depositions, inasmuch as no state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein; rather, such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Deposition may not be used by adverse party for "any purpose". Blind reliance on the portion of this rule in section (a)(2) that the deposition of a party ''may be used by an adverse party for any purpose'' does not establish error when the court refuses to admit portions of a deposition, for the permissive rule of this statute does not override the other rules of evidence and the discretion of the trial court. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

Deponent must be an adverse party to the proponent at the time the deposition is offered into evidence in order for the deposition to be admissible. Rojhani v. Meagher, 22 P.3d 554 (Colo. App. 2000).

This rule permits the admission of a deposition where the witness is dead or more than 100 miles from the place of trial or hearing. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Court's refusal to order additional parts of depositions introduced held not error. Where the trial court informed defendants that they might offer any and all additional parts of the depositions into evidence as part of their case and there was no showing on the part of the defendants that the plaintiff did not offer all relevant portions of the depositions into evidence, then the trial court's refusal to order the plaintiff to introduce additional parts of the depositions was not error under section (a)(4) of this rule. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

Depositions held admissible to prove plaintiff's claim where plaintiff not personally present. Where at the trial plaintiff did not appear in person, being then a resident of another state, and defendant's counsel moved that the action be dismissed for the reason that defendant would have no opportunity to cross-examine the witness who was the real party in interest and the jury would have no basis upon which to weigh the testimony or to judge the credibility of the witness, it was held that whether plaintiff could produce sufficient evidence to avert a motion for dismissal at the conclusion of her case was beside the question, but clearly she was entitled to introduce whatever evidence was available in support of her claim, and thus the depositions and interrogatories taken in the case were admissible as evidence in support of plaintiff's cause of action, and it was error to dismiss plaintiff's suit because plaintiff was not personally present to assert it. Hiltibrand v. Brown, 124 Colo. 52, 234 P.2d 618 (1951).

Depositions taken in original action held admissible in separate action. Where plaintiff had originally filed one action against defendants seeking to set aside an antenuptial agreement and to have a transfer of notes declared invalid and the cause of action on the notes was subsequently transferred to probate proceedings, the depositions of defendants taken in plaintiff's original action were admissible in the separate action on the validity of the notes, since these depositions were taken in plaintiff's original action and involved the same parties and same subject matter. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

The supreme court of Colorado is not bound by the findings of the jury as to any matters contained in depositions but is at liberty to place its own interpretation upon the testimony therein given. Morrison v. McCluer, 27 Colo. App. 264, 148 P. 380 (1915); Rinderie v. Morse, 27 Colo. App. 457, 150 P. 245 (1915), aff'd, 64 Colo. 32, 169 P. 648 (1917).

This fact does not abrogate rule of not disturbing trial court findings upon conflicting evidence. Where the evidence given upon issues of the fact is partly by depositions and partly by that submitted in open court, this fact does not abrogate, but only pro tanto affects, the rule that the findings of the trial court upon conflicting evidence should not be disturbed. Morrison v. McCluer, 27 Colo. App. 264, 148 P. 380 (1915).

It is in court's discretion to exclude repetitious matters or require identification of relevant portions. In determining whether a deposition may be used in evidence, the trial court has discretion to exclude repetitious matter and to require counsel to identify the relevant portions of a deposition. Scruggs v. Otteman, 640 P.2d 259 (Colo. App. 1981).

Deposition used for impeachment purposes is always admissible to discredit witness if the deposition is relevant, material, and not collateral, even if opposing party was not present or represented at deposition and did not have notice of its taking. Appel v. Sentry Life Ins. Co., 739 P.2d 1380 (Colo. 1987).

Trial court may refuse to admit deposition to promote fairness where conditions of ad-

missibility were met but plaintiff had been led to believe witness would give live testimony. Stoczynski v. Livermore, 782 P.2d 834 (Colo. App. 1989).

III. OBJECTIONS.

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

Admissibility of deposition is not an issue until deposition is introduced. The question of the inadmissibility of a deposition used for impeachment purposes is not a valid issue until such time as a party proposes to impeach a witness by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

The court cannot determine admissibility or relevancy if not given specific purpose or purposes for reading portions of a deposition when faced with an objection from the opposing party. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

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

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

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

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

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

IV. EFFECT OF TAKING OR USING.

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

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

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

V. ERRORS AND IRREGULARITIES.

A. Taking.

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

B. Completion and Return.

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

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

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

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

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

Rule 33. Interrogatories to Parties

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

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

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

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

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

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

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

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

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interroga-

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

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

Source: (a) to (c) amended and adopted and (e) added and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b)(1) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015; (b)(1), (e), and comments amended and adopted January 12, 2017, effective March 1, 2017.

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

COMMENTS

1995

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

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

2017

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

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

ANNOTATION

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

I. GENERAL CONSIDERATION.

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

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive dam-

ages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

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

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

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

II. AVAILABILITY AND PROCEDURE.

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

Refusal to answer valid interrogatories is grounds for reversal. Where the information sought by interrogatories is subject to discovery under C.R.C.P. 26(b) and 33, the refusal to supply the information requested is in itself a ground for reversal. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

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

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

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

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

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

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

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

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

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

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

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

III. SCOPE AND USE.

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

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

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

Supreme court adopts test set forth in Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684 (D. Nev. 1997), to aid courts in

distinguishing between discrete subparts of non-pattern interrogatories and those that are logically or factually subsumed within and necessarily related to the primary question. Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

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

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

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

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

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

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

Furnishing false answers to interrogatories may constitute first-degree perjury. People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

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

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

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

IV. OPTION TO PRODUCE BUSINESS RECORDS.

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

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

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

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

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

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

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

The party upon whom the request is served shall serve a written response within 35 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce which is the subject of the objection until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

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

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

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

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

COMMENTS

1995

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

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

2015

[3] Rule 34 is changed to adopt similar revisions as those proposed to Fed. R. Civ. P. 34, which are designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about each specific request. The second amendment is to allow production of documents in place of permitting inspection but to require that the production be scheduled to occur when the response to the document request is due, or some other specific and reasonable date. The third amendment is to require that when an objection

to a document request is made, the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The fourth and final amendment is simply to clarify that a written objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For note, ''Comments on Rule 34'', see 30 Dicta 367 (1953). For article, ''Civil Remedies and Civil Procedure'', see 30 Dicta 465 (1953). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''Taking Evidence Abroad for Use in Litigation in Colorado'', see 14 Colo. Law. 523 (1985). For article, ''Rule 34(c): Discovery of Non-Party Land and Large Intangible Things'', see 14 Colo. Law. 562 (1985). For article, ''Discovery and Spoliation Issues in the High-Tech Age'', see 32 Colo. Law. 81 (September 2003).

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

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

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

Applied in Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976); Globe Drilling Co. v. Cramer, 39 Colo. App. 153, 562 P.2d 762 (1977); City & County of Denver v. District Court, 199 Colo. 223, 607 P.2d 984 (1980); City & County of Denver v. District Court, 199 Colo. 303, 607 P.2d 985 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Wilson v. United States Fid. & Guar. Co., 633 P.2d 493 (Colo. App. 1981); Pietramale v. Robert G. Fisher Co., 638 P.2d 847 (Colo. App. 1981); Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982).

II. SCOPE.

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

Under this rule, a party does not have an unqualified right to examine a statement signed by him and delivered to the other party during an investigation conducted prior to the time suit is filed. McCoy v. District Court, 126 Colo. 32, 246 P.2d 619 (1952).

If a litigant is entitled to the production of documents, he must bring himself within the provisions of this rule. McCoy v. District Court, 126 Colo. 32, 246 P.2d 619 (1952).

The limitations set forth in this rule are: (1) Relevancy under C.R.C.P. 26(b); and (2) possession, custody, or control. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

It is not error to require a party to produce documents which are under his control, though not in his actual possession, and which are obtainable upon his order or direction. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

Denial of motion to compel production of documents on grounds that voluminous documentation had been provided and that the attorney-client privilege had not been waived was not an abuse of the trial court's discretion in discovery matters. Hill v. Boatright, 890 P.2d

180 (Colo. App. 1994), aff'd in part and rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

Limitation in protective order prohibiting defendant from copying petitioner's documentary evidence goes far beyond what discovery requires, and flies in the face of that aspect of this rule which specifically authorizes such copying. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

Discovery of documents rather than ex parte questioning appropriate. Ex parte questioning of physicians or others concerning documents to be examined cannot be ordered by the court in personal injury action, and, if an inspecting party needs further information concerning documentary material, the formal method of eliciting the same is by further discovery procedure. Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975).

Ordering plaintiff authorization allowing inspection proper. Under this rule, court order permitting the inspection and copying of records, reports, and X ray, and ordering plaintiff to execute and deliver an authorization allowing such inspection and copying, where the plaintiff brought an action for damages for injuries allegedly sustained in an automobile accident, was not error in the provisions of the authorization. Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975).

A party may be required to obtain copies of tax returns filed by him, since he has a potential right to the custody or control of such copies. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

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

A party cannot be compelled to produce X-ray photographs taken and retained by his physician in the absence of a showing that the party has a legal right to demand the photographs. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

Order to produce privileged communications improper. Order compelling defendant-insurer to make available to plaintiffs' attorneys all correspondence between its home office and its local counsel and local agents as well as all correspondence between insurer and its attorneys or agents and insured was improper as a violation of the attorney-client privilege. General Accident Fire & Life Assurance Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862 (1953).

A privilege may be waived by authorized parties. A trustee in bankruptcy for a corporation stands in the shoes of the board of directors and therefore has the power, in the exercise of his discretion, to waive the privilege under § 13-90-107 that the work product of a certified public accountant is nondiscoverable without the client's consent. Weck v. District Court, 161 Colo. 384, 422 P.2d 46 (1967).

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

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

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

Balancing competing interests required where official information privilege claimed. Where the official information privilege is raised in opposition to a request for discovery, the trial court must balance the competing interests through an in camera examination of the materials for which the official information

privilege is claimed. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Tripartite balancing inquiry undertaken when right to confidentiality is invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

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

Compelling state interest in disclosure must consist of the very materials or information which would otherwise be protected. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

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

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

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

The appropriate analysis in deciding whether to allow a destructive test as part of discovery where the owner of the object sought the testing was parallel to that involved in a conventional request for inspection under this rule and a resulting motion for a protective order under C.R.C.P. 26. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

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

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

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

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

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

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

III. PROCEDURE.

Burden placed on party opposing discovery. Requirement that party requesting discovery make out a prima facie case is not imposed by this rule, and any burden that exists should be placed on those opposing discovery. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

''Lone Pine orders'', where a trial court orders plaintiffs to present prima facie evidence supporting their claims after initial disclosures, but before other discovery commences, or risk having their case dismissed, are prohibited under state law. While the supreme court revised this rule to create a ''differential case management/early disclosure/limited discovery system'', these revisions are not so substantial as to effectively overrule other supreme court holdings. Although portions of C.R.C.P. 16 and C.R.C.P. 26 may afford trial courts more discretion than they previously had, that discretion is not so broad as to allow courts

to issue Lone Pine orders. And, notably, the state's version of C.R.C.P. 16 does not include the language relied upon by federal courts when issuing Lone Pine orders. Existing procedures under the Colorado rules of civil procedure sufficiently protect against meritless claims, and, therefore, a Lone Pine order was not required solely on that basis. Strudley v. Antero Res. Corp., 2013 COA 106, 350 P.3d 874, aff'd, 2015 CO 26, 347 P.3d 149.

A party seeking a subpoena duces tecum requiring production of documents by the other party at a deposition hearing must show good cause for the issuance of such a subpoena, and under such circumstances, C.R.C.P. 45(b), which provides for subpoena for the production of documentary evidence, must be read in conjunction with this rule. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

File should be produced upon "good cause" shown. Where it was proved by uncontradicted testimony that a claims agent who investigated the accident could not testify or give a ''coherent story about the results of his investigation'' without first refreshing his memory from his file on the investigation, such was sufficient to show good cause why the file should be produced at the time of the taking of the agent's deposition. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Production of documents is still subject to protective orders by court and objections. Where good cause for the production of documents at time of taking depositions is shown, such required presentation is subject to any protective orders the court might make concerning the use to be made of the documents and is subject to any objections to specific questions asked of deponent concerning the documents. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Pretrial order reviewable in certain circumstances. Orders pertaining to pretrial discovery are interlocutory in nature and are not ordinarily reviewable in an original proceeding. Because, however, the exercise of original jurisdiction is discretionary and governed by the particular circumstances of the case, there are exceptions to this general rule when, for example, a pretrial discovery order significantly departs from the controlling standards of discovery, or when a pretrial discovery order will cause a party unwarranted damage that cannot be cured on appeal, such as where treatment records are protected from disclosure by statutory privileges. Clark v. District Court, 668 P.2d 3 (Colo. 1983).

A party produces documents requested pursuant to C.R.C.P. 34 by making them available for inspections and copying. Application of Hines Highlands Partnership, 929 P.2d 718 (Colo. 1996).

Rule 35. Physical and Mental Examination of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examiner.

(1) If requested by the party against whom an order is made under section (a) of this Rule or the person examined, the party causing the examination to be made shall deliver to said other party a copy of a detailed written report of the examiner setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he or she is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he or she may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person in respect of the same mental or physical condition.

(3) This section (b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This section (b) does not preclude discovery of a report of an examiner in accordance with the provisions of any other Rule.

Source: Amended October 8, 1992, effective January 1, 1993.

Cross references: For protective orders concerning discovery, see C.R.C.P. 26(c); for sanctions for failure to comply with order, see C.R.C.P. 37(b).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963).

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

Determination of motion lies within the sound discretion of the trial court. In a dependency and neglect proceeding, denying intervenor's motion for mental examination of the mother when evaluation had been updated six months before the hearing was not an abuse of discretion. People ex rel. A.W.R., 17 P.3d 192 (Colo. App. 2000).

There is no absolute quasi-judicial immunity for professionals conducting an independent medical or psychiatric examination pursuant to this rule. Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999).

However, such professional is entitled to witness immunity where such professional examined a person pursuant to this rule. Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999).

Applied in Phillips v. District Court, 194 Colo. 455, 573 P.2d 553 (1978); People v. Elam, 198 Colo. 170, 597 P.2d 571 (1979); People v. Shuldham, 625 P.2d 1018 (Colo. 1981); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Clark v. District Court, 668 P.2d 3 (Colo. 1983).

II. ORDER.

Law reviews. For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For comment on Timpte v. District Court appearing below, see 39 U. Colo. L. Rev. 592 (1967).

Motion for physical examination is addressed to the sound discretion of the trial court. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

It is necessary to demonstrate good cause therefor. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Rule does not by its terms limit a party to one examination. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Circumstances held sufficient to justify a second physical examination are: (a) Separate injuries calling for analysis from distinct medical specialties such as ''whip-lash sprain'' and ''aggravation of preexisting heart condition'', (b) where the examining physician requires the assistance of other consultants before he can make a diagnosis, or (c) where a substantial time lag occurs between the initial examination and trial. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

A trial court is authorized to issue an order requiring a party to submit to a physical or mental examination upon a showing of good cause and that such order shall specify the conditions of the examination. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

Court may compel examination in Colorado where party has been examined in another jurisdiction. Where, on motion to vacate an interlocutory decree of divorce, defendant husband contended that he was insane at the time of the alleged commission of the acts relied upon as grounds for divorce, at the time of service of process, and throughout the pendency of the action, the trial court did not err in ruling that it would not receive in evidence depositions concerning husband's purported insanity by doctors in another state where husband had wilfully absented himself until such time as the husband made himself available for examination within the jurisdiction of Colorado by psychiatrists or physicians who might be selected by the wife. Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121 (1951).

Defendant has same right as plaintiff to have his own doctor testify. So long as a plaintiff may select his own doctor to testify as to his

physical condition, fundamental fairness dictates that a defendant shall have the same right, in the absence of an agreement by the parties as to whom the examining physician will be. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

Defendant's right to select a doctor to testify is subject to protective orders by the trial court such as, among others: Those limiting the number of doctors who may examine; those providing who may be present at the examinations, including plaintiffs' attorneys if the court deems it wise; and those setting the time, type, place, scope, and conduct of the examination. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966); Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

The court may reject a particular physician upon a finding, sustained by a showing of bias and prejudice, and order the defendant to submit the names of other physicians. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

The fact that certain doctors testify only for the defense in matters of personal injury does not in itself suggest bias and prejudice which demands disqualification of such a doctor; rather, it is a matter relevant only as to weight and credibility, and cross-examination upon this subject affords full protection to the plaintiff's rights. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

In no case, however, may the court select a so-called "neutral" physician. The trial judge may not permit the plaintiffs as well as the defendants to submit a list of doctors from which the trial court would select a so-called ''neutral'' physician. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

A trial court has the power to order a psychiatric examination of the parties in a domestic relations case even though not provided for in section (a) of this rule, since where matters such as custody of children are in dispute in a divorce or separation action and the mental stability of either or both of the parents is seriously challenged, a psychiatric examination may well provide a key to a wise determination of custody, a determination, the sole aim of which must be the best interests of the children. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

Where the record fails to disclose any evidence necessitating a forced psychiatric examination of one of the spouses as insisted by the other spouse, there is no abuse of discretion in the trial court's refusal to so order. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

Questions concerning the conduct of physical examinations conducted pursuant to section (a) of this rule, including the presence of third parties and tape recorders during such examinations, are to be resolved by the trial court in the exercise of its discretion. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

The party seeking such protective orders bears the burden of establishing the need for such relief. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

"In controversy" and "good cause" requirements. This rule requires that either the party's physical or mental condition be ''in controversy'' and that the movant show ''good cause'' before the court may order that a party submit to a physical or mental examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Affirmative showing required. The ''in controversy'' and ''good cause'' requirements of this rule are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

A plaintiff's general allegations of mental suffering, mental anguish, emotional distress, and the like, do not place his mental condition in controversy under this rule. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Trial court did not abuse its discretion in denying defendant's motion for an independent medical examination where, although the plaintiff brought a claim for mental distress, his mental condition was not in controversy. Further, the court did not err in allowing the plaintiff to testify regarding the embarrassment and humiliation he suffered as a result of the defendant's actions in telling others of plaintiff's sexual orientation. Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Complaint alleging that injuries suffered in the collision resulted in past and future medical expenses, loss of time from work, pain and suffering, and other impairment was sufficient to place plaintiff's physical condition in controversy and give defendant good cause for an order to submit to a physical examination. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

The notice provisions of this rule are mandatory and, absent proper notice, the court may refuse to order a physical or a mental examina-

tion. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Where irregularities in formalities leading to an order did not prejudice plaintiff, the order was properly granted. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Dismissal of case with prejudice held justified. Where plaintiff at no time objected to an examination, sought to cancel or change the appointments, or offered any excuse for his failure to keep at least six scheduled appointments, since the claim was based entirely on the personal injuries he allegedly suffered, and since he repeatedly failed to appear for examination without giving any reason therefor, the trial court was justified in dismissing the case with prejudice. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Proper case for supreme court's original jurisdiction. Petitioner's allegations that respondent court exceeded its jurisdiction and abused its discretion by ordering a psychiatric examination in violation of section (a) of this rule presented a proper case for exercise of the supreme court's original jurisdiction. Post-judgment appeal obviously cannot reverse the possible adverse consequences of a pretrial psychiatric examination of petitioner. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

The district court abused its discretion in ordering an independent medical examination after the insurance coverage decision at issue had already been made. Schultz v. GEICO Cas. Co., 2018 CO 87, 429 P.3d 844.

III. REPORT.

This rule does not place upon a party the burden of procuring copies of records of hospitals or of office records of physicians. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

This rule is limited to medical examinations conducted at the request of a party, and the reports, copies of which are subject to production, are the reports made by the physician as the result of such an examination. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

A physician was not required to prepare written reports concerning his treatment of plaintiff where defendant had been furnished, by agreement, the only report prepared by the doctor of a medical examination of plaintiff. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

Rule 36. Requests for Admission

(a) Request for Admission. Subject to the limitations contained in the Case Management Order, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of C.R.C.P. 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Leave of court must be obtained, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b), to serve more requests for admission than the number set forth in the Case Management Order. Without leave of court or written stipulation, requests for admission may not be served before the time specified in C.R.C.P. 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 35 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing pursuant to C.R.C.P. 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of C.R.C.P. 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answer or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Source: (a) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a) amended and adopted October 30, 1997, effective January 1, 1998; (a) 2nd paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For scope of discovery, see C.R.C.P. 26(b); for award of expenses of motion to determine the sufficiency of answer or objections, see C.R.C.P. 37(a)(4); for expenses on failure to admit, see C.R.C.P. 37(c).

COMMITTEE COMMENT

Revised C.R.C.P. 36 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

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

ANNOTATION

I. General Consideration.
II. Request.

I. GENERAL CONSIDERATION.

Law reviews. For article on Colorado Rules of Civil Procedure concerning depositions, discovery, and pretrial procedure, see 21 Rocky Mt. L. Rev. 38 (1948). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For comment on McGee v. Heim appearing below, see 34 Rocky Mt. L. Rev. 577 (1962). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Litigator's Guide to Summary Judgments'', see 14 Colo. Law. 216 (1985).

C.R.C.P. 26 to 37 must be construed together along with the requirement that the plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plain-

tiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

District court's decision to deny a motion to withdraw or amend a response to a request for admission is reviewed for abuse of discretion. Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

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

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

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. REQUEST.

When one fails to properly reply to requests for admissions, for the purpose of trial, those statements made in the request will be deemed admitted. McGee v. Heim, 146 Colo. 533, 362 P.2d 193 (1961); Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Moses v. Moses, 30 Colo. App. 173, 494 P.2d 133 (1971); Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

The genuineness of all documents not denied stands admitted under the provisions of this rule where a ''request for admission of facts and genuineness of documents'' is filed. Roemer v. Sinclair Ref. Co., 151 Colo. 401, 380 P.2d 56 (1963).

There is no binding effect on the requesting party of a request for admission pursuant to this rule and the response thereto. The purpose of this rule is to bind the party making the admission, not the party requesting it, and the submission of such a request and the response thereto admits nothing as to the requesting party. Aspen Petroleum Prods., Inc. v. Zedan, 113 P.3d 1290 (Colo. App. 2005).

An admission can constitute an adequate showing for the purpose of a summary judgment motion under C.R.C.P. 56. Roemer v. Sinclair Ref. Co., 151 Colo. 401, 380 P.2d 56 (1963); Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

Lack of adherence to formalities in verifying answers which do not result in prejudice should not interfere with the determination of the issues on the merits. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955).

Late filings may be permitted. Where there is a request for admission, a late filing of a denial does not create a nonrebuttable presumption of the truth of the admitted fact, and late filings may be permitted where no prejudice is shown. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Sanchez v. Moosburger, 187 P.3d 1185 (Colo. App. 2008).

Court should not have granted summary judgment based entirely on plaintiff's deemed admission. Though plaintiff failed to timely reply to request for admission, plaintiff moved for an extension of time to reply and submitted a denial of the request, an affidavit, and documentary evidence before the court granted summary judgment. Sanchez v. Moosburger, 187 P.3d 1185 (Colo. App. 2008).

Officials of an administrative agency cannot be compelled to answer requests for admissions concerning the procedure or manner in which they made their findings and rendered a decision in a given case. P.U.C. v. District Court, 163 Colo. 462, 431 P.2d 773 (1967).

The only exception to this rule is where an allegation has been made and there is a clear showing of illegal or unlawful action, misconduct, bias, or bad faith on the part of the administrative officials or a specific violation of an applicable statute. P.U.C. v. District Court, 163 Colo. 462, 431 P.2d 773 (1967).

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery and imposing sanctions as follows:

(1) Appropriate Court. An application for an order to a party or to a person who is not a party shall be made to the court in which the action is pending.

(2) Motion. (A) If a party fails to make a disclosure required by C.R.C.P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall be accompanied by a certification that the moving party in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subsection an evasive or incomplete disclosure, answer, or response shall be deemed a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. (A) If a motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court may, after reasonable notice and an opportunity to be heard, if requested, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard if requested, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Non-Party Deponents-Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending or from which the subpoena is issued, the failure may be considered a contempt of court.

(2) Party Deponents-Sanctions by Court. If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this subsection (2), unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to C.R.C.P. 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that

(A) the request was held objectionable pursuant to C.R.C.P. 36(a), or

(B) the admission sought was of no substantial importance, or

(C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

(D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated pursuant to C.R.C.P. Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice; or (2) to serve answers or objections to interrogatories submitted pursuant to C.R.C.P. 33, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted pursuant to C.R.C.P. 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized by subparagraphs (A), (B), and (C) of subsection (b)(2) of this Rule. Any motion specifying a failure under clauses (2) or (3) of this subsection shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has previously filed a motion for a protective order as provided by C.R.C.P. 26(c).

Source: (a), (c), and (d) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (c)(1) corrected and effective January 9, 1995; (a)(4) amended and adopted October 30, 1997, effective January 1, 1998; IP(a), (a)(4)(A), (a)(4)(B), (b)(2)(B), (b)(2)(E), (c)(1) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For general provisions governing discovery, see C.R.C.P. 26; for protective orders, see C.R.C.P. 26(c); for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31; for depositions of public or private corporations, partnerships or associations, or governmental agencies, see C.R.C.P. 30(b)(6) and 31(a); for interrogatories to parties, see C.R.C.P. 33; for production of documents and things and entry upon land for inspection and other purposes, see C.R.C.P. 34; for scope of discovery, see C.R.C.P. 26(b); for stipulations regarding discovery procedure, see C.R.C.P. 29; for sanctions for civil contempt, see C.R.C.P. 107; for vacating a final judgment, see C.R.C.P. 60(b); for requests for admission, see C.R.C.P. 36.

COMMENTS

1990

[1] Subsection (b)(1) was modified to reflect that orders to deponents under subsection (a)(1), when the depositions are taking place within this state, are sought in and issued by the court where the action is pending or from which the subpoena is issued pursuant to Section 13-90-111, C.R.S., and it is that court which will enforce its orders. Deponents appearing outside the state are beyond the jurisdictional limits of the Colorado courts. For out-of-state depositions, any problems should be addressed by the court of the jurisdiction where the deponent has appeared for the deposition under the laws of that jurisdiction.

1995

[2] Revised C.R.C.P. 37 is patterned substantially after Fed.R.Civ.P. 37 as amended in 1993 and has the same numbering. There are slight differences: (1) C.R.C.P. 37(4)(a) and (b) make sanctioning discretionary rather than mandatory; and (2) there is no State Rule 37(e) [pertaining to sanctions for failure to participate in framing of a discovery plan]. As with the other disclosure/discovery rules, revised C.R.C.P. 37 forms a part of a comprehensive case management system. See Committee Comments to C.R.C.P. 16, 26, 30, 31, 33, 34, and 36.

2015

[3] The threat and, when required, application, of sanctions is necessary to convince litigants of the importance of full disclosure. Because the 2015 amendments also require more complete disclosures, Rule 37(a)(4) now authorizes, for motions to compel disclosures or discovery, imposition of sanctions against the losing party unless its actions ''were substantially justified or that other circumstances make an award of expenses *manifestly* unjust.'' This change is intended to make it easier for judges to impose sanctions.

[4] On the other hand, consistent with recent supreme court cases such as *Pinkstaff v. Black & Decker (U.S.), Inc.*, 211 P.3d 698 (Colo. 2009), Rule 37(c) is amended to reduce the likelihood of preclusion of previously undisclosed evidence ''unless such failure has not caused or will not cause significant harm, or such preclusion is disproportionate to that harm.'' When preclusion applied ''unless the failure is harmless,'' it has been too easy for the objecting party to show *some* ''harm,'' and thereby cause preclusion of otherwise important evidence, which, in some circumstances, conflicts with the court's decisions.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Depositions and Discovery, Rules 26 to 37'', see 28 Dicta 375 (1951). For article, ''Depositions and Discovery: Rules 26-37'', see 23 Rocky Mt. L. Rev. 562 (1951). For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''Securing the Attendance of a Witness at a Deposition'', see 15 Colo. Law. 2000 (1986). For article, ''Rule 37: Discovery Sanctions 'Put Teeth in the Tiger''', see 16 Colo. Law. 1998 (1987). For article, ''Recovery of Attorney Fees and Costs in Colorado'', see 23 Colo. Law. 2041 (1994).

Reasonable discretion must be exercised in applying this rule. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

A party should not be denied a day in court because of an inflexible application of a procedural rule. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999); Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court should impose the least severe sanction, commensurate with the extent of the violation, contemplated in this section. Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

Specific finding of prejudice not required for award of attorney fees under section (a)(4). Hauer v. McMullin, 2015 COA 90, 421 P.3d 1154, rev'd on other grounds, 2018 CO 57, 420 P.3d 271.

"Opportunity to be heard", as used in section (a)(4)(A), does not mandate that a separate hearing be held before sanctions may be imposed. People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

C.R.C.P. 26 to 36 and this rule must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

The 2015 amendment to C.R.C.P. 26(a)(2)(B) that expert testimony "shall be limited to matters disclosed in detail in the [expert] report" does not create mandatory exclusion of expert testimony. Instead, the harm and proportionality analysis under section (c) of this rule remains the proper framework for determining sanctions for discovery violations. Section (c)(1) works in conjunction with rule 26 to authorize the trial court to sanction a party for failing to comply with discovery requirements. Catholic Health v. Earl Swensson Assocs., 2017 CO 94, 403 P.3d 185.

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

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

Tripartite balancing inquiry undertaken when right to confidentiality invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Court may order sanction if order sufficient. Where order required defendant to produce "requested" documents, plaintiff's motion to compel such production clearly listed the types of documents defendant was to produce, and evidence established that the requested documents were either in the defendant's custody or control, the court could properly order a sanction pursuant to section (b)(2)(A). N.S. by L.C.-K. v. S.S., 709 P.2d 6 (Colo. App. 1985).

A court is not required to, sua sponte, convert a motion to dismiss for failure to prosecute into a motion for sanctions under this rule. Cornelius v. River Ridge Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Sanctions for destruction of evidence may not be awarded under this rule absent an order compelling production. However, under a court's inherent powers, sanctions for the destruction of evidence may be awarded. Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. 1998).

Plaintiff's motion for sanctions for destruction of evidence denied because defendant was not provided with clear, prompt notice that a complaint would be filed and evidence was preserved for a year and a half after incident. Defendant's conduct in discarding evidence was not in bad faith. Castillo v. Chief Alternative, LLC, 140 P.3d 234 (Colo. App. 2006).

The appellate standard of review governing sanctions under this rule is whether the tribunal that imposed the sanction abused its discretion. When three separate hearings on the merits were vacated, and proceedings deadlocked for 18 months by claimant's refusal to sign an unconditional release, the sanction of dismissal was not an abuse of discretion. Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991).

Trial court may not impose sanctions under section (b)(2) where no violation of a court order has occurred. O'Reilly v. Physicians Mut. Ins. Co., 992 P.2d 644 (Colo. App. 1999).

Sovereign immunity does not bar an award of attorney fees against a public entity because sovereign immunity does not apply unless statutorily created and the Colorado Governmental Immunity Act does not provide immunity for an award of attorney fees against a public entity. C.K. v. People, 2017 CO 111, 407 P.3d 566.

Rule as basis for jurisdiction. See Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).

Applied in City & County of Denver v. District Court, 199 Colo. 223, 607 P.2d 984 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Wilson v. United States Fid. & Guar. Co., 633 P.2d 493 (Colo. App. 1981); Cross v. District Court, 643 P.2d 39 (Colo. 1982); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982); Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983); Asamera Oil (U.S.) Inc. v. KMOCO Oil Co., 759 P.2d 808 (Colo. App. 1988); Colo. State Bd. of Nursing v. Lang, 842 P.2d 1383 (Colo. App. 1992).

II. MOTION FOR ORDER.

A. In General.

Motion to compel discovery is committed to discretion of trial court and will be upheld on appeal absent a clear abuse of discretion. Gagnon v. District Court, 632 P.2d 567 (Colo. 1981).

Order reviewable in certain circumstances. Orders pertaining to pretrial discovery are interlocutory in nature and are not ordinarily reviewable in an original proceeding. Because, however, the exercise of original jurisdiction is discretionary and governed by the particular circumstances of the case, there are exceptions to this general rule when, for example, a pretrial discovery order significantly departs from the controlling standards of discovery, or when a pretrial discovery order will cause a party unwarranted damage that cannot be cured on appeal, such as where treatment records are protected from disclosure by statutory privileges. Clark v. District Court, 668 P.2d 3 (Colo. 1983).

When supreme court will review denial of motion to compel. While orders pertaining to pretrial discovery are interlocutory in nature and generally not reviewable, the supreme court will exercise original jurisdiction where the trial courts denial of a petitioner's motion to compel discovery will preclude the petitioner from obtaining information vital to his claims for relief. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

Trial court properly declined to award attorney's fees to nonparty deponent who moved the court not for a protective order but for an order striking defense counsel's endorsement of nonparty as an expert witness without any request for attorney's fees. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

Trial court finding that discovery motion was "not without justification" is insufficient to support denial of award of attorney's fees to person opposing motion which was denied. A remand is necessary because trial court must find that denied motion was "substantially justified" to deny award of attorney's fees to opponent of motion. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

B. Failure to Answer.

Sections (a)(1) and (d) are independent. The wording of the two sections (a)(1) and (d) of this rule establishes that these sections are independent significance and operation. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

The requirement of a motion and order under section (a)(1) should not be read into the provisions of section (d) as a condition precedent to entry of default judgment. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

When answers to interrogatories are not made, or are defective in some particular, the remedy is to compel proper answers, and one may not expect an answer on file to be disregarded by the court on the basis of technical defects unless he has properly raised the defects for consideration by the court. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973).

But employees, particularly nonresidents, of corporation cannot be compelled to answer or produce private records. Corporations are "sui generis", and a suit against a principal is not a suit against its agents or employees. So the fact that defendants are sued by a foreign corporation in Colorado does not mean that all of the plaintiff-corporation's officers and employees located and domiciled outside Colorado are subject to the jurisdiction of Colorado courts. Moreover, no employer, corporate or otherwise, can compel its personnel to travel to a foreign state or furnish their private records for the use of its opponents. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

C. Award of Expenses of Motion.

Entry of an award is mandatory under section (a)(3). Graefe & Graefe v. Beaver Mesa Exploration, 695 P.2d 767 (Colo. App. 1984).

Entry of an award is discretionary under section (a)(4). Where party's objection to disclosure was based on a good-faith belief that the documents sought exceeded the scope of permissible discovery and that failure to apply for a protective order would waive its objection to the admissibility of evidence, the court did not abuse its discretion in denying an award of attorney fees in connection with the motion. DA Mtn. Rentals, LLC v. Lodge at Lionshead Phase III Condo. Ass'n, 2016 COA 141, 409 P.3d 564.

Although wife's motion in dissolution of marriage action included language used in C.R.C.P. 26(c), neither the motion nor the argument made at the hearing indicated that she

was requesting discovery and the trial court had no authority to assess attorney fees pursuant to this rule. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

III. FAILURE TO COMPLY.

A. Sanctions by Court in District.

Strict compliance with contempt procedures must be followed before jurisdiction to adjudicate contempt and punishment therefor attaches. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Where the order of the court is one requiring a party to answer ''any questions desired to be asked by counsel'', violation of such a broad order cannot be adjudicated a contempt under this rule. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Sections (a) and (b)(1) of this rule must be read together and contemplate a specific order to answer specific questions, followed by an opportunity to resume the taking of the deposition, and, if there then occurs a refusal by the deponent to answer the specific questions as ordered, citation for contempt may issue. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Party must refuse to be sworn or answer to be in contempt. Where there is no contention that a party refused to be sworn or that he refused to answer any question after being directed to do so by the court, which are the only circumstances from which contempt of court will lie under section (b)(1) of this rule, then it is error for a court to find a party in contempt. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

A party who fails to attend the taking of a deposition cannot be adjudged in contempt under section (b)(1) of this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

B. Sanctions by Court in Which Action is Pending.

This rule provides that under limited circumstances if corporate officials fail to testify in a suit concerning the corporation, as may be required by the court, then certain pleading penalties may be invoked against the corporation, but not the corporation's agents or employees, and particularly those residing in another state. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Pleading penalties may be invoked. If corporate officials fail to testify in a suit concerning the corporation, as may be required by our courts, then certain pleading penalties may be invoked against the corporation. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

Default judgment should be set aside where trial court enters the default in the absence of any showing that the party against whom the default is entered had personal knowledge of the duties imposed upon him by a pretrial order and without a showing that the three-day notice of application for default requirement of C.R.C.P. 55(b)(2), has been observed. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Gross negligence on the part of counsel resulting in a default judgment being entered pursuant to section (b)(2)(C) of this rule is considered excusable neglect on the part of the client entitling him to have the judgment set aside under C.R.C.P. 60(b), for to hold otherwise, would be to punish the innocent client for the gross negligence of his attorney. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

Finding of willfulness or bad faith not required. Entry of a default judgment under section (b)(2) does not require a finding of willfulness or bad faith on the part of the disobedient party. Callahan v. Wadsworth Ltd., 669 P.2d 141 (Colo. App. 1983).

Judgment dismissing complaint under section (b)(2) does not require a finding of willfulness or bad faith by disobedient party. McRill v. Guar. Fed. Savings & Loan Ass'n, 682 P.2d 498 (Colo. App. 1984).

Notice requirement of C.R.C.P. 55(b)(2) must be scrupulously adhered to; however, default judgment is permissible even though proper time between service and entry of judgment was not met where the trial court's order was sufficiently clear to provide requisite notice to defendant that failure to provide discovery could result in entry of a default judgment. Muck v. Stubblefield, 682 P.2d 1237 (Colo. App. 1984); Audio-Visual Sys., Inc. v. Hopper, 762 P.2d 696 (Colo. App. 1988).

Appropriateness of sanction not held error. Although sanction establishing personal jurisdiction over defendant was overbroad and improper in relation to the motion on which it was based, it did not constitute reversible error because evidence adduced at the hearing was sufficient to establish personal jurisdiction. N.S. by L.C.-K. v. S.S., 709 P.2d 6 (Colo. App. 1985).

Trial court did not abuse its discretion in accepting plaintiffs' interpretation of contract as sanction for defendants' unexcused failure to appear for scheduled depositions. Scrima v. Goodley, 731 P.2d 766 (Colo. App. 1986).

Dismissal is not required where corporation's C.R.C.P. 30(b)(6) deponent failed to have personal knowledge regarding the question specified in the deposition subpoena, despite the fact that the district court's sanction of

an award of costs did not cure the prejudice to the party noticing the deposition. Mun. Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

Court did not abuse its discretion in failing to impose attorney fees as sanction for failure to respond to discovery requests in post-dissolution of marriage modification of child support case. In re Emerson, 77 P.3d 923 (Colo. App. 2003).

IV. EXPENSES ON FAILURE TO ADMIT.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962).

The awarding of costs is within the sound discretion of the trial court. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961); Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

The awarding of costs is within the sound discretion of the trial court and will not be interfered with on appeal absent an abuse of that discretion. Prof'l Rodeo Cowboys Ass'n v. Wilch, Smith & Brock, 42 Colo. App. 30, 589 P.2d 510 (1978).

Trial court erred in not awarding reasonable costs and attorney fees incurred by the defendant in disproving plaintiff's denial of fact which was material in proving truth of statement charged as defamatory in libel action. Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972).

Under section (c) of this rule, there must be something more than simply a refused admission and its subsequent proof. Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

Under this rule, such costs are awarded only upon proper finding of the requirements by the trial court. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The absence of an express finding of good faith on the part of one party does not entitle the other party to recover. Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

V. FAILURE TO DISCLOSE.

Section (c) provides for the exclusion of non-disclosed evidence unless the failure to disclose is either substantially justified or harmless to the opposing party. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999); Cook v. Fernandez-Rocha, 168 P.3d 505 (Colo. 2007); Trattler v. Citron, 182 P.3d 674 (Colo. 2008); Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

When evaluating whether a failure to disclose is harmless under section (c), the inquiry is whether the failure to disclose will prejudice the opposing party by denying the party an adequate opportunity to defend against that evidence. Todd v. Bear Valley Vill. Apartments, 980 P.2d 973 (Colo. 1999); Farm Credit of S. Colo. v. Mason, 2017 COA 42, __ P.3d __, rev'd on other grounds, 2018 CO 46, 419 P.3d 975.

For a non-exhaustive list of factors identified by federal courts that may be used to guide a trial court in evaluating whether a failure to disclose is either substantially justified or harmless, see Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999).

Failure to disclose was harmless under the facts of this case. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999).

Reading section (c) of this rule together with C.R.C.P. 26(a) and 26(c), a party may request sanctions based on the opposing party's providing, without substantial justification, misleading disclosures or its failure, without substantial justification, seasonably to correct misleading disclosures. In legal malpractice case, because the trial court did not consider the defendant's claim that attorneys representing plaintiff provided misleading disclosures or failed seasonably to correct such disclosures, it incorrectly denied the motion under section (c) of this rule. Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Because section (c) expressly requires the court to afford an opportunity to be heard, on remand, trial court must hold a hearing on defendant's motion seeking sanctions and attorney fees from plaintiff's attorneys. In doing so, the court must determine whether the disclosures were misleading or there was a failure seasonably to supplement misleading disclosures and, if so, whether the failure was either substantially justified or harmless, employing the factors outlined in Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999); Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Trial court abused its discretion in precluding expert witness testimony. Where plaintiff failed to fully disclose the testimonial history of expert witnesses as required by C.R.C.P. 26(a)(2)(B)(I) but otherwise provided all required disclosures, the entire proposed testimony of the expert witnesses could not be considered undisclosed evidence and witness preclusion was a disproportionately harsh sanction. Because sanctions should be directly commensurate with the prejudice caused to the opposing party, in lieu of witness preclusion, the trial court should have considered use of the alternative sanctions referenced in section (c). Trattler v. Citron, 182 P.3d 674 (Colo. 2008); Erskine v. Beim, 197 P.3d 225 (Colo. App. 2008).

Trial court abused its discretion in denying motion for extension of time for C.R.C.P. 26(a)(2) expert witness without conducting an inquiry into the harmlessness of party's non-compliance with C.R.C.P. 26(a)(2). Cook v. Fernandez-Rocha, 168 P.3d 505 (Colo. 2007).

Trial court did not abuse its discretion in striking affirmative defenses where defendant failed to respond to motion for limited sanctions and thereby failed to show that its failure to make initial disclosure was harmless. Furthermore, in striking the affirmative defenses the court did not deny defendants the opportunity to be heard because there were still issues of fact that could be challenged. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

Trial court abused its discretion in barring an expert medical witness where the facts of the case showed that plaintiff's untimely disclosure of the expert witness was substantially justified because it resulted from the progressive nature of the plaintiff's alleged injuries, the expert's testimony was potentially central to the plaintiff's case, and the delayed disclosure was harmless to the defendant because the trial date had not yet been set. Berry v. Keltner, 208 P.3d 247 (Colo. 2009).

Failure to properly disclose expert rebuttal testimony was harmless because the excluded testimony was important to plaintiff's case, should not have surprised defendant, and did not disrupt the trial and there was no evidence that plaintiffs acted in bad faith. Accordingly, trial court abused its discretion in striking rebuttal testimony. Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

Late disclosure did not cause prejudice. County's untimely disclosure of witnesses and exhibits required under C.R.C.P. 26(a) did not constitute serious misconduct that denied defendant an adequate opportunity to defend against the witnesses and exhibits. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court was not required to preclude expert witness's entire testimony. Where expert's report was submitted 11 days before trial and defendant knew the substance of the expert's testimony, had received all other disclosures required by C.R.C.P. 26, and deposed the expert before trial, trial court did not abuse its discretion in allowing expert to testify after redacting portions of the report that previously had not been made known to the defendant. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court did not abuse its discretion by precluding expert witness's testimony. The sanction of preclusion of expert medical witness was not disproportionate because it was based not only on witness's failure to fully disclose testimonial history, but also on witness's failure to produce materials used to formulate opinions pursuant to C.R.C.P. 26(a)(2)(B)(I). Clements v. Davies, 217 P.3d 912 (Colo. App. 2009).

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

VI. FAILURE OF PARTY TO ATTEND DEPOSITION.

Sections (a)(1) and (d) are independent. The wording of the two sections (a)(1) and (d) of this rule establishes that these sections are of independent significance and operation. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

The requirement of a motion and order under section (a)(1) should not be read into the provisions of section (d) as a condition precedent to entry of default judgment. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

For intent of 1970 amendment, see Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

Under this rule if the failure to appear before the officer who is to take the deposition is willful, the court, on notice and motion, may strike out all or any part of the pleadings, dismiss the action or proceeding, or enter judgment by default against the party so failing. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

There must be a clear showing of "willful failure". The court should not resort to the drastic action of dismissing a complaint for failure to appear for a deposition in the absence of a clear showing that the party ''willfully fails'' to respond. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

A trial court may rule confidential information admissible as a discovery sanction when the violating party fails to object timely to the discovery requests which originally sought confidential information. Scott v. Matlack, Inc., 39 P.3d 1160 (Colo. 2002).

Default judgment proper where party fails to appear for deposition. Judgment by default may be entered against a party who willfully

fails to appear in response to a proper notice to have his deposition taken under this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Default and judgment properly taken against party where he refuses to answer interrogatories or produce documents. Where interrogatories are properly served on a party and he is also duly served with an order for production of documents pertinent to the issues involved in the cause, and the party fails and refuses either to answer the interrogatories or produce the documents ordered by the court, then a default and judgment is properly taken against that party for such refusal. Johnson v. George, 119 Colo. 594, 206 P.2d 345 (1949).

Before the penalty of default is imposed, there must be given an opportunity to show cause for nonappearance. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

This rule requires that, before a default can be entered, it must be on "motion and notice", including the three-day notice requirement of C.R.C.P. 55(b)(2), where the party against whom judgment by default is sought has appeared in the action. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Contempt is not a penalty that goes along with a default judgment under this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Entering a default judgment is discretionary under this rule. This rule provides that where a party fails to appear for his deposition the court "may" enter a default judgment. Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963).

There is an abuse of discretion to enter default where party was financially unable to appear and offered to give deposition prior to trial. There was no willful failure of a nonresident party to appear for the taking of a deposition as would justify the trial court in dismissing that party's action where she was financially unable to pay her expenses to the place where the deposition was to be taken; since there are other procedures available to the opposing party by way of interrogatories and requests for admissions which afford protection against surprise, and counsel for the nonappearing party offered to have the party appear a few days prior to the date of trial, thereby involving the expenditure of but one trip and not denying the opposing party his right to a deposition. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

There is no abuse of discretion in not entering default where party offered to appear in another place. Where a party, a resident of another state, notified counsel for the other party that she either could not or would not appear at the place in Colorado indicated in the notice to take her deposition, but would be available at another place in Colorado for such purpose, and did not appear at the place indicated, the trial court did not abuse its discretion in denying a motion to strike the nonappearing party's answer and enter a default judgment under section (d) of this rule. Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963).

The trial court must consider whether a party's failure to comply with discovery was willful or in bad faith in determining which sanctions should be applied under section (d). Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

Imposition of default judgment is a drastic sanction requiring specific finding of willfulness, bad faith, or culpable fault consisting of at least gross negligence in failing to comply with discovery obligations. Kwik Way Stores, Inc., v. Caldwell, 745 P.2d 672 (Colo. 1987).

Finding of willful disobedience justifies imposition of default. Audio-Visual Sys., Inc. v. Hopper, 762 P.2d 696 (Colo. App. 1988); Kennedy by and through Kennedy v. Pelster, 813 P.2d 845 (Colo. App. 1991).

Before entering order of dismissal, court is required to consider and to determine whether plaintiffs had the practical ability to pay the attorney fees awarded. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

Sanction of dismissal should be imposed only if the sanctioned party has engaged in culpable conduct consisting of willful disobedience, a flagrant disregard of that party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

Party's pattern of noncompliance and sabotage in connection with court-ordered psychiatric examination warranted dismissal under section (b)(2). Newell v. Engel, 899 P.2d 273 (Colo. App. 1994).

Failure to pay attorneys fees and costs can result in dismissal only if it is established that such failure was willful or in bad faith, and not because of an inability to pay. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

If there is a genuine factual issue as to the party's ability to pay, the trial court must undertake to resolve that issue and to adopt sufficient findings and conclusions to disclose the basis for its decision. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

The actions of a party acting as "next friend" for a minor plaintiff cannot be the basis for punitive sanctions against the minor where there is no evidence the minor refused to

cooperate in discovery and there are lesser sanctions to compel discovery which would not result in dismissal of the minor's claim for events beyond his control. Kennedy by and through Kennedy v. Pelster, 813 P.2d 845 (Colo. App. 1991).

CHAPTER 5

Trials

ANALYSIS BY RULE

CHAPTER 5

TRIALS

Rule 38. Right to Trial by Jury

(a) Exercise of Right. Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury. The jury fee is not refundable; however, a demanding party may waive that party's demand for trial by jury pursuant to section (e) of this rule.

(b) Demand. Any party may demand a trial by jury of any issue triable by a jury by filing and serving upon all other parties, pursuant to Rule 5(d), a demand therefor at any time after the commencement of the action but not later than 14 days after the service of the last pleading directed to such issue, except that in actions subject to mandatory arbitration under Rule 109.1 the demand for trial by jury shall be filed and served not later than 14 days following a demand for trial de novo. A demand for trial by jury may be endorsed upon a pleading. The demanding party shall pay the requisite jury fee upon the filing of the demand.

(c) Jury Fees. When a party to an action has exercised the right to demand a trial by jury, every other party to such action shall also pay the requisite jury fee unless such other party, pursuant to Rule 5(d), files and serves a notice of waiver of the right to trial by jury within 14 days after service of the demand.

(d) Specification of Issues. A demand may specify the issues to be tried to the jury; in the absence of such specification, the party filing the demand shall be deemed to have demanded trial by jury of all issues so triable. If a party demands trial by jury on fewer than all of the issues so triable, any other party, within 14 days after service of the demand, may file and serve a demand for trial by jury of any other issues so triable.

(e) Waiver; Withdrawal. The failure of a party to file and serve a demand for trial by jury and simultaneously pay the requisite jury fee as required by this Rule constitutes a waiver of that party's right to trial by jury. A demand for trial by jury made pursuant to this rule may not subsequently be withdrawn in the absence of the written consent of every party who has demanded a trial by jury and paid the requisite jury fee and of every party who has failed to waive the right to trial by jury and paid the requisite jury fee.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990; (b), (c), and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For jurors, see C.R.C.P. 47 and 48; for trial by jury or by the court, see C.R.C.P. 39; for consolidation and separate trial, see C.R.C.P. 42; for filing and serving, see C.R.C.P. 5(d).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and

Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''One Year Review of Contracts'', see 39 Dicta 161 (1962). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For article, ''Will Contests — Some Procedural Aspects'', see 15 Colo. Law. 787 (1986). For article, ''Right to a Civil Jury Trial: State Versus Federal Court'', see 17 Colo. Law. 39 (1988).

Applied in Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971); Gleason v. Guzman, 623 P.2d 378 (Colo. 1981); Nat'l Acceptance Co. of Am. v. Mars, 780 P.2d 59 (Colo. App. 1989).

II. WHERE JURY RIGHT EXISTS.

A. In General.

Law reviews. For article, ''One Year Review of Domestic Relations'', see 39 Dicta 102 (1962).

Annotator's note. Since section (a) of this rule is similar to § 191 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Under the Colorado constitution, trial by a jury in a civil action is not a matter of right. Parker v. Plympton, 85 Colo. 87, 273 P. 1030 (1928); Kahm v. People, 83 Colo. 300, 264 P. 718 (1928); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982).

There is no constitutional right to a trial by jury in civil actions. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951); Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981); Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Snow Basin, Ltd. v. Boettcher & Co., 805 P.2d 1151 (Colo. App. 1990); First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

The right to jury trials in civil cases is regulated by this rule. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Where an action is purely legal in nature, the parties are entitled to a jury trial. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

No other rule of civil procedure enlarges the category of cases in which the right to jury trial shall be had. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

This rule itself does not enlarge upon the right to jury trial as those rights were fixed by the former code provisions and the judicial pronouncements thereunder. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Law-equity distinction survives for determination of right to jury. Although law and equity have been merged under the Colorado rules of civil procedure, the law-equity distinction continues to survive for the purpose of determining whether there is a right to a jury trial in a civil action. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

Issue of fact must be tried to jury upon demand. Although there is no constitutional right to a jury trial in civil cases in Colorado, an issue of fact must be tried to a jury upon demand in an action for personal injuries. Gleason v. Guzman, 623 P.2d 378 (Colo. 1981).

Generally in purely equitable cases, the trial must be to the court. Sieber v. Frink, 7 Colo. 148, 2 P. 901 (1883); Dohner v. Union Cent. Life Ins. Co., 109 Colo. 35, 121 P.2d 661 (1942).

When the action is an equitable proceeding, the issues joined are to be tried by the court. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

Equity claims are triable by the court and not by jury. Claims sounding in equity are triable by the court and not by a jury. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970); Faucett v. Hamill, 815 P.2d 989 (Colo. App. 1991).

In equity cases, neither party is entitled to a jury trial as a matter of right. Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 P. 158 (1911).

There is no right to a jury trial in actions which historically were brought before courts of equity. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Difede v. Mountain States Tel. & Tel., 763 P. 2d 298 (Colo. App. 1988), rev'd on other grounds, 780 P.2d 533 (Colo. 1989).

The right to trial by jury is guaranteed only in actions at law specifically named in section (a). Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Whether an issue of fact must be tried to a jury depends upon the character of the action in which the issue is joined. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

The character of the action determines whether an issue of fact is to be tried to a court or to a jury. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Snow Basin Ltd. v. Boettcher & Co., 805 P.2d 1151 (Colo. App. 1990).

Where there were no disputed facts with respect to the plaintiff's forcible entry and detainer claim, and the factual issues to be tried related only to equitable defenses asserted by the defendant, no jury was required. RTV,

L.L.C. v. Grandote Int'l Ltd., 937 P.2d 768 (Colo. App. 1996).

It is the nature of the relief sought or defense asserted, not the nature of the factual issues presented, that determines whether the right to a jury exists. RTV, L.L.C. v. Grandote Int'l Ltd., 937 P.2d 768 (Colo. App. 1996).

Nature of issue does not determine trial by jury. The right to have an issue of fact tried by a jury is not determined by the nature of the issue. Danielson v. Gude, 11 Colo. 87, 17 P. 283 (1887); United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 P. 1045 (1897); Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

"Basic thrust" doctrine involves a determination of whether a lawsuit, characterized as a whole, will be entitled to a jury under this rule, rather than applying the rule at the outset to each issue within the case. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

A plaintiff's amended complaint supersedes its original complaint for purposes of the civil jury trial right. If a plaintiff files an amended complaint and a party properly demands a jury trial, the court should look to the claims in the amended complaint to determine whether the case may be tried to a jury. Mason v. Farm Credit of S. Colo., 2018 CO 46, 419 P.3d 975.

The original complaint filed in an action and not the counterclaim fixes the nature of the suit, by what arm of the court it should be tried, and whether either party is entitled to a jury trial. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

The complaint fixes the nature of a suit. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

Where the original petition and the third-party complaint states actions sounding in equity, it is proper to deny the third-party respondent's jury demand. In re Malone v. Colo. Nat'l Bank, 658 P.2d 284 (Colo. App. 1982).

It is the character of the complaint, rather than that of any counterclaims or defenses subsequently asserted, that fixes the nature of the suit and determines whether it should be tried in equity or at law. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

A cross-complaint may present issues properly triable to a jury. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

There is no material difference between this rule and the provision of the former Code of Civil Procedure on the subject of compulsory counterclaims to justify abandonment of the rule limiting the right to a jury. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Where legal and equitable claims are joined in a complaint, the court must determine whether the basic thrust of the action is equitable or legal in nature. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 B.R. 1002 (Bankr. D. Colo. 1981); Motz v. Jammaron, 676 P.2d 1211 (Colo. App. 1983), cert. dismissed, 680 P.2d 238 (Colo. 1984); First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990); Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993); Mason v. Farm Credit of S. Colo., 2018 CO 46, 419 P.3d 975.

There are two methods to determine whether an action is legal or equitable. One is to look to the nature of the remedy sought. The second is to look at the historical nature of the right. Mason v. Farm Credit of S. Colo., 2018 CO 46, 419 P.3d 975.

It is generally preferred to look at the nature of the remedy sought to determine whether a claim is legal or equitable. Mason v. Farm Credit of S. Colo., 2018 CO 46, 419 P.3d 975.

Where plaintiff demands damages only in the event that equitable relief is impossible, he is not entitled as a matter of law to demand a jury. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

Until the plaintiff amends his complaint to strip him of his initial demand for equitable relief, he must be held to be pressing for that relief, in which case he is not entitled to demand jury trial. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

If a third-party defendant makes a timely demand for a jury trial, the third-party defendant would be entitled to a jury trial on the issues raised between him and the defendant, although not on those issues between the defendant and the plaintiff. Simpson v. Digiallonardo, 29 Colo. App. 556, 488 P.2d 208 (1971).

Where a third-party defendant properly demands a jury trial on issues raised by the parties concerning a matter clearly within the scope of this rule, it is error not to have its liability under the third-party complaint determined by a jury, and the fact that the other parties do not desire a jury trial is of no moment. Simpson v. Digiallonardo, 29 Colo. App. 556, 488 P.2d 208 (1971).

Either party on appeal from a county court to a district court should be entitled to a jury trial in the district court in actions set forth in this rule. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

B. Application of Right.

Where plaintiffs seek damages and subsequent injunctive relief, there is a right to a jury trial on the legal issues. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Where plaintiffs pray primarily for equitable relief, and only in the alternative for a

remedy at law, the character of the suit is equitable, and plaintiffs therefore are not entitled to a jury trial. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Trial court's characterization of an action as equitable was not contrary to law where the primary remedy sought resembled that afforded in actions for partition and where there were also claims for an accounting and for unjust enrichment, all of which are equitable claims. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

A suit for specific performance is an equitable action, and being such, it is triable to the court without a jury. Plains Iron Works Co. v. Haggott, 72 Colo. 228, 210 P. 696 (1922).

Suit for specific performance is not "for the recovery of specific personal property". While the recovery of specific personal property may result from the successful prosecution of a suit for specific performance of a contract to transfer such personal property, the suit, nevertheless, is not one ''for the recovery of specific personal property'' within the meaning of this section. Plains Iron Works Co. v. Haggott, 72 Colo. 228, 210 P. 696 (1922).

Similarly, the fact that the equitable relief sought would require the conveyance of land does not bring the case within that portion of this rule requiring a jury trial in actions for the recovery of specific real property, inasmuch as that portion deals only with actions at law for the recovery of real property. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

The foreclosure of a mortgage is an equitable proceeding, and the issues joined are to be tried by the court. Neikirk v. Boulder Nat'l Bank, 53 Colo. 350, 127 P. 137 (1912); Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Actions seeking judicial foreclosure of liens have traditionally been considered equitable proceedings. Although such actions typically involve determinations of the existence and amount of indebtedness, and although any ensuing foreclosure decree typically includes a personal monetary award against the debtor founded in contract, the basic thrust of foreclosure proceedings has nevertheless been held to be equitable. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

Where the relief sought is an injunction, the action is therefore equitable in nature, and a defendant has no right to a jury trial. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Attachment and garnishment proceedings submitted to court. The remedies of attachment and garnishment were unknown at common law and exist only by reason of statute or rules of procedure enacted pursuant to statutory authority, and it is not error to submit fact issues in a garnishment proceeding to the court rather than to a jury. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

Right to jury in replevin action. A replevin action is an action at law and traditionally carries with it the right to a jury trial. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

Claims for replevin and conversion are legal in nature and defendant is entitled to a jury trial. Both claims primarily seek money damages, and historically were considered actions at law. Mason v. Farm Credit of S. Colo., 2018 CO 46, 419 P.3d 975.

Defendant entitled to jury trial where plaintiff's claims for relief, including replevin, conversion, theft, and fraud, are all traditionally triable to a jury. Citicorp Acceptance Co., Inc., v. Sittner, 772 P.2d 655 (Colo. App. 1989).

The Colorado supreme court denied certiorari in the case annotated under this catchline in the 1990 replacement volume. See Citicorp Acceptance Co., Inc. v. Sittner, 783 P.2d 838 (Colo. 1989).

The fact that an action is for a declaratory judgment is not, in and of itself, determinative of the type of action brought for purposes of determining whether there is a right to a trial by jury. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

If the issue of fact involves a trust, it is triable to the court. Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

There is no right to jury trial in action to declare trust invalid. The right to jury trial granted by section (a) does not extend to actions to declare a trust invalid. Ayres v. King, 665 P.2d 594 (Colo. 1983).

Actions by beneficiary or ward against trustee or guardian in an existing trust or guardianship are generally, but not always, equitable in nature. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

Where fraud in both the execution and the inducement is available as a defense in an action at law, then under this rule, the defendant is entitled to have this issue go to the jury in an action on a note. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

The fact that plaintiff asks for a money judgment is by no means decisive that the action is one at law. Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

This rule does not prescribe a jury trial in an annulment proceeding as a matter of right. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

There is no right to jury trial in action to set aside fraudulent transfer. An action to set aside a fraudulent transfer is traditionally equitable and thus carries with it no right to a jury

trial. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

In litigation involving statutorily required uninsured motorist coverage, a tort claim against the uninsured motorist is distinct from the insured motorist's contract claim against his or her insurer. In the former case, where the uninsured motorist's liability has been determined by default, public policy precludes the insurer from insisting upon a jury trial although in some respects the insurer may be considered a codefendant. In the latter case, however, the amount of damages payable under the contract is an issue on which the insurer may demand a jury trial. State Farm Mut. Auto. Ins. Co. v. Brekke, 105 P.3d 177 (Colo. 2004).

There is no right to a jury trial in a mechanic's lien case. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

The air pollution control act contains no provision for trial by a jury or for penalty assessment by a jury. Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976).

There is not jury trial provision in action for repossession of collateral by secured party. Although this rule provides that a party is entitled to a jury trial upon demand in an action for the recovery of specific real or personal property, the rule is not intended to extend to actions involving the repossession of collateral by a secured party. Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

There is no right to a jury trial under the Colorado Consumer Protection Act. People v. Shifrin, 2014 COA 14, 342 P.3d 506.

III. DEMAND.

Upon compliance with this rule a party, to an action may have a jury trial as a matter of right. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Right to jury trial, once proper demand is made and fee is paid, may be lost only for reasons stated in C.R.C.P. 39(a). The trial court, in an action for payment of medical benefits, erred in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with C.R.C.P. 121. Neither C.R.C.P. 39(a) nor C.R.C.P. 121 includes a waiver provision on such basis. Whaley v. Keystone, 811 P.2d 404 (Colo. App. 1989).

This rule does not specifically cover the time within which demand for jury trial should be made in cases appealed from a county court to a district court. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

If the demand for a jury trial in cases appealed from county court is made within a reasonable time prior to trial, and the trial court, under C.R.C.P. 40, is afforded an opportunity to arrange its trial calendar in an expeditious manner, the request for jury trial should be granted. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

IV. WAIVER.

Law reviews. For note, ''Does a Motion for a Directed Verdict by Both Parties Constitute a Waiver of the Jury?'', see 3 Rocky Mt. L. Rev. 67 (1930). For article, ''Selection of a Jury in a Civil Case'', see 33 Dicta 179 (1956).

Plaintiff specifically waived her right to a jury trial by not paying the jury fee in a timely manner. The second sentence of section (e) applies when a defendant timely requests a jury trial and, in response, a plaintiff then timely pays the jury fee. In that situation, the plaintiff would still be entitled to a jury trial even if the defendant attempts to withdraw his or her request for a jury trial. Crawford v. Melby, 89 P.3d 451 (Colo. App. 2003).

Deadline for jury fee may not be extended under C.R.C.P. 6(b) because the deadlines are set forth in statute. Defendant who failed to pay jury fee waived his right to a jury trial. Premier Members Fed. Credit Union v. Block, 2013 COA 128, 312 P.3d 276.

Failure to act in accordance with this rule waives right to jury trial regardless of the reasons given in excuse or for neglect. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

One requesting a jury trial may not later withdraw that request unless his desire for a nonjury trial is acceded to by the remaining parties to the lawsuit. Forster v. Superior Court, 175 Colo. 444, 488 P.2d 202 (1971).

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded and the requisite jury fee has been paid pursuant to Rule 38, the action shall be designated upon the register of actions as a jury action. The trial shall be by jury of all issues so demanded unless (1) all parties who have demanded a trial by jury and paid the requisite jury fee and all parties who have failed to waive the right to trial by jury and paid the requisite jury fee have, in writing, waived their rights to trial by jury, or (2) the court upon motion or on its own initiative finds that a right to trial by jury of some or all of those issues does not exist, or (3) all parties demanding trial by jury fail to appear at trial.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court.

(c) Advisory Jury and Trial by Consent. In all actions not triable by a jury the court upon motion or on its own initiative may try any issue with an advisory jury, or, except in actions against the State of Colorado when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990.

Cross references: For motion for directed verdict, see C.R.C.P. 50; for right to trial by jury, see C.R.C.P. 38.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962).

Applied in Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

II. BY JURY.

Agreement of parties regarding jury trial not binding on court. The trial court is not bound by the agreement of the parties regarding a jury trial if no right to a jury trial exists. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

Although a trial court may empanel an advisory jury over the objections of a party in an equitable action, the jury's findings in such advisory capacity do not constitute final or binding resolutions of disputed issues. Rather, the court remains the ultimate fact finder and is required to make findings and conclusions in support of its judgment. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

Failure to comply with demand is no grounds for reversal where no objection. Where formal demand for jury trial is made by a party, the cause thereafter proceeds to trial by the court without a jury, and there is no objection to such trial by either party, the unsuccessful party cannot thereafter secure reversal of the judgment entered against him upon the ground that there was no formal disposition of the demand for jury trial in strict compliance with section (a) of this rule. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

Before the issue of proximate cause can be taken from the jury, the evidence must be undisputed and such that reasonable minds could reach but one conclusion. Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

For cases construing § 196 of the former code of civil procedure which was supplanted by this rule, see Leahy v. Dunlap, 6 Colo. 552, (1883); Cerussite Mining Co. v. Anderson, 19 Colo. App. 307, 75 P. 158 (1903); Frank v. Bauer, 19 Colo. App. 445, 75 P. 930 (1904); Parker v. Plympton, 85 Colo. 87, 273 P. 1030 (1928); Hiner v. Cassiday, 92 Colo. 78, 18 P.2d 309 (1932); In re Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

This rule grants broad powers to a district judge to order a jury trial. Once a master is appointed, however, the district judge cannot summarily reject the master's report and order a jury trial in derogation of the requirement of C.R.C.P. 53 (e)(2). Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Right to jury trial, once proper demand is made and fee is paid, may be lost only for reasons stated in section (a) of this rule. The trial court, in an action for payment of medical benefits, erred in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with C.R.C.P. 121. Neither this rule nor C.R.C.P. 121 includes a waiver provision on such basis. Whaley v. Keystone, 811 P.2d 404 (Colo. App. 1989).

III. BY COURT.

Where a litigant acquiesces in a trial before the court, thereby consenting thereto, he cannot thereafter contend for the first time on appeal that a jury should have been called. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

This rule permits the trial court, in its discretion, to order a jury trial of any and all issues. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

If the trial court orders a jury trial, it may exercise its discretion without interference from the supreme court. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Trial courts may order a jury trial with a belated motion or none at all. Trial courts, either with a belated motion before them, with or without reasons stated therein, or without any motion at all, may order a jury trial, because it is within their discretion so to do. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

A trial court is within its right and power in ordering a jury trial without a timely formal request therefor. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

Section (b) of this rule affords the court no discretion to grant an untimely request for a jury trial. Machol v. Sancetta, 924 P.2d 1197 (Colo. App. 1996).

Unlike federal practice, reasons for belated demand are unnecessary. In applying this rule, Colorado does not follow the interpretation of the federal trial courts that where a belated jury demand is made, counsel must give valid reasons for the request or else the trial court will not choose to exercise its discretion to consider it. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Judge need not give any reasons why he desires jury. The rule that ''judicial discretion must have some rational basis; it is not synonymous with judicial whim or caprice'' does not mean that a trial judge under section (b) of this rule has to give any reasons why he desires a jury in a case. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Since no reason need be given, the fact that the wrong reason is given for granting the motion is immaterial, because the trial court on its own motion can order a jury trial without giving any reason whatsoever. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Where the petitioner fails to tender the jury fee required by local district court rules, he is deemed to have waived his demand for a jury trial and this rule should not be used to overcome the waiver. McConnell v. District Court, 680 P.2d 528 (Colo. 1984).

Although this rule grants discretion to trial court to order a trial by jury without demand, such discretion is bounded by the proviso that the order be made only in an action in which the demand might have been made in the first place. Nowhere is discretion or authority given to trial court to grant a jury trial over a litigant's meritorious motion to strike demand. Motz v. Jammaron, 676 P.2d 1211 (Colo. App. 1983), cert. dismissed, 680 P.2d 238 (Colo. 1984).

Applied in Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

IV. ADVISORY JURY AND TRIAL BY CONSENT.

Law reviews. For article, ''One Year Review of Domestic Relations'', see 39 Dicta 102 (1962).

This rule refers to two kinds of trials: (1) Cases not triable by a jury may, on motion or on the court's own initiative, be tried with an ''advisory jury''; (2) nonjury cases including nonjury statutory actions (with an exception) may, by consent of court and the parties, be tried with a ''jury''. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

In the first, an "advisory jury" acts; in the second, a "jury" acts. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

This rule takes care of two differing situations: In the first, a party may request that a nonjury case be tried to a jury and the adversary party may resist, and in such case, the court may grant the request but, since it has been resisted, may use the services of the jury in an advisory capacity only; in the second, parties and court consenting, the jury's verdict has the effect of a common-law verdict. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

Handling of issues of fact in equitable cause discretionary with court. It is discretionary with the court in equitable causes of action whether issues of fact shall be tried by the court or sent to a jury. Zimmerman v. Mozer, 10 B.R. 1002 (Bankr. D. Colo. 1981).

In an equity cause, where issues are submitted to a jury, its verdict is merely advisory to the court and may be disregarded. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968); Zimmerman v. Mozer, 10 B.R. 1002 (Bankr. D. Colo. 1981).

Court never has been bound by conclusions of an advisory jury. In the trial of equity cases, the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact. Such findings are, however, no more binding now than they were when the old chancery practice prevailed. Conclusions of the jury are in such cases simply advisory; they may be accepted and form the basis of decree or judgment, or they may be entirely disregarded. When the Code of Civil Procedure was first adopted, the contrary suggestion on this subject in the note on page 376 of ''Adams' Equity'' may have been applicable, but the enactment in 1879 clearly established the practice of trying chancery cases to the court without a jury; and it cannot now be correctly claimed that special findings of a jury in such cases are as binding as verdicts in actions in law. Hall v. Linn, 8 Colo. 264, 5 P. 641 (1885); Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 P. 158, 1913B Ann. Cas. 282 (1911) (decided under § 191 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

The mere fact that an action is in equity does not bar the parties from a jury trial by consent wherein the jury's verdict has the same effect as it would at common law. Shuman v.

Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Where one party demands a jury trial of a nonjury case, neither the other party nor court objects, and trial so proceeds, consent to such trial is deemed to have been given. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Trial of nonjury action to a jury is jury trial in regular sense. Under this rule, the trial of a nonjury action to a jury, with the consent of both parties and the trial judge, is a jury trial in its regular sense as if trial to a jury had been a matter of right. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

In a trial by consent, the jury's verdict should have the same effect as if it were a common-law verdict. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Consent to binding jury. Where complex procedural history of cases did not make clear that failure to object at each pretrial proceeding would be treated as consent to binding jury and where defendants made pretrial objections to binding jury in motion to bifurcate two cases, defendants did not consent to binding jury. Mountain States Tel. & Tel. v. DiFede, 780 P.2d 533 (Colo. 1989).

Status of jury may not be changed except by agreement. Once court and counsel embark upon a nonjury statutory proceeding in such manner as to treat it as a jury case, the status of the jury may not be changed except by agreement. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

The unilateral act of a trial court in changing the case from one of trial by consent to one in which an advisory verdict would be received is error, as such change could only have been accomplished by agreement of the parties and the court. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

A trial court does not err in refusing to try the issues with an advisory jury pursuant to the discretionary powers conferred upon the trial court by section (c) of this rule. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

The air pollution control act contains no provision for trial by a jury or for penalty assessment by a jury. Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976).

Rule 40. Assignment of Cases for Trial

Subject to the directives of the Chief Justice of the Colorado Supreme Court, trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient. Precedence shall be given to actions entitled thereto.

Cross references: For precedence of motions for preliminary injunctions, see C.R.C.P. 65(a).

ANNOTATION

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951).

Annotator's note. Since this rule is similar to § 193 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

In the interests of justice, trials must be expedited. Benster v. Bell, 83 Colo. 587, 267 P. 792 (1928); Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

The right to a jury trial may not be utilized to disrupt a trial calendar and to obtain delay. Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975).

If it may be said that the setting of the cause for trial by the court of its own motion without notice is erroneous, a party must show where he was prejudiced by such action. Lux v. McLeod, 19 Colo. 465, 36 P. 246 (1894).

Where counsel is present at the time a cause is set for trial and makes no objection to the setting of the case, all irregularities in the notice of such setting and the service thereof are waived. Cerussite Mining Co. v. Anderson, 19 Colo. App. 307, 75 P. 158 (1903).

The fact that an attorney has other cases set for trial in another court at the same time does not excuse him or his client from being in attendance at the trial of a case regularly reached on the calendar of the court where no motion for a continuance or showing is made why the case should not proceed to trial; under such circumstances there is no abuse of discretion in the refusal of the trial court to set aside a judgment regularly entered. Diebold v. Diebold, 79 Colo. 7, 243 P. 630 (1926).

Applied in Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982).

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) **By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court upon payment of costs: (A) By filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action or by their attorneys. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once previously dismissed in any court an action based on or including the same claim.

(2) **By Order of Court.** Except as provided in subsection (a)(1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection (2) is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) **By Defendant.** For failure of a plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52. Unless the court in its order for dismissal otherwise specifies, a dismissal under this section (b) and any dismissal not provided for in this Rule, other than a dismissal for failure to prosecute, for lack of jurisdiction, for failure to file a complaint under Rule 3, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(2) **By the Court.** Actions not prosecuted or brought to trial with due diligence may be dismissed by the court with prejudice after reasonable notice by the court and in accordance with Rule 121, section 1-10.

(3) All motions for dismissal for failure to prosecute shall be presented in accordance with Rule 121, section 1-10 and shall specify whether the movant requests dismissal with or without prejudice. All orders dismissing for failure to prosecute shall specify whether the dismissal is with or without prejudice. Motions or orders that do not so specify shall be deemed motions for dismissal without prejudice or orders for dismissal without prejudice as appropriate.

(c) Dismissal of Counterclaim, Cross Claim, or Third-Party Claim. The provisions of this Rule apply to the dismissal of any counterclaim, cross claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this Rule shall be made before a responsive pleading is filed or served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Source: (b)(1) amended and effective January 12, 2017.

Cross references: For dismissal of class actions, see C.R.C.P. 23(e); for dismissal of receivership action, see C.R.C.P. 66(c); for findings by the court, see C.R.C.P. 52; for commencement of action, see C.R.C.P. 3; for joinder of persons needed for just adjudication, see C.R.C.P. 19.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For note, ''Comments on Last Clear Chance — Procedure and Substance'', see 32 Dicta 275 (1955). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with conversion of a motion to dismiss into a motion for summary judgment, see 62 Den. U. L. Rev. 220 (1985).

Annotator's note. Since sections (a) and (b) of this rule are similar to § 184 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Under section 184 of the former Code of Civil Procedure, which was supplanted by this rule, the plaintiff, where no counterclaim had been set up in the answer, was entitled to dismiss his action. Tabor v. Sullivan, 12 Colo. 136, 20 P. 437 (1888); Long v. McGowan, 16 Colo. App. 540, 66 P. 1076 (1901); Doll v. Slaughter, 39 Colo. 51, 88 P. 848 (1907); Colo. Util. Corp. v. Pizor, 99 Colo. 294, 62 P.2d 570 (1936).

It was within the discretion of the court to dismiss the plaintiff's suit without prejudice, where motion for dismissal was made before trial and no counterclaim had been filed. Denver & Rio Grande Ry. v. Cobley, 9 Colo. 152, 10 P. 669 (1886); Schechter v. Denver, L. & G. R. R., 8 Colo. App. 25, 44 P. 761 (1896); Teller v. Sievers, 20 Colo. App. 109, 77 P. 261 (1904); Miller v. East Denver Mun. Irrigation Dist., 83 Colo. 406, 266 P. 211 (1928).

Court order granting voluntary dismissal under section (a)(2) is reviewed for an abuse of discretion. And the court did not abuse its discretion in granting plaintiff's request to voluntarily abandon its condemnation proceeding because the defendants could assert their counterclaims in a separate pending declaratory judgment action and therefore were not prejudiced by the dismissal. Sinclair Transp. Co. v. Sandberg, 2014 COA 75M, 350 P.3d 915.

A dismissal without prejudice is not a final order for purposes of appellate review. Bock v. Brody, 8870 P.2d 530 (Colo. App. 1993).

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

Standard in ruling on motion to dismiss shall be considered. In ruling on a motion to dismiss, the standard is not whether the plaintiff established a prima facie case, but whether judgment in favor of defendant is justified on the evidence presented. Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Gapter v. Kocjancic, 703 P.2d 660 (Colo. App. 1985); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

Water court did not err in requiring applicants for conditional rights of exchange to establish more than a prima facie case at midtrial to avoid judicial fact finding and dismissal pursuant to section (b) when no other rule or statute alters the application of said section in regard to this matter. Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

"Motion for directed verdict" is motion to dismiss. When the court is the trier of fact, a motion denominated a ''motion for directed verdict'' is actually a motion to dismiss pursuant to section (b) of this rule. Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Gapter v. Kocjancic, 703 P.2d 660 (Colo. App. 1985).

Rule as basis for jurisdiction. See Lurvey v. Phil Long Ford, Inc., 37 Colo. App. 11, 541 P.2d 114 (1975); Bd. of County Comm'rs v. City & County of Denver, 190 Colo. 347, 547 P.2d 249 (1976).

Applied in Lehman v. Williamson, 35 Colo. App. 372, 533 P.2d 63 (1975); Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976); People v. In Interest of D.A.K., 198 Colo. 11, 596 P.2d 747 (1979); Romero v. Rossmiller, 43 Colo. App. 215, 603 P.2d 964 (1979); Hanks v. Green, 44 Colo. 80, 607 P.2d 1034 (1980); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); People ex rel. MacFarlane v. Delaware Corp., 626 P.2d 1144 (Colo. App. 1980); Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981); Fish v. Charnes, 652 P.2d 598 (Colo. 1982); Crocker v. Colo. Dept. of Rev., 652 P.2d 1067 (Colo. 1982); Conrad v. City & County of Denver, 656 P.2d 662 (Colo.

1982); Lucero v. Martin, 660 P.2d 902 (Colo. 1983); Foothills Meadow v. Myers, 832 P.2d 1097 (Colo. App. 1992).

II. VOLUNTARY DISMISSAL.

A. By Plaintiff.

Law reviews. For article, ''What Divorce Statutes Are Now in Effect in Colorado?'', see 21 Dicta 68 (1944).

By the salutary provisions of this rule, a plaintiff is given the right to dismiss a first suit at an early stage. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

A party that obtains a voluntary dismissal of its claims subject to terms and conditions to which it consistently maintains its objections may challenge those terms and conditions as legally impermissible or as an abuse of discretion on appellate review. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

An action may be dismissed prior to answer or motion for summary judgment. An action may be dismissed by notice, without court order, at any time before the adverse party files an answer or motion for summary judgment. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969); Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Filing of motion under rule 12 (b)(2) alleging lack of subject matter jurisdiction does not bar plaintiff from filing of notice to dismiss under rule 41 (a)(1). Burden v. Greeven, 953 P.2d 205 (Colo. App. 1998).

Determination of the terms and conditions of dismissal under section (a)(2) is discretionary with the trial court and will not be disturbed on review absent an abuse of that discretion. Section (a)(2) expressly gives the court power to grant a motion for dismissal under the rule upon such terms and conditions as the court deems proper. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Under this section, payment of costs is a condition to a dismissal by a plaintiff. Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

A requirement for payment of attorney fees and expenses as a term or condition of an order granting voluntary dismissal of a claim may be imposed without evidence and findings satisfying the requirements of § 13-17-102 (5) and C.R.C.P. 11. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

When a voluntary motion to dismiss is with prejudice, there is no authority to condition the granting of the motion upon the payment of attorney fees. Groundwater Appropriators of the S. Platte River Basin, Inc. v. City of Boulder, 73 P.3d 22 (Colo. 2003).

The party requesting an award of attorney fees bears the burden of proving by a preponderance of the evidence its entitlement to such an award. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Award of attorney fees and expenses are not precluded by the special nature of water right adjudication proceedings. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994); Application of Hines Highlands P'ship, 929 P.2d 718 (Colo. 1996).

Plaintiff may do so without prejudice and with no terms or conditions attached thereto. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Section (a)(2) is intended to give the right to dismiss a claim that may later become viable or may be asserted later in a different forum, provided that the defendant will not be unfairly prejudiced. The purpose of the rule is different from the objectives of § 13-17-102 (5) and C.R.C.P. 11, which are intended to protect a plaintiff from imposition of attorney fees upon dismissal of an unmeritorious claim provided that the plaintiff seeks dismissal promptly after learning that the claim cannot prevail. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

A plaintiff need do no more than file a notice of dismissal with the clerk; that document itself closes the file, and the court has no role to play; there is not even a perfunctory order of court closing the file. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

The filing of a notice to dismiss, even pending actual transfer to court of proper venue, is effective. Since the transferor court, until the certification and actual transfer of the case to a different venue, has physical control over the files, the clerk of the transferor court may accept the filing of an answer and place it in the file, and the filing of a notice to dismiss, pending the actual transfer of the proceedings to a court of proper venue, is likewise effective. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

The action stands dismissed without an order of court. Where defendant has not interposed any cross-complaint or answer and plaintiff seeks to dismiss the proceeding, then upon the filing of the dismissal, the action stands dismissed without order of court, and the court errs in declining to dismiss the case. Chamberlain v. Chamberlain, 108 Colo. 538, 120 P.2d 641 (1941).

By filing a notice to dismiss, the court's jurisdiction does not immediately terminate for all purposes. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Plaintiff's voluntary dismissal does divest a court of jurisdiction to grant defendant's motion to dismiss plaintiff's claims. Alpha Spacecom, Inc. v. Hu, 179 P.3d 62 (Colo. App. 2007).

Appropriate orders may be entered. The filing of the notice of dismissal closes the file, but the trial court may enter appropriate orders subsequent to the notice, as practical considerations must prevail. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

When a plaintiff has once dismissed, a second dismissal operates as an adjudication on the merits. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

This rule also protects a defendant by providing that if the plaintiff takes advantage of his right of early dismissal on one occasion, he may not repeat the process with impunity. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Where the answer filed in a state court is after the first notice of dismissal and before a second notice of dismissal in a federal court, then at the time the answer is filed, defendant cannot have anticipated that a notice of dismissal would subsequently be filed in the federal court, and so, because the right to invoke the ''double dismissal'' rule does not arise until after defendant's answer is filed in the state court and since the answer is not directed to the federal court complaint, the filing thereof does not constitute a waiver of defendant's right to move for dismissal, as it would on the basis of the rule. A defendant cannot invoke the right prior to the filing of the second notice of dismissal, because the right does not exist, nor can he logically waive a right prior to the time it comes into existence. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Dismissal order held not to contravene this rule. Hilliard v. Klein, 124 Colo. 479, 238 P.2d 882 (1951).

When from the very nature of the transaction the intent to preserve the right to sue other tortfeasors is apparent, the intent of a written agreement to release some of the joint tortfeasors will be given the same effect as if it were a pure covenant not to sue; there is to be a dismissal as to such parties and a preservation of the right to continue the action with respect to the remaining defendants where it is clear that the intent of the plaintiff is to preserve any rights the plaintiff might have to recover against the remaining defendants. Farmers Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

Stipulated judgment of dismissal held final. Where the parties to litigation, dealing at arm's length, stipulate for the entry of a judgment of dismissal under section (a)(1), and they do not claim mistake, inadvertence, surprise, or excusable neglect, nor are any of the parties to the action seeking to have the order set aside, that judgment is final. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

''Meeting of minds'' necessary before stipulation of dismissal. Where parties do not have a ''meeting of the minds'' as to the terms of a proposed compromise and settlement, there is no settlement which would serve as a basis for a stipulation of dismissal under section (a)(1)(B). H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Where no comment made as to whether first dismissal was with or without prejudice that dismissal was without prejudice. Where no comment by counsel or the court was made as to whether the dismissal prior to the trial of the first action was with or without prejudice, by the clear language of section (a)(1) of this rule, that dismissal was without prejudice. Vigil v. Lewis Maint. Serv., Inc., 38 Colo. App. 209, 554 P.2d 703 (1976); FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

Water court did not abuse its discretion by not awarding attorney fees because it was reasonable to continue to assert the claim until the eve of trial. Application of Hines Highlands P'ship, 929 P.2d 718 (Colo. 1996).

B. By Court.

A plaintiff is not entitled to dismiss his action as a matter of right after the trial has begun, but only as a matter of favor. Reagan v. Dyrenforth, 87 Colo. 126, 285 P. 775 (1931); Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

If he wishes to escape the effect of the ''two dismissal rule'', he is required to obtain a dismissal by the court under section (a)(2) of this rule upon such terms and conditions as the court deems proper. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Dismissal discretionary. Although section (a)(2) gives the court discretion to grant or deny a motion to dismiss, a plaintiff's motion to dismiss voluntarily without prejudice generally should be granted, unless granting the motion will cause some legal prejudice to the defen-

dant. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984); Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Trial court has discretionary authority to convert a voluntary proceeding to dismiss without prejudice to an involuntary dismissal with prejudice under rule governing voluntary dismissal of actions by order of the court. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Fact that plaintiff may later bring the same suit against defendant in another court in and of itself is not sufficient prejudice to defendant to warrant denying motion to dismiss; however, if a dismissal would unfairly prejudice defendant, then it should be denied. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Before granting a plaintiff's motion for voluntary dismissal without prejudice, the trial court must determine that any harm to the defendant may be avoided by imposing terms and conditions of dismissal. FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

In determining whether a dismissal without prejudice would cause harm to a defendant, the trial court should consider: Duplicative expense of separate litigation; extent to which current suit has progressed, including effort and expenses incurred by defendant; adequacy of plaintiff's explanation for need to dismiss; plaintiff's diligence in bringing motion to dismiss; and any undue vexatiousness on plaintiff's part. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

When a trial court grants a plaintiff's motion for voluntary dismissal without prejudice under section (a)(2) and does so over the defendant's objection, without imposing terms and conditions that the defendant requests, or without making allowances for the defendant's counterclaims, the court's order is sufficiently final to support the defendant's appeal. FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

Denial of plaintiff's motion to dismiss without prejudice not an abuse of discretion where: Case had languished for a year; plaintiff failed to verify his claim that he was financially unable to proceed; defendant incurred legal expenses of over $30,000; trial on the merits was imminent and would have been relatively simple and inexpensive; and the trial court was likely to rule in favor of defendant on the remaining legal issue. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

It is within discretion of district court to dismiss appeal from state administrative agency action if the appellant has not complied with the statutory time limitations for filing briefs. Warren Vill., Inc. v. Bd. of Assmt. Appeals, 619 P.2d 60 (Colo. 1980).

Trial court has implicit authority to order dismissal with prejudice under rule governing voluntary dismissal of actions by order of the court. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Terms and conditions of dismissal may include award of costs and fees. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Award of costs and fees may not include work that will be useful in continuing litigation, as the policy of the rule is to fashion a remedy for the defendant rather than to punish the plaintiff. The court's order must include competent evidence supporting the allocation of fees and costs. Haystack Ranch, LLC v. Fazzio, 997 P.2d 548 (Colo. 2000).

Once an adverse party has answered or filed a motion for summary judgment, section (a) requires that a stipulation of dismissal must be signed by all parties who have appeared in the action or by their attorneys. Because the city of Westminster was not a party to the stipulation of dismissal, the dismissal was not done pursuant to section (a)(1), and, therefore, under section (a)(2), a court order of dismissal was necessary. The running of the 45-day period for filing an appeal does not begin until a court order of dismissal as to all parties is filed. Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993).

If court places terms and conditions upon voluntary dismissal by order of the court which are unacceptable to plaintiff, plaintiff is entitled to proceed with litigation. Accordingly, plaintiff was entitled to elect to proceed to trial rather than to accept dismissal with prejudice as a term and condition of dismissal. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

A court's decision on a section (b) motion will not be overruled on appeal unless it is shown that the findings and conclusions of the trial court were so manifestly against the weight of the evidence as to compel a contrary result. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

III. INVOLUNTARY DISMISSAL BY DEFENDANT.

A. Failure to Prosecute.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959).

The plaintiff and not the defendant must prosecute the case in due course and without unusual delay under this rule. Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947).

The burden rests upon the plaintiff to prosecute a case in due course without unusual

delay. Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956); Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

The burden is on the plaintiff to prosecute a case in due course and without unusual delays. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982).

It is not the defendant's duty to make any move whatever, except such as the law requires him to make in response to the steps of the plaintiff. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

It is unnecessary for the party moving to dismiss to show inconvenience or injury suffered by reason of the delay because the law presumes injury from unreasonable delay. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982).

A plaintiff who does not move forward with reasonable dispatch demanded by this rule can find no solace in the activity of his opponent unless it has somehow hindered his own ability to proceed. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

Defendant is estopped by his waiver. Where the record indicates that any laches on the part of plaintiffs was waived by defendant and his conduct in the matter, defendant is estopped to urge dismissal. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

Where both parties fail in their duty to observe the steps to be taken to bring their claims to a speedy trial or termination, neither should be given an advantage over the other because of this fact, and dismissal of an action for failure to prosecute should be denied upon a proper showing. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963).

This rule which permits a court to dismiss a case for inactivity is not meant to be a rule of forfeiture, but rather a guide for the efficient and orderly administration of the courts. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

If a person starts the law in motion and does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of a default and a dismissal of the action. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A trial court has the inherent power to dismiss a claim for failure to prosecute. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967); Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985); Cullen v. Phillips, 30 P.3d 828 (Colo. App. 2001).

Power to dismiss for failure to prosecute in sound discretion of trial court. The inherent power to dismiss an action for failure to prosecute rests in the sound discretion of a trial court. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Tell v. McElroy, 39 Colo. App. 431, 566 P.2d 374 (1977).

The decision whether there has been a failure to prosecute which warrants dismissal lies within the sound discretion of the trial court. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982); Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Discretion not without bounds. The discretion to dismiss an action for failure to prosecute is not without bounds and it must be borne in mind that courts ''exist primarily to afford a forum to settle litigable matters between disputing parties''. Farber v. Green Shoe Mfg. Co., 42 Colo. App. 255, 596 P.2d 398 (1979).

Power to dismiss for failure to prosecute is not an unlimited power. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Tell v. McElroy, 39 Colo. App. 431, 566 P.2d 374 (1977).

The power should not be exercised where the record shows that both parties nursed the case along with the court's approval, for in such circumstances, it is an abuse of discretion to order a dismissal. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

An appellate court cannot say that, as a matter of law, a plaintiff either was or was not diligent, since this conclusion was for the trial court to make within the radius of its sound discretion. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A trial court retains the discretion to dismiss an action with or without prejudice. Cornelius v. River Ridge Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Dismissal with prejudice held proper. Where there is no explanation whatsoever for plaintiff's delay of over two years in prosecuting tort action, and there was a sufficient showing to satisfy the requirement of willful default, it was a proper case for dismissal with prejudice. Kappers v. Thomas, 32 Colo. App. 200, 511 P.2d 910 (1973).

A water court does not abuse its discretion in dismissing a case with prejudice when an applicant for adjudication of water rights does not comply with the civil disclosure rules and fails to provide any information related to the applications other than that contained in the initial application. Given the large-scale nondisclosure, the water court's conclusion that the applicant's failure to comply with disclosure requirements constitutes a failure to prosecute was not an abuse of discretion. Cornelius v. River Ridge

Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Serious wilful default should be shown. Courts have the responsibility to do justice between disputing parties, and one's day in court should not be denied except upon a serious showing of wilful default. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965); Levine v. Colo. Transp. Co., 163 Colo. 215, 429 P.2d 274 (1967).

Where there are facts that serve as mitigating circumstances for delay, they should be considered by the court, and a motion for dismissal of an action for failure to prosecute denied upon a proper showing. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

Where the plaintiff put forth every effort to have her case prosecuted and finally obtained new counsel in order to speed the proceedings, it cannot be said that she was guilty of failing to prosecute. Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947).

A statement on the day set for trial that plaintiff does not wish to proceed with the suit is sufficient to justify dismissal for want of prosecution. Merwin v. Ideal Cement Co., 128 Colo. 503, 263 P.2d 1021 (1953).

Where the supreme court reversed a judgment and remanded the cause for further proceedings and plaintiff failed for eight years to take any steps to have the cause retried, a motion to dismiss for want of prosecution should have been sustained, no reasonable excuse for the delay being shown. Yampa Valley Coal Co. v. Velotta, 83 Colo. 235, 263 P. 717 (1928).

A case disclosed a reasonable excuse for the delay where there were mitigating circumstances involved in the delay of the suit when: First, the parties were engaged in negotiation toward a settlement for three years for passage of time alone does not, under such circumstances, show that the action has not been prosecuted with reasonable diligence; second, plaintiffs were required to obtain new counsel after their former attorney had been elected county judge, for this occasioned permissible delay as counsel was required to familiarize himself with the facts and details of the case; and third, there was substantial evidence in the record indicating that defendant was equally responsible with plaintiffs for delaying trial of the action, since several of the later trial dates were vacated because defendant's counsel either requested postponement or failed to appear. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

Where the first attorney became ill for months and was unable to work and the plaintiffs were unable to retain other attorneys until they acquired the necessary funds, these facts show a reasonable excuse for the delays in prosecuting an action, particularly when, by the time the motion to dismiss for lack of prosecution was heard, the plaintiffs were ready and anxious to proceed and were not trying to delay the cause. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

When dismissal for failure to prosecute unjustified. Where the motion to dismiss is made after the plaintiff has resumed his efforts to prosecute, has set the case for trial, and, indeed, is ready for trial on the very day the motion is heard, the policy underlying the dismissal rule to prevent unreasonable delays is less compelling than the policy favoring resolution of disputes on the merits, and the court errs in dismissing the action. Farber v. Green Shoe Mfg. Co., 42 Colo. App. 255, 596 P.2d 398 (1979).

There is no abuse of discretion in dismissing for lack of prosecution where plaintiff had not prosecuted action for thirty-seven years. Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

B. No Right to Relief.

In ruling on a motion to dismiss for failure to prove a prima facie case, the proper test is whether plaintiff produced some evidence which, when taken most favorably to him, proved a claim upon which relief could be granted. Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

Trial court's decision regarding whether to grant a motion for dismissal should not be disturbed on appeal unless findings of trial court are clearly against the weight of the evidence. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992); Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

Under this rule a trial court is empowered to determine a case on its merits at the conclusion of plaintiff's evidence and to render a judgment upon findings based thereon. Edwards Post No. 252, Regular Veterans Ass'n v. Gould, 144 Colo. 334, 356 P.2d 908 (1960).

Trial court may sit as the trier of facts. Under section (b)(1) of this rule, a trial court sitting as the trier of the facts may at the conclusion of plaintiff's presentation of evidence determine the facts and render judgment against

the plaintiff. Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966).

The trial court is the finder of fact. When the trial is to the court, the trial court is the finder of fact and may make its findings and render judgment against the plaintiff at the close of the plaintiff's case. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); Franklin Drilling v. Lawrence Constr. Co., 2018 COA 59, __ P.3d __.

Where there is an issue of fact to be resolved, a trial court errs in dismissing plaintiff's complaint under this rule. Reed v. United States Fid. & Guar. Co., 176 Colo. 568, 491 P.2d 1377 (1971).

A complaint cannot be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts which may be proved in support of the claim. Millard v. Smith, 30 Colo. App. 466, 495 P.2d 234 (1972).

When a trial judge, after considering all of the evidence, is convinced that there is no basis upon which a verdict in favor of the plaintiff could be supported, it is his duty as a matter of law to sustain a motion for dismissal. McSpadden v. Minick, 159 Colo. 556, 413 P.2d 463 (1966).

The correct test for determining the issues raised by a motion to dismiss in a trial without jury is whether a judgment in favor of the defendant is justified on the plaintiff's evidence and not whether plaintiff has presented a "prima facie" case. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

Where defendant's motion to reopen the divorce decree was not a motion pursuant to section (b) of this rule, no findings of fact and conclusions of law were required to accompany the ruling on this motion. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

The question on review of such action is not whether the plaintiff made a "prima facie" case, but whether a judgment in favor of the defendant was justified on the plaintiff's evidence. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); South Carolina Ins. Co. v. Fisher, 698 P.2d 1369 (Colo. App. 1984).

This is not a situation where the evidence is to be viewed in the light most favorable to plaintiffs. Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966).

When reviewing a dismissal entered in jury trial, the evidence must be viewed in light most favorable to plaintiff. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

Every favorable inference oftentimes is indulged. Comprehended in a ruling on a motion for dismissal is oftentimes the indulgence by the trial court of every favorable inference of fact which can legitimately be drawn from plaintiff's evidence. A. D. Jones & Co. v. Parsons, 136 Colo. 434, 319 P.2d 480 (1957).

When passing upon a motion for a dismissal where the court is also the trier of fact, then, at the conclusion of plaintiffs' evidence, the trial judge may weigh the evidence, determine issues of credibility, and reach all permissible inferences, including those favoring defendants. First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

In granting a motion to dismiss under this rule, the court necessarily finds on the factual questions that the plaintiff has shown no right to relief. Sedalia Land Co. v. Robinson Brick & Tile Co., 28 Colo. App. 550, 475 P.2d 351 (1970).

In reviewing such findings, all conflicting evidence and possible inferences therefrom must be resolved by the appellate court in favor of the trial court's judgment. Sedalia Land Co. v. Robinson Brick & Tile Co., 28 Colo. App. 550, 475 P.2d 351 (1970).

If reasonable men could differ in the inferences and conclusions to be drawn from the evidence as it stood at the close of the plaintiff's case, then an appellate court cannot interfere with the findings and conclusions of the trial court. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); R.A. Reither Const. Co. v. Wheatland Rural Elec. Ass'n, 680 P.2d 1342 (Colo. App. 1984); Colo. Coffee Bean v. Peaberry Coffee, 251 P.3d 9 (Colo. App. 2010).

Where the question depends on a state of facts from which different minds could honestly draw different conclusions on that issue, then, under the (former) Code of Civil Procedure, the question must have been submitted to the jury for determination. Whitehead v. Valley View Consol. Gold Mining Co., 26 Colo. App. 114, 141 P. 138 (1914); City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000 (1927); Arps v. City & County of Denver, 82 Colo. 189, 257 P. 1094 (1927); Robinson v. Belmont-Buckingham Holding Co., 94 Colo. 534, 31

P.2d 918 (1934); Lesser v. Porter, 94 Colo. 348, 30 P.2d 318 (1934).

Previously, such a motion admitted the truth of the evidence produced by plaintiff, in sense most unfavorable to defendant, and every inference legitimately deducible therefrom. Allen v. Florence & C. C. R. R., 15 Colo. App. 213, 61 P. 491 (1900); Whitehead v. Valley View Consol. Gold Mining Co., 26 Colo. App. 114, 141 P. 138 (1914); Mulford v. Nickerson, 76 Colo. 404, 232 P. 674 (1925).

Ordinarily, a denial of a defendant's motion to dismiss entitles him to go forward with proof in support of his denials and the affirmative matter set up in his answer, as it is tantamount to a finding that a plaintiff has made out a ''prima facie'' case. A. D. Jones & Co. v. Parsons, 136 Colo. 434, 319 P.2d 480 (1957).

Dismissal ends defendant's right to introduce evidence. In the absence of anything in the order for dismissal indicating otherwise, defendant's right thereafter to introduce additional evidence is lost. Carlile v. Zink, 130 Colo. 451, 276 P.2d 554 (1954).

A motion for nonsuit is not proper under this rule, since the motion should be for dismissal. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946); Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946); W. T. Grant Co. v. Casady, 117 Colo. 405, 188 P.2d 881 (1948).

On appeal the court will treat a motion for nonsuit as one to dismiss under this rule. Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946).

C. Adjudication on Merits.

An order of dismissal under this rule is an adjudication on the merits. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Order is adjudication whether the dismissal is directed to counterclaims, cross-claims, or third-party claims. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Jurisdictional or procedural grounds considered before substantive merits examined. Jurisdictional or procedural grounds for dismissal will be considered prior to examination of the substantive merits of a case. Summerhouse Condo. Ass'n v. Majestic Sav. & Loan Ass'n, 660 P.2d 16 (Colo. App. 1982).

A mere dismissal without prejudice is no bar to another action for the same cause. Hallack v. Loft, 19 Colo. 74, 34 P. 568 (1893); Martin v. McCarthy, 3 Colo. App. 37, 32 P. 551 (1893); First Nat'l Bank v. Mulich, 83 Colo. 518, 266 P. 1110 (1928).

A dismissal without prejudice does not operate as "res judicata". Wistrand v. Leach Realty Co., 147 Colo. 573, 364 P.2d 396 (1961).

A dismissal based upon preliminary, subsidiary, technical, or jurisdictional grounds or lack of standing does not operate as "res judicata". Batterman v. Wells Fargo AG Credit Corp., 802 P.2d 1112 (Colo. App. 1990).

Where the order of dismissal expressly specifies that it is without prejudice, the plaintiff has a right to have his claim adjudicated by amending his complaint or standing on the complaint and appealing. Wistrand v. Leach Realty Co., 147 Colo. 573, 364 P.2d 396 (1961).

Amendment at close of evidence is error. At the close of the evidence, it is error to grant plaintiff, over defendant's objection, leave to amend the complaint to allege a new matter; instead of allowing the amendment, the trial court, under section (b)(1) of this rule, could dismiss plaintiff's complaint with a specification that such dismissal would not operate as an adjudication upon the merits. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

A judgment upon the merits is final and conclusive upon the parties, unless suspended or set aside by some proper proceeding. Hallack v. Loft, 19 Colo. 74, 34 P. 568 (1893).

Dismissal "with prejudice" under C.R.C.P. 3(a) is a nullity. Section (b)(1) of this rule makes it clear that dismissals under C.R.C.P. 3(a), are without prejudice and do not operate as an adjudication on the merits; therefore the words ''with prejudice'' in an order of dismissal are a nullity and would in no way bar a subsequent action asserting the same claim for relief as set forth in the complaint. Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971); Market Eng'g v. Monogram Software, 805 P.2d 1185 (Colo. App. 1991).

Where a complaint is dismissed as to certain defendants and judgment of dismissal entered, a court has no power, after the time to file a motion for a new trial has expired as to such defendants, to grant a motion for a new trial as to all defendants, such dismissal constituting a judgment on the merits under this rule. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Dismissal as to decedent under C.R.C.P. 25(a)(1) does not absolve remaining defendants who may be liable on a theory of respondeat superior. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Where an action is dismissed because of the absence of proper parties, there is no decision on the merits. Summerhouse Condo. Ass'n v. Majestic Sav. & Loan Ass'n, 660 P.2d 16 (Colo. App. 1982).

If a plaintiff wishes to contest such a dismissal as error, a timely motion for a new trial must be filed. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Where a motion to dismiss is based upon failure of a plaintiff to establish a claim since he has released some joint tortfeasors, there is nothing in the record and the law to justify any conclusion other than that the action should

proceed against the remaining joint tortfeasors where it is clear from a written agreement that they are not to be released as defendants. Farmers Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

Failure to pay attorneys fees and costs pursuant to court order can result in dismissal only if it is established that such failure was willful or in bad faith, and not because of an inability to pay. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

Applied in O'Done v. Shulman, 124 Colo. 445, 238 P.2d 1117 (1951); City & County of Denver v. Stanley Aviation Corp., 143 Colo. 182, 352 P.2d 291 (1960); Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

IV. INVOLUNTARY DISMISSAL BY COURT.

This rule contemplates that notice precede an order of dismissal. Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Courts of record have power to make and enforce rules for the transaction of their business, the only restriction upon such power being that the rules shall be reasonable and shall not contravene a statute. Cone v. Jackson, 12 Colo. App. 461, 55 P. 940 (1899); Hoy v. McConaghy, 14 Colo. App. 372, 60 P. 184 (1900).

The rule of a trial court providing for the dismissal of causes for failure of prosecution is valid, and the court has power to enforce it. Carnahan v. Connolly, 17 Colo. App. 98, 68 P. 836 (1902).

The rule can be enforced for failing to timely perform act required by law. A rule of court providing for the dismissal of cases for want of prosecution can only be enforced against a party for a failure to perform, within the prescribed time, some act required of him by law. Hoy v. McConaghy, 14 Colo. App. 372, 60 P. 184 (1900).

Where the facts to which a court applied the rule in dismissing a case are not before an appellate court, it cannot be said that the trial court abused its discretion or violated the law in applying the rule. Carnahan v. Connolly, 17 Colo. App. 98, 68 P. 836 (1902).

A judgment of dismissal entered without notice is void and is subject to direct or collateral attack. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959).

Where a trial court's own rules give the court authority to set a case for trial without notice other than that explicit in the rule itself, then, although this rule governing dismissals requires actual notice to show cause why the case should not be dismissed before a court can entertain a show cause order, the trial court should adhere to its own published rules, a departure constituting an abuse of its discretion. Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967).

Where a local rule of a trial court provides that at the opening of a term all matters ready for trial will be set therefor, but the evidence discloses that a plaintiff was diligent in his desire to have his action tried and concluded and there appears no explanation why the case, being at issue, was not originally set for trial by the trial court pursuant to its rule, then dismissal of the action for failure to prosecute is an abuse of discretion. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963).

Dismissal of action improper where court allowed an additional time period within which the plaintiffs were to effect service and amend the complaint and plaintiffs met the time deadline imposed by the court. Nelson v. Blacker, 701 P.2d 135 (Colo. App. 1985).

In addition, it was an abuse of discretion for court to impose a sanction for both parties' failure to file trial data certificates which was detrimental only to plaintiff, and benefitted the equally noncomplying defendants. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

It is error to dismiss where plaintiffs are seeking to proceed. Where no party has sought a dismissal, plaintiffs are seeking to proceed, no hearing is had on the question of justifiable cause for dismissal and no findings of wilful default are made by the court, it is error for a trial court to dismiss the action. Levine v. Colo. Transp. Co., 163 Colo. 215, 429 P.2d 274 (1967); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Mere "activity" in a case under a local court rule is not sufficient to protect against motions to dismiss for failure to prosecute, where the rule refers to ''progress'' and not simply ''activity''. ''Progress'' is a particular type of activity, to move forward, and clearly what is envisaged by such a rule is progress in prosecuting to a conclusion some claim for relief. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A district court dismissal with prejudice in one county is "res judicata" to the same proceeding in another county and will support dismissal without prejudice in the second county; to hold otherwise would constitute a collateral attack on the first judgment. Smith v. Bott, 169 Colo. 133, 454 P.2d 82 (1969).

Court's sua sponte order of dismissal for failure to prosecute cannot stand if it is not preceded by the notice required by this section and C.R.C.P. 121 § 1-10. In re Custody of Nugent, 955 P.2d 584 (Colo. App. 1997); Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

A delay reduction order does not suffice to provide reasonable notice of dismissal for

purposes of section (b)(2). Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

Claims asserted barred by doctrine of res judicata. Where plaintiff originally brought claims in federal court and asked federal court to assert its discretionary pendent jurisdiction over claims, failed to request federal court to assert diversity jurisdiction, and failed to respond to federal court's order to show cause why it should assert its pendent jurisdiction and federal court dismissed claims based on default of plaintiff, plaintiff's claims are barred in state court by res judicata because plaintiff failed to show that the federal court would have refused to exercise its pendent jurisdiction. Whalen v. United Air Lines, Inc., 851 P.2d 251 (Colo. App. 1993).

The substance of the doctrine of "res judicata", that any right, fact, or legal matter which is put in issue and directly adjudicated or necessarily determined by a court of competent jurisdiction is conclusively settled by such judgment and cannot afterwards be litigated or raised again by the same parties applies in criminal proceedings with the same conclusive effect as in civil proceedings. Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

Applied in Hatcher v. Hatcher, 169 Colo. 174, 454 P.2d 812 (1969); Streu v. City of Colo. Springs ex rel. Colo. Springs Utils., 239 P.3d 1264 (Colo. 2010).

V. DISMISSAL OF COUNTERCLAIM, CROSS CLAIM, OR THIRD-PARTY CLAIM.

This rule is applicable where multiple claims may be involved. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

This rule is controlling where a complaint is dismissed as to less than all defendants. There is apparent conflict in the directions contained in sections (b)(1) and (2) and (c) of this rule concerning dismissals and C.R.C.P. 54(a) and (b) relating to judgments on multiple claims. The latter rule requires an express determination that a claim has been adjudicated, while section (b)(1) of this rule provides that in the absence of a specific direction, an order of dismissal operates as an adjudication. However, this rule is controlling where a complaint is dismissed as to less than all of the defendants in a case. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

This rule gives plaintiff right to dismiss only plaintiff's own claims and not separate and independent claims brought by another party. Accordingly, plaintiff's voluntary dismissal did not preclude a court from ruling on defendant's motion for a special shareholder meeting when the motion, despite not being pled as a separate complaint or counterclaim, was best characterized as a separate cause of action independent of plaintiff's action. Alpha Spacecom, Inc. v. Hu, 179 P.3d 62 (Colo. App. 2007).

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience, or to avoid prejudice, or when separate trials will be conducive to expedition or economy may order a separate trial of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims, or issues.

(c) Court Sessions Public; When Closed. All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case.

Cross references: For judgement on a counterclaim or cross claim if separate trial is ordered, see C.R.C.P. 13(i); for separate trial of third-party issues, see C.R.C.P. 14(a); for separate judgments, see C.R.C.P. 54(b); for harmless error, see C.R.C.P. 61.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961).

The submission of issues for special verdicts is appropriate, especially when the issues are complicated or likely to confuse the jury. Thus, the submission of special issues of fact to the jury lies within the sound discretion of the trial court. Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

Applied in Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972); Gleason v. Guzman, 623 P.2d 378 (Colo. 1981); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).

II. CONSOLIDATION.

This rule for consolidation of causes of actions is a departure from the former Code of Civil Procedure. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidated suits do not merge into a single cause or make those who are parties in one suit parties in another. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981); Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

A discretionary order of consolidation does not merge the consolidated suits into a single cause of action. Nat'l Farmers Union Prop. & Gas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

It gives to the trial judge discretionary authority to consolidate actions. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidation is a matter of the trial court's discretion. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

Consolidation is a matter within the discretion of a trial court, and its exercise of that discretion will not be distributed absent a clear showing of abuse. People ex rel. J.F., 672 P.2d 544 (Colo. App. 1983).

Consolidation is not an abuse of discretion where common questions of law and fact were present. Mortgage Inv. Corp. v. Battle Mountain Corp., 56 P.3d 1104 (Colo. App. 2001), rev'd on other grounds, 70 P.3d 1176 (Colo. 2003).

Consolidation not abuse of court's discretion where husband and wife were alleging that same defendant had been negligent to both parties, the same questions of law relating to proximate cause and damages were raised by both plaintiffs, and both plaintiffs were represented by same attorney. Askew v. Gerace, 851 P.2d 199 (Colo. App. 1992).

Standard of review shall be used by courts of review. It is only when it clearly appears that discretionary authority has been abused that courts of review will hold that the consolidation was prejudicial to a complaining party. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidating several tort actions growing out of one accident was proper. The trial judge did not abuse his discretion in consolidating actions by a widow for the death of her husband, for medical care of her minor child, and, as next friend of her minor child, for injuries suffered by the child, all of which actions grew out of the same accident. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidation would have been proper course of action, rather than dismissing one of two cases on the day of trial, if both actions involve common question of law or fact. Weyerhaeuser Mortgage Co. v. Equitable Gen. Ins. Co., 686 P.2d 1357 (Colo. App. 1983).

Consolidation does not change different appeal procedures applicable to individual cases. Denver v. Bd. of Assessment Appeals, 748 P.2d 1306 (Colo. App. 1987).

Applied in Schimmel v. District Court, 155 Colo. 240, 393 P.2d 741 (1964).

III. SEPARATE TRIALS.

Law reviews. For note, ''Res Judicata — Should It Apply to a Judgment Which is Being Appealed?'', see 33 Rocky Mt. L. Rev. 95 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''One Year Review of Torts'', see 40 Den. L. Ctr. J. 160 (1963).

This rule vests discretion in the trial court as to whether there shall be separate trials of multiple claims. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962); Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); People in Interest of D.M.W., 752 P.2d 587 (Colo. App. 1987).

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

Upon finding that the jury might improperly use the evidence to show a propensity of negligent driving, the court properly bifurcated separate claims of negligence and neg-

ligent hiring and supervision. Martin v. Minnard, 862 P.2d 1014 (Colo. App. 1993).

This rule is permissive, not mandatory. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

This rule is permissive and not mandatory, and the trial court has wide discretion in its application. Kielsmier v. Foster, 669 P.2d 630 (Colo. App. 1983).

This section provides a remedy to prevent prejudice to parties resulting from joinder. Sutterfield v. District Court ex rel. County of Arapahoe, 165 Colo. 225, 438 P.2d 236 (1968).

Court order as to joint or separate trial will not be disturbed in the absence of a clear showing that there has been an abuse of discretion. Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986); Colo. Coffee Bean v. Peaberry Coffee, 251 P.3d 9 (Colo. App. 2010).

Standard of review of discretionary power shall be used on appeal. A ruling by the trial court under this rule where it has discretionary power will not be disturbed on review, unless it be clearly shown that there was an abuse of such discretionary power. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

Severance without findings improper. Where the trial court made no finding that any of the conditions permitting separate trials of properly joined claims were present, the severance cannot be sustained until proper findings are made. Sutterfield v. District Court ex rel. County of Arapahoe, 165 Colo. 225, 438 P.2d 236 (1968); Gaede v. District Court, 676 P.2d 1186 (Colo. 1984).

Belated request properly denied. A request for a separate trial of the second claim of a complaint made moments before commencement of trial, where the case had been at issue more than seven months, was properly denied. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

Abuse of discretion in ordering joint trial occurs where the court's failure to order separate proceedings virtually assures prejudice to a party. Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980).

Denial of motion for separate hearings not an abuse of discretion, where juvenile court found that issues concerning both parents were interlocked and that court as trier of fact would not have difficulty separating issues and evidence as to each party, and where no showing of actual prejudice was made. People in Interest of D.M.W., 752 P.2d 587 (Colo. App. 1987).

Bifurcated trial on issue of liability for punitive damages in products liability suit not granted. In products liability claim, defendant did not make an adequate showing of past punitive damages awards arising out of the same course of conduct to warrant granting a bifurcated trial on the issue of punitive damages in order to avoid any prejudice to the defendant on the issue of liability. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

IV. COURT SESSIONS PUBLIC.

Protective order would not violate section (c) in trade secrets trial. Proviso in protective order for exclusion of the public would not violate the mandate of section (c) relating to public sessions of court where the trial involves trade secrets. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

Rule 42.1. Consolidated Multidistrict Litigation

(a) Definitions.

(1) ''Panel'' means the Panel on Consolidated Multidistrict Litigation. The Panel shall consist of not less than three nor more than seven district judges designated from time to time by the Chief Justice, no two of whom shall be from the same judicial district. One of the judges shall be appointed as Chairman by the Chief Justice. The Panel may sit in departments of three or more, as designated by the Chairman of the Panel. The concurrence of a majority of the members sitting in department shall be necessary to any action by the Panel, except that the chair may approve stipulations and recommend consolidation or order dismissal consistent with those stipulations, may rule on motions of a procedural nature, and may deny consolidation when it appears from the face of the motion that the panel does not have jurisdiction to recommend consolidation.

(2) ''Clerk'' means the Clerk of the Panel. The Clerk of the Colorado Supreme Court shall be the Clerk of the Panel.

(b) Transfer. When actions involving a common question of law or fact are pending in different judicial districts, such actions may be transferred to any judge for hearing or trial of any or all of the matters in issue in any action, provided however, (1) any jury trial shall be held in the place prescribed by Rule 98 C.R.C.P.; and (2) such actions shall be consolidated only as permitted by Rule 42 C.R.C.P.

(c) Initiation of Proceedings. Proceedings for the transfer of an action under this rule may be initiated by:

(1) The Panel upon its own initiative or upon the request of any court; or

(2) Upon a motion filed with the Panel by a party in any action in which transfer under this rule may be appropriate, which motion shall not be entertained unless filed more than 91 days (13 weeks) next preceding any trial date set in the affected actions, unless a showing of good cause is made. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

(d) Order to Show Cause; Hearing; Response. When the transfer of multidistrict litigation is being considered, an order shall be entered by the Panel directing the parties in each action to show cause why the action or actions should not be transferred. A hearing shall be set at the time the show cause order is entered. Any party may file a response to the show cause order and an accompanying brief within 14 days after the order is entered, unless otherwise provided in the order. Within 7 days of receipt of a party's response or brief, any party may file a reply brief limited to new matters.

(1) Except by permission of the Panel, briefs shall not exceed five (5) pages, exclusive of appendices. An original and seven (7) copies of each brief shall be filed with the Clerk of the Panel.

(2) Each side shall be allowed fifteen (15) minutes of oral argument at the hearing, unless extended by the Panel.

(e) Pending Motion or Order to Show Cause; No Effect. The pendency of a motion or order to show cause before the Panel concerning the transfer of an action pursuant to this rule shall not affect or suspend proceedings and orders in the district court and does not limit the jurisdiction of that court.

(f) Orders of Panel. The Panel may enter such orders as are appropriate including but not limited to staying proceedings in all actions until a determination is made whether the actions should be transferred under the rule and setting any matter for hearing.

(g) Standards Governing Transfer. Transfer of civil actions sharing a common question of law or fact is appropriate if one judge hearing all of the actions will promote the ends of justice and the just and efficient conduct of such actions. The factors to be considered shall include, but shall not be limited to, the following: (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of the parties, witnesses and counsel; (3) the relative development of the action and the work product of counsel; (4) the efficient utilization of judicial facilities and manpower; (5) the calendar of the courts; (6) the disadvantages of duplicative and inconsistent rulings, orders or judgments; and (7) the likelihood of settlement of the actions without further litigation should transfer be denied.

(h) Certification to Chief Justice. Upon the determination by the Panel that the actions should be transferred under this rule, the Panel shall certify the actions to the Chief Justice and recommend the assignment of a specific judge to hear the actions.

(i) Appellate Review; Assignment of Judge. No proceedings for review of any certification order or other order entered by the Panel shall be permitted except as permitted by Rule 21 C.A.R. If no original proceedings are commenced in the Supreme Court or a show cause order is not issued by the Supreme Court within 21 days after entry of the certification order by the Panel, the Chief Justice shall assign the actions to a judge.

(j) Other Cases; Transfer by Clerk. Upon learning of the pendency of a civil action apparently sharing common questions of law or fact with actions previously transferred under this rule, an order may be entered by the Clerk transferring the action to the assigned judge. A copy of the order shall be served on each party to the litigation. The order shall not become final until 14 days after entry thereof. Any party opposing the transfer shall file a notice of opposition with the Clerk within 14 days from the date the order is entered. The notice of opposition shall be supported by a brief. Any party shall have 14 days to file an answer brief. The filing of a notice of opposition and brief shall suspend the finality of the Clerk's order pending action by the Panel.

(k) Procedure After Transfer.

(1) Upon receipt of an order from the Chief Justice assigning the actions to a judge, the clerk of the transferor court shall submit to the clerk of the court of the assigned judge copies of all papers contained in the original file and a certified copy of the register of actions.

(2) Original pleadings regarding consolidated matters shall thereafter be filed with the clerk of the transferee court.

(l) Adoption of Rules. Subject to approval by the Colorado Supreme Court in accordance with Rule 121 C.R.C.P., the Panel may adopt rules of procedures on Consolidated Multidistrict Litigation consistent with this Rule.

Source: (a)(1) and (k) amended and effective October 22, 1992; (c)(2), IP(d), (i), and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (k)(2) amended and effective April 29, 2014.

ANNOTATION

Law reviews. For article, ''Multidistrict Litigation: An Overview for Practitioners'', see 11 Colo. Law. 2 (1982). For article, ''Colorado's Multidistrict Litigation Panel'', see 17 Colo. Law. 1981 (1988).

Nowhere does this rule expressly grant the transferee judge assigned to hear "all of the actions" the authority to transfer any of the actions or individual issues related to separate parties to another judge. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Rule 43. Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules, the Colorado Rules of Evidence, or any statute of this state or of the United States (except the Federal Rules of Evidence).

(b) to (d) Repealed.

(e) Evidence on Motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. This shall include applications to grant or dissolve an injunction and for the appointment or discharge of a receiver.

(f) to (h) Repealed.

(i) (1) Request for absentee testimony. A party may request that testimony be presented at a trial or hearing by a person absent from the courtroom by means of telephone or some other suitable and equivalent medium of communication. A request for absentee testimony shall be made by written motion or stipulation filed as soon as practicable after the need for absentee testimony becomes known. The motion shall include:

(A) The reason(s) for allowing such testimony.

(B) A detailed description of all testimony which is proposed to be taken by telephone or other medium of communication.

(C) Copies of all documents or reports which will be used or referred to in such testimony.

(2) Response. If any party objects to absentee testimony, said party shall file a written response within 3 days following service of the motion unless the opening of the proceeding occurs first, in which case the objection shall be made orally in open court at the commencement of the proceeding or as soon as practicable thereafter. If no response is filed or objection is made, the motion may be deemed confessed.

(3) Determination. The court shall determine whether in the interest of justice absentee testimony may be allowed. The facts to be considered by the court in determining whether to permit absentee testimony shall include but not be limited to the following:

(A) Whether there is a statutory right to absentee testimony.

(B) The cost savings to the parties of having absentee testimony versus the cost of the witness appearing in person.

(C) The availability of appropriate equipment at the court to permit the presentation of absentee testimony.

(D) The availability of the witness to appear personally in court.

(E) The relative importance of the issue or issues for which the witness is offered to testify.

(F) If credibility of the witness is an issue.

(G) Whether the case is to be tried to the court or to a jury.

(H) Whether the presentation of absentee testimony would inhibit the ability to cross examine the witness.

(I) The efforts of the requesting parties to obtain the presence of the witness.

If the court orders absentee testimony to be taken, the court may issue such orders as it deems appropriate to protect the integrity of the proceedings.

Source: (a) amended, (b), (c), (d), (f), (g), and (h) repealed, and (i) added March 17, 1994, effective July 1, 1994; (i) amended and adopted October 20, 2005, effective January 1, 2006.

Cross references: For general provisions concerning evidence and witnesses, see article 25 and part 1 of article 90 of title 13, C.R.S.; for rights of examination of party in interest by adverse party, see § 13-90-116, C.R.S.; for costs, see C.R.C.P. 54(d); for admissibility of evidence of lost instruments, see § 13-25-113, C.R.S.; for admissibility of copies of lost instruments and records, see §§ 24-72-101 and 24-72-111, C.R.S.; for admissibility of copies of documents kept by county officers, see § 30-10-103, C.R.S.

ANNOTATION

I. General Consideration.
II. Form and Admissibility.
III. Evidence on Motions.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing'', see 35 Colo. Law. 21 (May 2006).

The plaintiff always has the burden of proving his or her case. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Once a "prima facie" case is established, the burden of going forward to rebut the ''prima facie'' case shifts to the defendant. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

The burden of going forward is met when the defendant introduces enough evidence to present a jury question where formerly there was a ''prima facie'' case. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Lack of direct testimony as to cause of action is not necessarily fatal to plaintiff's case, as causation may be shown by circumstantial evidence alone and jurors may draw upon ordinary human experience as to the reasonable probabilities. Irish v. Mountain States Tel. & Tel. Co., 31 Colo. App. 89, 500 P.2d 151 (1972).

To recover loss of profits, the plaintiff not only has to establish the existence of such loss but also has to provide evidence from which such loss could be computed. Irish v. Mountain States Tel. & Tel. Co., 31 Colo. App. 89, 500 P.2d 151 (1972).

When the "accident-suicide" dichotomy is placed in issue by the pleadings and by rebuttable presumption, the plaintiff has the burden of proving accident to the exclusion of suicide by a preponderance of the evidence. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Applied in Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Berger v. Coon, 199 Colo. 133, 606 P.2d 68 (1980).

II. FORM AND ADMISSIBILITY.

Colorado favors the admissibility and not the rejection of evidence in civil actions in accordance with the most convenient methods prescribed by statute and the rules of evidence. Dept. of Highways, v. Intermountain Term. Co., 164 Colo. 354, 435 P.2d 391 (1967).

All evidence admissible under federal statutes applies in state court. Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972), aff'd, 181 Colo. 218, 508 P.2d 1254 (1973).

The applicability of the federal business act (28 U.S.C. § 1732) to hospital records has been firmly established. Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972), aff'd, 181 Colo. 218, 508 P.2d 1254 (1973).

Hospital records are ordinarily admissible under section (a) of this rule. Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977).

The admission of hospital records requires that they be relevant to the issues. Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977).

The sufficiency, probative effect, and weight of all evidence, including documentary evidence, and the inferences and conclusions to be drawn therefrom are all within the province of the trial court, whose conclusions will not be disturbed unless so clearly erroneous as to find no support in the record. Dominion Ins. Co. v. Hart, 178 Colo. 451, 498 P.2d 1138 (1972); Jones v. Adkins, 34 Colo. App. 196, 526 P.2d 153 (1974).

Evidence will be viewed on appeal in the light most favorable to upholding the judgment. Hayes v. State, 178 Colo. 447, 498 P.2d 1119 (1972).

Where an insurance company attempted to introduce evidence concerning other insurance policies owned by the decedent before his death, the trial court must weigh the prejudicial effect of such evidence against its relevancy to the issue of whether the death was accidental or suicidal, and where, at a hearing before the judge outside the presence of the jury, the insurance company informed the court that the policies were at least three years old at the time of decedent's death, the probative value of such evidence was virtually nonexistent, so that the discretionary decision of the trial court to exclude this evidence as irrelevant and potentially prejudicial was not error. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

Evidence of testamentary capacity held properly received outside presence of jury. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

Considerations of credibility of witnesses and the weight to be accorded their testimony are for the trial court. Hayes v. State, 178 Colo. 447, 498 P.2d 1119 (1972).

Trial court shall determine whether witness has the right to express an opinion. The sufficiency of the evidence to establish the qualifications and knowledge of a witness to entitle him to express an opinion is a question to be determined by the trial court, and its decision will be upheld unless clearly erroneous. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Determination of the pertinency of omitted facts from a hypothetical question to a witness rests in the discretion of the trial court and will not be reversed unless clearly erroneous. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Where a witness has no personal knowledge of a fact, he should not be allowed to give testimony concerning that fact because there would then be reliance on the out-of-court declaration of another and the normal safeguards of oath, confrontation, and cross-examination would be precluded. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

It is within the discretion of the trial court to determine the competence of an expert witness to testify. Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118 (1975).

Expert opinion is permissible only where a proper foundation is laid. Simpson v. Anderson, 186 Colo. 163, 526 P.2d 298 (1974).

Trial judge should decide whether witness is a qualified expert on subject appropriate for expert testimony, but basis of his opinion and weight to be given opinion should be left for advocates to challenge and for jury to determine. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Evidence of opinion of experts is admissible only when subject matter of controversy renders it necessary or proper to resort to opinion evidence. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

In admitting the testimony of a medical witness on the issue of standard of care, there is no abuse of discretion when the evidence shows that the proposed witness is familiar with the standard of care in the same or similar communities at the time in question. Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118 (1975).

Where expert opinion is based on evidence adduced at trial which is hearsay, it is error to include it. Nat'l State Bank v. Brayman, 180 Colo. 304, 505 P.2d 11 (1973).

Where an accident-reconstruction expert offers testimony, such evidence is admissible where based on photographs properly admitted even though expert had failed to personally examine scene of accident and vehicles involved within short time after accident. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

The sufficiency of evidence qualifying a law enforcement officer to express an expert opinion based upon physical facts he has observed is a question to be determined by the trial court, and its decision will be upheld unless clearly erroneous. Nat'l State Bank v. Brayman, 30 Colo. App. 554, 497 P.2d 710 (1972), rev'd on other grounds, 180 Colo. 305, 505 P.2d 11 (1973).

Where witness is officer who conducted investigation of scene of accident minutes after accident is an expert as to point of impact and the extent of movement of vehicles is fully testified to by competent witness before officer's opinion is illicited, officer's testimony as to point of impact should be admitted despite absence of skid marks and fact that prior to officer's arrival at scene, automobiles had been moved slightly. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Facts supporting only conjectural inferences have no probative value and should not be admitted in evidence. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Where the owner is an occupant of his own vehicle at the time of an accident, it is ''prima facie'' evidence that he was the driver. Brayman v. Nat'l State Bank of Boulder, 180 Colo. 305, 505 P.2d 11 (1973).

Replicas of physical evidence usually admissible. While replicas of physical evidence are usually admissible where the original item has been lost or destroyed, the admissibility of such evidence is a matter within the discretion of the trial judge. Reaves v. Horton, 33 Colo. App. 186, 518 P.2d 1380 (1973), modified, 186 Colo. 149, 526 P.2d 304 (1974).

Where a written document is a complete and accurate expression of the agreement between the parties, evidence is not admissible for the purpose of varying or contradicting the terms of the written document. Aztec Sound Corp. v. Western States Leasing Co., 32 Colo. App. 248, 510 P.2d 897 (1973).

A certified copy of a death certificate is admissible and is ''prima facie'' evidence of the facts recited therein. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Soil sample should not be admitted where vehicle was towed in area after accident. Where evidence in wrongful death action against motorist arising from automobile collision indicates that soil taken from defendant's automobile matches soil samples taken from parking lot, such evidence should not be admitted to prove that defendant's automobile had been in parking lot before accident where, immediately after accident, defendant's automobile had been towed through parking lot in question. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Where a photograph of the scene of an accident taken after vehicles had been removed is offered to show scene of accident and not the condition of the road surface, then the wetness or dryness of road surface is not significant, and the photograph should be admitted. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

In order to warrant admission of a photograph in evidence, if it is otherwise competent, it is only necessary to show that it is correct likeness of objects it purports to represent, and this may be shown by person who made it or by any competent witness. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Fact that photographic evidence may be cumulative is not alone ground for its rejection. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Testimony properly excluded as hearsay. Where the trial court refuses to permit witnesses to testify to conversations with other persons concerning the knowledge of such other persons about the activities of an individual, such testimony is properly excluded as hearsay. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Past recollection recorded exception to hearsay rule. A determination by the trial court that a statement was made too remote in point of time to the date of an accident to be admissible under the past recollection recorded exception to the hearsay rule was a matter resting within the discretion of the trial court and such determination will be disturbed only if the trial court abused its discretion. McCall v. Roper, 32 Colo. App. 352, 511 P.2d 541 (1973).

Hearsay is admissible as evidence against the interest of a deceased. The testimony of an individual, who brings suit against the estate of a deceased for proceeds from the sale of property allegedly held in trust, to the effect that the deceased told the claimant that he was holding some property in trust for one of the claimant's parents is hearsay but admissible as evidence against the interest of the deceased. In re Estate of Granberry, 30 Colo. App. 550, 498 P.2d 960 (1972).

It is not error to admit hearsay to demonstrate intention or state of mind. Where the trial court took adequate precautions in admitting hearsay testimony, including instructing the jury as to the manner and purpose for which the evidence might be considered, the trial court did not err in admitting evidence of a declaration for the limited purpose of demonstrating intention or state of mind. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

A person's intentions may be reflected by the declarations of that person, and these declarations are therefore admissible not for the proof of the facts stated by the declaration but to demonstrate the state of mind of the declarant; when offered for this purpose, the hearsay rule is not applicable to such a declaration. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

In determining whether to admit hearsay evidence to establish state of mind, the court must make a judgment based on a weighing of the materiality and relevance of the testimony for a limited purpose against the possibility that, in spite of an instruction by the court to the contrary, the jury might consider a statement for the truth of the facts it contains. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

Where testimony is hearsay, its admission is harmless when the essential and operative facts upon which a judgment rests are established by competent evidence in the record. San Isabel Elec. Ass'n v. Bramer, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

Defendant could not predicate error on trial court's denial of admission of hearsay evidence; since defendant made no offer of proof, it was not apparent from the context what the substance of the testimony would have been, and defense counsel made no objection to the denial. People v. Hoover, 165 P.3d 784 (Colo. App. 2006).

A deed may be proven by parol evidence to be a mortgage, but the evidence must be clear, certain, and unequivocal as well as be convincing beyond a reasonable doubt. Padia v. Hobbs, 132 Colo. 165, 286 P.2d 613 (1955).

Admitting exhibits out of the usual order is immaterial where the objecting party is the only witness, the order of proof being in the sound discretion of the court. Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946).

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976).

III. EVIDENCE ON MOTIONS.

Trial court erred in awarding fees and expenses to receiver over objection of an interested party, without a hearing, without any representation that fees and expenses were reasonable and necessary, and without receiving sworn testimony or verified documents. Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co., 883 P.2d 600 (Colo. App. 1994).

Applied in Sollitt v. District Court, 180 Colo. 114, 502 P.2d 1108 (1972).

Rule 44. Proof of Official Record

(a) Authentication.

(1) **Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuiness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subsection (a)(1) of this Rule in the case of a domestic record, or complying with the requirements of subsection (a)(2) of this Rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This Rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by law.

(d) Seal Dispensed With. In the event any office or officer, authenticating any documents under the provisions of this Rule, has no official seal, then authentication by seal is dispensed with.

(e) Statutes and Laws of Other States and Countries. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section (e), with the same force and effect as if the same had been admitted in evidence.

Source: (a) amended October 8, 1992, effective January 1, 1993.

Cross references: For use of printed statutes and reports of decisions as evidence, see § 13-25-101, C.R.S.; for admissibility of evidence, see C.R.C.P. 43(a); for courts and clerks, see C.R.C.P. 77; for proof of parts of book, see C.R.C.P. 264.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For article, ''Authentication of Foreign Public Documents for Use in Trial'', see 11 Colo. Law. 692 (1982).

Exclusion by trial judge of document admissible under this rule is not prejudicial error where the defendant was successful in introducing a similar exhibit from which the excluded document had been prepared and which contained exactly the same information as the excluded document. Polster v. Griff's of Am., Inc., 34 Colo. App. 161, 525 P.2d 1179 (1974).

II. AUTHENTICATION.

A. In General.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963).

B. Domestic.

Section (a)(1) not exclusive. While section (a)(1) of this rule established a method by which official records may be admitted into evidence as self-authenticating documents, it is not the exclusive method by which such documents can be introduced. People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

Where one claims that documents were not properly authenticated under this rule, but he testifies, as of his own knowledge, to every fact sought to have been established by the offered documents, any error is therefore harmless. Nieto v. People, 160 Colo. 179, 415 P.2d 531 (1966).

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976).

C. Foreign.

Law reviews. For comment on Walker v. Calada Materials Co., appearing below, see 35 U. Colo. L. Rev. 451 (1963).

This rule is plain and in full force and effect. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

This rule prescribes how an official record may be evidenced. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

It does not purport to prescribe what must be established in order to prevail in an action based upon a foreign judgment. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

A foreign judgment is dependent for its effect and validity upon the record which

precedes it. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

The judgment roll should accompany copy of the judgment. In an action on a judgment of a foreign state an exemplified copy of the judgment, to be admissible in evidence, should be accompanied by the judgment roll, i.e., the record proper up to the time of judgment. The complaint, the summons, the return upon the summons, the affidavit for publication where constructive service is made, and papers of that sort constitute a part of the judgment roll. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

There is a difference between a certified copy of a record and one made according to this rule. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

The admission of certified copies of documents purporting to prove a foreign judgment is erroneous where such documents failed to comply with the provisions of this rule. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

Where there is no attempt to comply with the provisions of this rule, a decree entered by a foreign court is not admissible in evidence for any purpose. Potter v. Potter, 131 Colo. 14, 278 P.2d 1020 (1955); In re Seewald, 22 P.3d 580 (Colo. App. 2001).

III. OTHER PROOF.

Copy of official record admissible. Where an individual with legal custody of the records testifies that the evidence offered is a true copy of an official record maintained in the ordinary course of business, it is admissible. People v. Roybal, 43 Colo. App. 483, 609 P.2d 1110 (1979).

Any method authorized. Section (c) of this rule provides expressly that proof of official records may be made by any method authorized by law. People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

A court may take judicial notice of any matters in its own records and files. Sakal v. Donnelly, 30 Colo. App. 384, 494 P.2d 1316 (1972).

IV. STATUTES AND LAWS OF OTHER STATES AND COUNTRIES.

Annotator's note. Since section (e) of this rule is similar to § 396 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Courts do not take judicial notice of the statutes of other states. Atchison, T. & S. F. R. R. v. Betts, 10 Colo. 431, 15 P. 821 (1887).

The statutes of a foreign state are sufficiently proven by testimony of a duly licensed practicing attorney of that state where such testimony is uncontradicted. Mosko v. Matthews, 87 Colo. 55, 284 P. 1021 (1930).

Applied in Spencer v. People in Interest of Spencer, 133 Colo. 196, 292 P.2d 971 (1956).

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Cross references: For admissibility of evidence, see C.R.C.P. 43(a); for proof of parts of book, see C.R.C.P. 264.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) *Requirements — In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending and its case number;

(iii) command each person to whom it is directed to do one or both of the following at a specified time and place: attend and testify at a deposition, hearing or trial; or produce designated books, papers and documents, whether in physical or electronic form (''records''), or tangible things, in that person's possession, custody, or control;

(iv) identify the party and the party's attorney, if any, who is serving the subpoena;

(v) identify the names, addresses and phone numbers and email addresses where known, of the attorneys for each of the parties and of each party who has appeared in the action without an attorney;

(vi) state the method for recording the testimony if the subpoena commands attendance at a deposition; and

(vii) if production of records or a tangible thing is sought, set out the text of sections (c) and (d) of this Rule verbatim on or as an attachment to the subpoena.

(B) *Combining or Separating a Command to Produce.* A command to produce records or tangible things may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be contained in a separate subpoena that does not require attendance.

(C) *Deposition Subpoena Must Comply With Discovery Rules.* A deposition subpoena may require the production of records or tangible things which are within the scope of discovery permitted by C.R.C.P. 26. A subpoena must not be used to avoid the limits on discovery imposed by C.R.C.P. 16.1, 16.2 or 26 or by the Case Management Order applicable to that case.

(D) *Subpoenas to Named Parties.* A subpoena issued under this Rule may not be utilized to obtain discovery from named parties to the action unless the court orders otherwise for good cause.

(2) Issued by Whom. The clerk of the court in which the case is docketed must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney who has entered an appearance in the case also may issue, complete and sign a subpoena as an officer of the court.

(b) Service.

(1) Time for Service. Unless otherwise ordered by the court for good cause:

(A) *Subpoena for Trial or Hearing Testimony.* Service of a subpoena only for testimony in a trial or hearing shall be made no later than 48 hours before the time for appearance set out in the subpoena.

(B) *Subpoena for Deposition Testimony.* Service of a subpoena only for testimony in a deposition shall be made not later than 7 days before compliance is required.

(C) *Subpoena for Production of Documents.* Service of any subpoena commanding a person to produce records or tangible things in that person's possession, custody, or control shall be made not later than 14 days before compliance is required. In the case of an expedited hearing pursuant to these rules or any statute, service shall be made as soon as possible before compliance is required.

(2) By Whom Served; How Served. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person or service as otherwise ordered by the court consistent with due process. Service is also valid if the person named in the subpoena has signed a written acknowledgement or waiver of service. Service may be made anywhere within the state of Colorado.

(3) Tender of Payment for Mileage. If the subpoena requires a person's attendance, the payment for 1 day's mileage allowed by law must be tendered to the subpoenaed person at the time of service of the subpoena or within a reasonable time after service of the subpoena, but in any event prior to the appearance date. Payment for mileage need not be tendered when the subpoena issues on behalf of the state of Colorado or any of its officers or agencies.

(4) Proof of Service. Proof of service shall be made as provided in C.R.C.P. 4(h). Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(5) Notice to Other Parties.

(A) *Service on the Parties.* Immediately following service of a subpoena, the party or attorney who issues the subpoena, shall serve a copy of the subpoena on all parties pursuant to C.R.C.P. 5; provided that such service is not required for a subpoena issued pursuant to C.R.C.P. 69.

(B) *Notice of Changes.* The party or attorney who issues the subpoena must give the other parties reasonable notice of any written modification of the subpoena or any new date and time for the deposition, or production of records and tangible things.

(C) *Availability of Produced Records or Tangible Things.* The party or attorney who issues the subpoena for production of records or tangible things must make available in a

timely fashion for inspection and copying to all other parties the records or tangible things produced by the responding party.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Records or Tangible Things.

(A) *Attendance Not Required.* A person commanded to produce records or tangible things need not attend in person at the place of production unless also commanded to attend for a deposition, hearing, or trial.

(B) *For Production of Privileged Records.*

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107, or from the records custodian for that person, which records pertain to services performed by or at the direction of that person (''privileged records''), such a subpoena must be accompanied by an authorization signed by the privilege holder or holders or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder or holders in such privileged records, including an appropriate means of notice to the privilege holder or holders or whether any objection to production may be resolved by redaction.

(iii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena.

(C) *Objections.* Any party or the person subpoenaed to produce records or tangible things may submit to the party issuing the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials. The objection must be submitted before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, the party issuing the subpoena shall promptly serve a copy of the objection on all other parties. If an objection is made, the party issuing the subpoena is not entitled to inspect, copy, test or sample the materials except pursuant to an order of the court from which the subpoena was issued. If an objection is made, at any time on notice to the subpoenaed person and the other parties, the party issuing the subpoena may move the issuing court for an order compelling production.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On motion made promptly and in any event at or before the time specified in the subpoena for compliance, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to attend a deposition in any county other than where the person resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion made promptly and in any event at or before the time specified in the subpoena for compliance, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific matters in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order attendance or production under specified conditions if the issuing party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to Subpoena.

(1) Producing Records or Tangible Things.

(A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and

(B) If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* Unless the subpoena is subject to subsection (c)(2)(B) of this Rule relating to production of privileged records, a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) make the claim expressly; and

(ii) describe the nature of the withheld records or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Subpoena for Deposition; Place of Examination.

(1) Residents of This State. A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein the witness resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(2) Nonresidents of This State. A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service of the subpoena in the state of Colorado or in the county wherein the nonresident resides or is employed or transacts business in person or at such other convenient place as is fixed by an order of court.

(f) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(e).

Source: (c) amended and adopted October 30, 1997, effective January 1, 1998; (c) and (d)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule repealed and readopted and Committee Comments added October 18, 2012, effective January 1, 2013.

Cross references: For manner of proof of service of process, see C.R.C.P. 4(h); for scope of discovery, see C.R.C.P. 26(b); for protective orders in discovery, see C.R.C.P. 26(c); for notice of taking depositions, see C.R.C.P. 30(b) and 31(a).

COMMITTEE COMMENTS

If a subpoena to attend a deposition is sought pursuant to Rule 45(c)(2)(A) in order to produce and authenticate documents, the issuing party should consider establishing admissibility under C.R.E. 902(11) as a means of reducing undue burden and expense upon the subpoenaed person.

For scope of provision contained in Rule 45(c)(3)(B)(ii) relating to ''unretained experts'', *see* Official Comments to Federal Rules of Civil Procedure, 1991 Amendment, Clause (c)(3)(B)(ii).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''Taking Evidence Abroad for Use in Litigation in Colorado'', see 14 Colo. Law. 523 (1985). For article, ''Rule 34(c): Discovery of Non-Party Land and Large Intangible Things'', see 14 Colo. Law. 562 (1985). For article, ''Securing the Attendance of a Witness at a Deposition'', see 15 Colo. Law. 2000 (1986). For formal opinion of the Colorado Bar Association on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990). For article, ''New CRCP 45 Impacts Medical Records Subpoenas and Tracks Federal Rule'', see 42 Colo. Law. 23 (January 2013). For article, ''The Changes to Colorado and Federal Civil Rule 45'', see 42 Colo. Law. 57 (December 2013). For article, ''Discovery to Nonparties in Colorado Arbitrations'', see 45 Colo. Law. 25 (April 2016).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Applied in Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

II. ATTENDANCE OF WITNESSES.

Protections not grounds for quashing subpoena. It was error for trial court to quash subpoena of a witness on the basis of the attorney-client privilege and attorney work product doctrine. These protections may be asserted at trial as a bar to specific questions, but are not grounds for quashing a subpoena properly issued. S.C. Ins. Co. v. Fisher, 698 P.2d 1369 (Colo. App. 1984).

A motion to quash subpoenas issued to third persons allegedly contributing to support of children is properly granted where the voluntary donations of such parties have nothing to do with a defendant's duty to support children. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

III. PRODUCTION OF DOCUMENTARY EVIDENCE.

A party seeking a "subpoena duces tecum" requiring production of documents by the other party must show good cause for the issuance of such a subpoena. Lee v. Mo. P. R. R. 152 Colo. 179, 381 P.2d 35 (1963).

A "tangible thing" described in section (b) does not include real estate or fixtures. Thompson v. Thornton, 198 P.3d 1281 (Colo. App. 2008).

For purposes of section (b), a subpoena duces tecum cannot compel the inspection of premises. Thompson v. Thornton, 198 P.3d 1281 (Colo. App. 2008).

This rule must be read in conjunction with C.R.C.P. 34, governing the production of documents. Lee v. Mo. P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Colorado rules of civil procedure are not directly applicable to enforcement proceedings under the securities act. However, a court may consider the policies underlying section (b) of this rule in ruling on a motion for the advancement of costs incurred in complying with an administrative subpoena. Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

In the exercise of their equitable authority, district courts may quash an administrative subpoena found to be unreasonable or oppressive.

Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

Where it was shown that a claim agent of a railroad could not give coherent story of an accident he investigated without first refreshing his memory from the file of such investigation, such evidence was sufficient to show good cause for the production of the file and it was error to quash a ''subpoena duces tecum''. Lee v. Mo. P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Trial court did not have discretion to order disclosure of psychologist's records during discovery, even for in camera review. Absent a clear waiver of psychologist-patient privilege, a trial court may not review documents related to a patient's treatment even in camera. People v. Sisneros, 55 P.3d 797 (Colo. 2002).

Taxpayer has standing to raise legitimacy of access to records in motion to quash subpoena. Once the court allows intervention in a § 39-21-112 proceeding, it follows that a taxpayer with an expectation of privacy in his bank records has standing to raise the legitimacy of governmental access to the records in a motion to quash the subpoena for the records. Charnes v. DiGiacomo, 200 Colo. 94, 612 P.2d 1117 (1980).

As a general rule, recipients of subpoenas in criminal proceedings must assume the cost of compliance as a matter of civic responsibility. However, an individualized determination is called for when it is claimed that the cost of compliance with a subpoena renders the subpoena itself unreasonable and oppressive. The person seeking to quash an administrative subpoena on such grounds has the burden of establishing the precise amount of the cost and that such amount exceeds the amount the recipient would reasonably be expected to incur as a civic responsibility. Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

If an attorney desires to receive subpoenaed documents from a subpoenaed witness in advance of the time and place specified in the subpoena, or if the subpoenaed witness offers to produce the documents ahead of time, the attorney must confer with and obtain consent from all other parties to the case as well as the subpoenaed witness. If the other parties or the subpoenaed witness does not consent, then production must wait until the time and place of the event specified in the subpoena. Obtaining consent for the advance production of subpoenaed documents not only satisfies the procedural safeguards of this rule but also affords pragmatic accommodation to the realities of litigation practice. In re Wiggins, 2012 CO 44, 279 P.3d 1.

Manner by which father's attorney obtained mother's former employment file and any other documents from mother's former place of employment in response to a subpoena violated rule. Rule requires that, unless subpoenaed witness and other parties consent to an alternate arrangement or by other court order, subpoenaed documents be produced only at the deposition, hearing, or trial specified in the subpoena. Attorney's unilateral arrangements violated rule because they prevented mother from having an opportunity to object to the subpoena before her entire employment file was disclosed. In re Wiggins, 2012 CO 44, 279 P.3d 1.

IV. SERVICE.

Failure to find "good cause" for serving subpoena fewer than 48 hours in advance of appearance or to grant continuance held abuse of discretion. Montoya v. Career Serv. Bd., 708 P.2d 478 (Colo. App. 1985).

Subpoenas that were served on Friday morning, directing the witnesses to appear on Monday morning, were not served 48 hours before the time the witnesses were to appear and were properly quashed. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

Service on registered agent. Personal delivery of interrogatories on foreign corporation's registered agent constitutes effective service. Isis Litig., L.L.C., v. Svensk Filmindustri, 170 P.3d 742 (Colo. App. 2007).

V. DEPOSITIONS.

Section (d)(2) of this rule, relating to nonresidents, is limited solely to those persons who are either parties to the action or witnesses therein, both of which classes of nonresidents must first have been properly served in the action in order to subject them to the jurisdiction of the court, unless they have waived or consented to the jurisdiction of a Colorado court. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minn. ex rel. Minn. Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

This rule, as applied to nonresidents not parties to an action in Colorado and not served in Colorado, is subject to the implied limitations that nonresidents are subject to jurisdiction due to mutual compact or uniform act. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minn. ex rel. Minn. Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Applied in CeBuzz, Inc. v. Sniderman, 171 Colo. 246, 466 P.2d 457 (1970).

VI. HEARING OR TRIAL.

The refusal to reopen a compensation case for the purpose of taking testimony from a witness is not error where there was no showing that any subpoena was issued under the

provisions of section (e) of this rule. Pac. Employers Ins. Co. v. Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (1943).

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

ANNOTATION

Law reviews. For article, ''Colorado Criminal Procedure — Does It Meet Minimum Standards?'', see 28 Dicta 14 (1951). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

This rule is mandatory. Anderson v. Anderson, 124 Colo. 74, 234 P.2d 903 (1951).

An appellate court may refuse to consider a specification where this rule has not been complied with. Anderson v. Anderson, 124 Colo. 74, 234 P.2d 903 (1951); Allen v. Crouch, 134 Colo. 603, 307 P.2d 815 (1957).

Where a party is afforded no opportunity by the court to register an objection, the absence of an objection in the record does not prejudice the party upon review. Brakhahn v. Hildebrand, 134 Colo. 197, 301 P.2d 347 (1956).

A party who was afforded no opportunity to object to an instruction given orally outside his presence is not precluded from raising the point on review. Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

Failure of prosecution to object to trial court's action, which objection affords trial court opportunity to correct an alleged error, precludes review of merits on appeal. People v. Schweer, 775 P.2d 582 (Colo. 1989).

Applied in Menne v. Menne, 194 Colo. 304, 572 P.2d 472 (1977).

Rule 47. Jurors

(a) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case, utilizing the parties' CJI(3d) Instruction 2:1 or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements.

(V) General legal principles applicable to the case, including burdens of proof, definitions of preponderance and other pertinent evidentiary standards and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors

additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. The judge may limit the time available to the parties or their counsel for juror examination based on the needs of the case. Any party may request additional time for juror examination in the Trial Management Order, at the commencement of the trial, or during juror examination based on developments during such examination. Any such request shall include the reasons for needing additional juror examination time. Denial of a request for additional time shall be based on a specific finding of good cause reflecting the nature of the particular case and other factors that the judge determines are relevant to the particular case and are appropriate to properly effectuate the purposes of juror examination set forth in section (a) of this Rule. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge will again explain in more detail the general principles of law applicable to civil cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case. Jurors shall be told that they may not discuss the case with anyone until the trial is over with one exception: jurors may discuss the evidence among themselves in the jury room when all jurors are present. Jurors shall also be told that they must avoid discussing any potential outcome of the case and must avoid reaching any conclusion until they have heard all the evidence, final instructions by the court and closing arguments by counsel. The trial court shall have the discretion to prohibit or limit pre-deliberation discussions of the evidence in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.

(b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. If the court and the parties agree, alternate jurors may deliberate and participate fully with the principal jurors in considering and returning a verdict. If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be exercised as to any prospective juror.

(c) Challenge to Array. Any party may challenge the array of jurors by motion setting forth particularly the causes of challenge; and the party opposing the challenge may join issue on the motion, and the issue shall be tried and decided by the court.

(d) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory.

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;

(2) Consanguinity or affinity within the third degree to any party;

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation;

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

(f) Order and Determination of Challenges for Cause. The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness.

(g) Order of Selecting Jury. The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of jurors remaining, in the order called, and each side, beginning with plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then swear the remaining jurors, or so many of them in the order listed as will make up the number fixed to try the cause, and these shall constitute the jury.

(h) Peremptory Challenges. Each side shall be entitled to four peremptory challenges, and if there is more than one party to a side they must join in such challenges. Additional peremptory challenges in such number as the court may see fit may be allowed to parties appearing in the action either under Rule 14 or Rule 24 if the trial court in its discretion determines that the ends of justice so require.

(i) Oath of Jurors. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.

(j) When Juror Discharged. If, before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew.

(k) Examination of Premises by Jury. If in the opinion of the court it is proper for the jury to see or examine any property or place, it may order the jury to be conducted thereto in a body by a court officer. A guide may be appointed. The court shall, in the presence of the parties, instruct the officer and guide as to their duties. While the jury is thus absent, no person shall speak to it on any subject connected with the trial excepting only the guide and officer in compliance with such instructions. The parties and their attorneys may be present.

(l) Deliberation of Jury. After hearing the charge the jury may either decide in court or retire for deliberation. If it retires, except as hereinafter provided in this section (l), it shall be kept together in a separate room or other convenient place under the charge of one or more officers until it agrees upon a verdict or is discharged. While the jury is deliberating the officer shall, to the utmost of his ability, keep the jury together, separate from other persons. He shall not suffer any communication to be made to any juror or make any himself unless by order of the court except to ask it if it has agreed upon a verdict; and he shall not, before the verdict is rendered, communicate with any person the state of its deliberations or the verdict agreed upon. The court in its discretion in any individual case may modify the procedure under this Rule by permitting a jury which is deliberating to separate during the luncheon or dinner hour or separate for the night under appropriate cautionary instructions, with directions that they meet again at a time certain to resume deliberations again under the charge of the appropriate officer.

(m) Items Taken to Deliberation. Upon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence.

(n) Additional Instructions. After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties.

(o) New Trial if No Verdict. When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) When Sealed Verdict. While the jury is absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day.

(q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer is in the affirmative, they shall hand the same to the clerk. The clerk shall enter in his records the names of the jurors. Upon a request of any party the jury may be polled.

(r) Correction of Verdict. If the verdict is informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out.

(s) Verdict Recorded, Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

(t) Juror Notebooks. Juror notebooks shall be available during trial and deliberation to aid jurors in the performance of their duties.

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedure established by the trial court. The court shall, out of the hearing of the jury, review each question with counsel or unrepresented litigants and consider any objections they make. The court shall have discretion to prohibit, modify or limit a question for good cause, even if an objection is not made, before posing it to the witness. The court shall have discretion to allow juror follow up questions in writing. The court shall not allow a juror to clarify a question by an oral statement or pose an oral question directly to a witness. The parties shall be permitted to ask additional questions of the witness within the scope of any juror questions posed by the court.

COMMENT

The amendments to this rule add language to require orientation of the prospective jurors. This case-specific orientation would be in addition to any general orientation the prospective jurors may have received. As set forth in the standardized outline that has been developed for use in the orientation, examination and selection processes, the imparted information and instructions should be clear and as neutral as possible.

The contents of any factual orientation information should be reviewed by the judge with counsel at a pre-trial conference to enable consensus concerning the information to be provided. It is recommended that the judge read a stipulated statement of what the case is about. If counsel cannot agree about the content of such a statement, the Judge may develop a preliminary statement of the case in the judge's own discretion. Alternatively, if both counsel desire to make brief, non-argumentative statements to the prospective jurors on what the case is about, the court should have discretion to permit such statements.

As part of the case-specific orientation, certain preliminary instructions should be used to help prospective jurors to understand the claims and defenses of the parties in the civil case. At a minimum, these instructions should address burden of proof, credibility, objections by counsel, bench conferences and whether jurors will be permitted to take notes and ask questions. In complex or technical cases, definitions of terms and other information that would help orient the jury to the case should be given. The trial judge, rather than counsel, should give these instructions as part of the before-examination orientation.

Provisions of the rules pertaining to examination of prospective jurors have been reorganized and clarified to emphasize certain objections. Specific authority is conferred on the jury commissioner to allow service ''postponements'' as contemplated by C.R.S. § 13-71-116 and to examine and excuse prospective jurors who do not satisfy statutory qualification requirements of C.R.S. § 13-71-105.

The court's role has been better defined. Because of the court's neutral role in the case, the trial judge should conduct the initial juror examination by asking standard questions and also those which relate to the specific case, but may be of a sensitive nature. A uniform outline of orientation, juror examination and juror selection procedures has been developed by the committee for both civil and criminal cases. Use of

such outline would assure that all important information is covered, time is saved and that cases are handled uniformly throughout the state.

Counsel and pro se litigants would continue to have a part in the juror examination process by being allowed to question prospective jurors on relevant matters not covered by the trial judge. The judge, however, would continue to have authority to limit such examinations to avoid repetition, irrelevant or improper inquiries and wasting of time.

In addition to the standardized outline of orientation, jury examination and jury selection, posterboards and questionnaires have been developed to enhance the process of acquiring information from prospective jurors. When and how posterboards and questionnaires are used in discretionary with the trial judge. Posterboard questions provide a method to obtain information from prospective jurors in a fast, neutral and flexible way. Such method gives counsel time to observe panelists and make notes, which is not always possible when the attorney is engrossed in asking questions directly. Questionnaires, while not normally used in routine cases, can be valuable in those cases involving high publicity and/or complex issues. Where used, questionnaires not only can obtain autobiographical information, but can also seek case-specific information to identify potential prejudice on sensitive issues.

Juror notebooks should be used in trials as an aid to jurors in the performance of their duties. The court should supply three-ring binders which can be retrieved and repeatedly reused. The court and counsel should provide the materials to be placed in the juror notebooks. The timing and placement of particular materials in the notebooks will be at the court's discretion. Juror notebooks should not be taken from the courtroom or jury room. They should be returned at the end of the trial so that notes can be destroyed and other materials replaced, recycled and/or reused. Sections should be tabbed with particular sections deleted or left empty as appropriate.

Juror notebooks should contain the following:

(1) Orientation materials;

(2) Preliminary jury instructions;

(3) A copy of the final instructions given by the court;

(4) Items ordered by the court; and

(5) Blank paper for juror notes (together with a copy of CJI(3D) 1:7).

Source: (a) repealed and readopted, (m) amended, and (t) and comment added June 25, 1998, effective January 1, 1999; (b) amended and adopted and (u) added and adopted February 19, 2003, effective July 1, 2003; (a)(5) and (u) amended and effective June 7, 2010; (a)(3) amended and effective September 16, 2010; (u) amended and effective October 30, 2014.

Cross references: For the ''Colorado Uniform Jury Selection and Service Act'', see article 71 of title 13, C.R.S.; for irregularity in selecting, summoning, and managing jurors, see § 13-71-140, C.R.S.; for motions for post-trial relief, see C.R.C.P. 59; for grounds for new trial, see C.R.C.P. 59(d); for third-party practice, see C.R.C.P. 14; for intervention, see C.R.C.P. 24.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Jury Selection and Opening Statements'', see 28 Dicta 383 (1951). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951).

Applied in City of Lakewood v. DeRoos, 631 P.2d 1140 (Colo. App. 1981).

II. ORIENTATION OF JURORS.

Jury instruction was not a proper pattern introductory statement of the case instruction in dependency and neglect case under section (a)(2)(IV) when it incorporated the entire case history from the petition into the statement-of-the-case instruction to prospective jurors. The case history included unsubstantiated allegations and allegations based on inadmissible evidence. The error impaired the basic fairness of the trial, requiring reversal. People in Interest of M.H-K., 2018 COA 178, 433 P.3d 627.

III. EXAMINATION OF JURORS.

Law reviews. For article, ''Colorado Criminal Procedure — Does It Meet Minimum Standards?'', see 28 Dicta 14 (1951).

The purpose of a "voir dire" examination of the jury panel is to enable the court and counsel to select as fair and impartial a jury as possible. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Collective or individual questioning not improper. It is not improper for plaintiff's counsel on voir dire to ask each prospective juror individually a question that could be properly asked of the panel collectively. Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (1973).

Considerable latitude must be allowed in voir dire examination, when made in good faith, to enable counsel properly to exercise not only challenges for cause but also peremptory challenges. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Permitting questions to jurors upon which to base a peremptory challenge is within the discretion of the trial court. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921).

Counsel has right to inquire about relationship with insurance company. In voir dire, counsel not only has the right to inquire if any prospective juror has any relationship to a defendant's insurance company, but counsel may also inquire into that relationship, if one exists. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972); Smith v. District Ct. of State of Colo., 907 P.2d 611 (Colo. 1994).

So long as counsel acts in good faith in a personal injury case, the counsel for plaintiff may interrogate prospective jurors respecting their interest in or connection with indemnity insurance companies apparently interested in the result of the case. Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916).

Counsel for plaintiff may not interrogate defendant's counsel, either at the bar or as a witness, concerning whether an insurance company is interested in the case for the purpose of obtaining a basis for interrogating the jurors. Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916).

Order preventing questioning on insurance not reversible error in a certain case. A protective order preventing plaintiff from questioning two prospective jurors regarding any interest in defendants' insurance company is not reversible error where prospective jurors had heard the insurance question asked of other jurors and prospective jurors stated there were no interests or other information which they felt ought to be known by plaintiff. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

Limitations on voir dire questions are within the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Trial court may place reasonable restrictions on questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's peremptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

A trial court may properly restrict questions as to the content of publicity regarding defendants and their pasts. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Whether community prejudice against a party exists is a question of fact that may be developed at voir dire. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Section 13-71-105 (2)(b) provides that a prospective juror shall be disqualified based on the inability to read, speak, and understand the English language. People v. Lee, 93 P.3d 544 (Colo. App. 2003).

Whether a prospective juror should be disqualified under § 13-71-105 (2)(b) is a question of fact for resolution by the trial court. People v. Lee, 93 P.3d 544 (Colo. App. 2003).

Alternatives to mistrial in context of prospective juror who has made prejudicial comments during voir dire. Curative instructions and jury canvassing are two alternatives to a mistrial that may remedy the prejudice to a defendant that results from a prospective juror's prejudicial comments during voir dire. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

The general rule that curative instructions will normally remedy any harm caused by a prejudicial statement is also applicable where a jury panel is exposed to prejudicial comments by a prospective juror. A trial court's instruction to the remaining jurors to disregard the statement and render a verdict based on the evidence presented in court will normally be sufficient to cure any harm to the defendant. To receive a

curative instruction in this context, however, a defendant must request it, and a trial court does not commit plain error if it does not give a curative instruction sua sponte. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

In the alternative, the trial court could canvass the jury to see whether the jury actually heard the prejudicial comment and, if so, whether the comment affected the jurors ability to decide the case fairly. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

Where a juror is asked if he would be satisfied to have a man, with the same amount of prejudice that he had against defendants, try his case, an objection to such question is properly sustained. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921).

The absence of a direct reference during voir dire to the name of the police officer defendant inmate had previously been convicted of murdering did not preclude a full and complete elaboration of defendant's defense theory that, because of the murder conviction, corrections personnel disliked him, and because of his testimony against a co-conspirator, other inmates considered home a snitch, someone placed the marihuana cigarette for which he was being prosecuted in his pocket without his knowledge. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Right to demand a discharge for improper interrogation may be waived. Where during the examination of the jury counsel for defendant announces that he does not wish to demand discharge of the jury on the ground of alleged improper interrogation of its members, the statement constitutes a waiver of the right to have the court declare a mistrial on such ground at that stage of the proceedings, if any such right existed. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

IV. ALTERNATE JURORS.

Law reviews. For article, ''Colorado Criminal Procedure — Does It Meet Minimum Standards?'', see 28 Dicta 14 (1951).

The purpose of seating an alternate juror is to have available another juror when, through unforeseen circumstances, a juror is unable to continue to serve. People v. Abbott, 690 P.2d 1263 (Colo. 1984); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

A trial court is in the best position to evaluate whether a juror is unable to serve, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion. People v. Abbott, 690 P.2d 1263 (Colo. 1984); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

A trial court is not required to conduct a more thorough investigation to make a factual determination regarding an absent juror's physical inability to continue. Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

Where some unforeseen circumstance unrelated to the merits of a case hampers a juror's continued ability to sit, replacing a juror with an alternate is in the nature of an administrative task. People v. Anderson, 183 P.3d 649 (Colo. App. 2007); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

Erroneously permitting an alternate juror to deliberate and participate fully with the principal jurors in considering and returning a verdict when a party objects is harmless pursuant to C.R.C.P. 61 because the error did not affect the substantial rights of the objecting party. Johnson v. Schonlaw, 2018 CO 73, 426 P.3d 345.

V. CHALLENGES FOR CAUSE.

Annotator's note. Since section (e) of this rule is similar to § 200 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Trial court entitled to accept statements of jurors made under oath in determining whether bias or enmity exists. Freedman v. Kaiser Fund. Health Plan, 849 P.2d 811 (Colo. App. 1992).

This rule specifies the grounds upon which a challenge for cause may be asserted. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

A party is not to be unreasonably denied a challenge for cause to which he shows himself entitled. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

Trial courts are afforded broad discretion in ruling on a challenge for cause to a potential juror, and a decision to deny a challenge will be set aside only when the record shows a clear abuse of that discretion. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

A party's right to a challenge is a substantial right which it is not within the discretion of the court to take away arbitrarily. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

While peremptory challenges are an important right of an accused, they are not constitutionally required. People v. Hollis, 670 P.2d 441 (Colo. App. 1983); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

The opportunity for such challenges must therefore be taken along with those limitations attendant upon the manner of its exercise. People v. Durre, 713 P.2d 1344 (Colo. App. 1985); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

The allocation of peremptory challenges is not a matter of judicial discretion. Blades v.

DaFoe, 704 P.2d 317 (Colo. App. 1985); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

Juvenile's right to equal protection was not violated by trial court's refusal to grant juvenile, who was charged as being a violent juvenile offender, five rather than four peremptory challenges where juvenile failed to show that there was unequal treatment within the class of violent juvenile offenders. Although an aggravated juvenile offender is entitled to five peremptory challenges under § 19-2-804 (4)(b)(I), the elements constituting an aggravated juvenile offender differ from those constituting a violent juvenile offender. People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

Trial court may place reasonable restrictions on the questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's preemptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Bias is implied under section (e) of this rule to insure that a jury is impartial, not only in fact, but in appearance. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

In cases of prospective jurors who fall within the categories listed in section (e)(1) to (5), bias is implied to avoid even the appearance of prejudice. Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Actual bias need not be shown. When a prospective juror falls within the class of persons designated within section (e) of this rule, subject to a challenge for cause, actual bias need not be shown. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

In determining whether a potential juror is biased toward any party, the trial court must consider the juror's voir dire statements as a whole. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

The decision of the trial court on the challenge of a juror for cause is not ground for reversal unless manifestly erroneous and prejudicial to the party complaining of it. Salazar v. Taylor, 18 Colo. 538, 33 P. 369 (1893).

Automatic reversal rule in the civil context not overruled by People v. Novotny, 2014 CO 18, 320 P.3d 1194. The automatic reversal rule was initially announced in Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911). The automatic reversal rule provides that when a trial court improvidently denies a challenge for cause to a prospective juror and then, after exercising a peremptory challenge to that juror, a litigant exhausts his or her peremptory challenges, reversal is required without a showing of prejudice. Morales-Guevara v. Koren, 2014 COA 89, 405 P.3d 251, overruled in Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972.

Denver City Tramway Co. remains the controlling and binding authority on the application of the automatic reversal rule in the civil context and was not overruled by the Colorado supreme court in People v. Novotny, in which the automatic reversal rule arose in the criminal context. Morales-Guevara v. Koren, 2014 COA 89, 405 P.3d 251, overruled in Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972.

The ruling of the trial court should be sustained unless it clearly appears from the record that the requirements have been disregarded in the overruling of a challenge for cause. Denver, S. P. & P. R. R. v. Moynahan, 8 Colo. 56, 5 P. 811 (1884).

The decision of the trial court to deny a challenge for cause will not be disturbed on review in the absence of a manifest abuse of discretion. Blades v. DaFoe, 666 P.2d 1126 (Colo. App. 1983), rev'd on other grounds, 704 P.2d 317 (Colo. 1985); Denver & Rio Grande v. Forster, 773 P.2d 612 (Colo. App. 1989).

If the examination leaves the competency of a juror in doubt, the ruling of the trial court will not be disturbed, for before an appellate court will interfere, it must appear that some positive statute has been violated or that the court has abused its discretion. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

For an assignment of error for overruling a challenge for cause to be considered, it must affirmatively appear that the challenging party was forced to accept disqualified jurors or exhausted all its peremptory challenges in attempting to get rid of them. Blackman v. Edsall, 17 Colo. App. 429, 68 P. 790 (1902); Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

Where no bias in favor of the plaintiff nor enmity toward the defendants was shown, a challenge for cause is properly overruled. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921); Stock Yards Nat'l Bank v. Neugebauer, 97 Colo. 246, 48 P.2d 813 (1935).

The trial court properly denied defendant's challenge for cause to a Colorado state senator who had participated in enacting the statute under which defendant was charged where the juror's voir dire responses as a whole neither showed any fixed predisposition against the defendant, nor indicated an inability to render an impartial verdict based on the evidence presented and the court's instructions. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Decision to deny challenge for cause will not be disturbed on review absent a manifest abuse of discretion. Freedman v. Kaiser Found. Health Plan, 849 P.2d 811 (Colo. App. 1992); Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

A trial court is correct in denying plaintiff's request to dismiss prospective jurors for cause after establishing only that they were policyholders with the same insurance company as the defendant, because the fact that they were policyholders in and of itself would not necessarily affect their judgment in the case. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

A court does err in refusing to allow further inquiry of these policyholders, because such inquiry is necessary to enable counsel to determine if there is a basis for a challenge for cause and to aid counsel in later making an intelligent exercise of his peremptory challenges. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Fact that juror and party are stockholders in same company not alone grounds for sustaining challenge. Where a juror is a stockholder in a company and the plaintiff is also a stockholder in the same company, but it does not appear that the juror is otherwise connected with the plaintiff or with the defendant, such a showing as this furnishes no grounds for sustaining the defendant's challenge of this juror for cause. Tabor v. Sullivan, 12 Colo. 136, 20 P. 437 (1889).

The interest of a juror as a member or citizen of a municipality which is a party to the proceeding does not disqualify him. Warner v. Gunnison, 2 Colo. App. 430, 31 P. 238 (1892).

Mere possibility of a potential juror's future contact with a litigant is insufficient to disqualify the juror under section (e)(5) of this rule. Where juror's interest in the event of the action was uncertain and speculative, trial court did not abuse its discretion by denying plaintiffs' challenge of the juror for cause. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

This rule does not make the forming or expressing of an opinion a decisive test as to the juror's competency, unless the opinion be unqualified as to the merits of the action. Collins v. Burns, 16 Colo. 7, 26 P. 145 (1891).

The law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. The rule is a plain and necessary one, but its application is often exceedingly difficult; this is owing to a variety of circumstances which arise in practice. Denver, S. P. & P. R. R. v. Moynahan, 8 Colo. 56, 5 P. 811 (1884).

This rule relates more to the quality of the opinion than to the evidence upon which it is based, for the real question is whether the juror stands indifferent between the parties. The general rule that he who has heard rumors and reports only is competent, and he who has had a full relation of the facts from witnesses, or parties, is disqualified is intended as a guide to general results and is not without exceptions. Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877).

An opinion founded upon rumor of uncertain report, which has not taken firm hold of the mind, shall not disqualify. Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877).

Inability on the part of persons called to serve as jurors, to speak the English language and to understand it when spoken does not necessarily disqualify them from serving as jurors under the statutes of Colorado. Trinidad v. Simpson, 5 Colo. 65 (1879); In re Allison, 13 Colo. 525, 22 P. 820 (1889).

Court has discretion to exclude them. There are many serious objections to the interposition of interpreters in judicial proceedings and while a court holds it within its power to appoint an interpreter where a juror does not understand the English language, it is also within its discretion to exclude such jurors. Trinidad v. Simpson, 5 Colo. 65 (1879).

Whenever it is practicable to secure a full panel of English speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language. Trinidad v. Simpson, 5 Colo. 65 (1879).

Juror's religious reservation on judging another cannot be ground for challenge under section (e)(1). Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Failure to sustain challenge was reversible error. The failure of the trial judge to sustain the plaintiff's challenge for cause, after the juror was determined to be within the class of persons designated in section (e)(3) of this rule, was reversible error. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

Test for disqualification because of religious conviction pursuant to section (e)(7) is the impartial fact-finder test. Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Law enforcement agency employee not challengeable for cause. The rules of civil procedure, unlike the rules of criminal procedure, do not explicitly define as grounds for a challenge for cause the juror's employment by a law enforcement agency. People in Interest of R.A.D., 196 Colo. 430, 586 P.2d 46 (1978).

No challenge for cause for being attorney. Trial court committed reversible error by granting a challenge for cause on the grounds that a prospective juror was an attorney, because this was not a ground set forth in the statute governing challenge for cause in civil actions and resulted in giving the defendant what amounted to an extra peremptory challenge. Faucett v. Hamill, 815 P.2d 989 (Colo. App. 1991).

No challenge for cause for juror with specific knowledge of damages caps under Health Care Availability Act notwithstanding requirement in § 13-64-302 (1) that prevents disclosure of such damage limitations to the jury. Trial court did not err in rejecting defendant's challenge for cause for prospective juror with special knowledge of the caps because this is not a ground set forth in section (e) of this rule for dismissal of a potential juror. Dupont v. Preston, 9 P.3d 1193 (Colo. App. 2000), aff'd on other grounds, 35 P.3d 433 (Colo. 2001).

Juror's debtor-creditor relation with party insufficient for challenge for cause. In a civil case, a juror's standing in a debtor-creditor relation with a party, without more, is insufficient grounds for a challenge for cause. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

Denial of challenge not abuse of discretion if juror decides case impartially. Denial of challenge for cause of juror who stated that he could, and would, put his feelings to one side and decide the case fairly and impartially based on the evidence presented was not an abuse of discretion. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

A juror who expresses an ability to set aside any biases need not be disqualified from jury service. Trial court did not abuse its discretion by denying plaintiffs' challenge for cause of juror who, despite expressing sympathy for defendant, stated she could evaluate the case fairly. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

Trial court should have excused prospective juror who made no affirmative assurance that she would follow the court's instructions after expressing an unwillingness to do so. Morales-Guevara v. Koren, 2014 COA 89, 405 P.3d 251.

VI. ORDER AND DETERMINATION OF CHALLENGES FOR CAUSE.

Annotator's note. Since section (f) of this rule is similar to § 202 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construing that section have been included in the annotations to this rule.

The method and order of procedure in ascertaining the qualifications of veniremen and disposing of challenges for cause are commonly in the discretion of the court, but the discretion is not an arbitrary one. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

The rule which requires the challenge of any particular juror for cause to be made at the very time when the ground for challenge becomes apparent from his examination before passing to the examination of another juror is doubtful, and the argument in favor of such a rule is not convincing. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

VII. ORDER OF SELECTING A JURY.

Annotator's note. Since section (g) of this rule is similar to § 203 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The forming of a jury to try an issue of fact rests largely in the discretion of the trial court. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

For an assignment of error to be considered, it must affirmatively appear from the record that the challenging party exhausted all its peremptory challenges. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

VIII. PEREMPTORY CHALLENGES.

Law reviews. For comment, ''Batson v. Kentucky: Peremptory Challenges Redefined'', see 64 Den. U. L. Rev. 579 (1988).

Annotator's note. Since section (h) of this rule is similar to § 199 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A peremptory challenge was not granted by the common law, and the right exists, if at all, by virtue of statute. Butler v. Hands, 43 Colo. 541, 95 P. 920 (1908).

Unless this rule regulating the manner of challenges is such that the right cannot be exercised, the court must hold that the right exists. Butler v. Hands, 43 Colo. 541, 95 P. 920 (1908).

Automatic reversal rule in the civil context not overruled by People v. Novotny, 2014 CO 18, 320 P.3d 1194. The automatic reversal rule was initially announced in Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911). The automatic reversal rule provides that when a trial court improvidently denies a challenge for cause to a prospective juror and then, after exercising a peremptory challenge to that juror, a litigant exhausts his or her peremptory challenges, reversal is required without a showing of prejudice. Morales-Guevara v. Koren, 2014 COA 89, 405 P.3d 251, overruled in Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972.

Denver City Tramway Co. remains the controlling and binding authority on the application of the automatic reversal rule in the civil context and was not overruled by the

Colorado supreme court in People v. Novotny, in which the automatic reversal rule arose in the criminal context. Morales-Guevara v. Koren, 2014 COA 89, 405 P.3d 251, overruled in Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972.

Automatic reversal not required if a civil litigant is allowed fewer peremptory challenges than authorized, or than available to and exercised by the opposing party. Instead, the reviewing court must determine whether the error substantially influenced the outcome of the case in accordance with the harmless error rule. Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972 (overruling Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911); Safeway Stores, Inc. v. Langden, 532 P.2d 337 (Colo. 1975); and Blades v. DaFoe, 704 P.2d 317 (Colo. 1985)).

Guardian ad litem for child who was subject of paternity action should not have been granted preemptory challenges but such preemptory challenges may not be challenged on appeal by putative father who urged the granting of such challenges at trial. Morgan County DSS v. J.A.C., 791 P.2d 1157 (Colo. App. 1989).

A juror possessing statutory qualifications is still subject to such challenge. Trinidad v. Simpson, 5 Colo. 65 (1879).

Trial court may place reasonable restrictions on the questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's preemptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Multiple litigants are entitled to only one set of peremptory challenges, regardless of whether their interests are essentially common or generally antagonistic. Blades v. DaFoe, 704 P.2d 317 (Colo. 1985); Koustas Realty v. Regency Square P'ship, 724 P.2d 97 (Colo. App. 1986).

It is reversible error if the trial court grants peremptory challenges in excess of the number prescribed by this rule. Blades v. DaFoe, 704 P.2d 317 (Colo. 1985), overruled in Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972 (overruling the automatic reversal rule); Fieger v. E. Nat. Bank, 710 P.2d 1134 (Colo. App. 1985); Koustas Realty v. Regency Square P'ship, 724 P.2d 97 (Colo. App. 1986).

IX. OATH OF JURORS.

The juror's oath prescribes his duty; by the obligation thus imposed, he is to well and truly try the issues joined and a true verdict render, according to the law and the evidence. Demato v. People, 49 Colo. 147, 111 P. 703 (1910) (decided under § 198 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Absent any showing of prejudice by the defendant, the administration of the oath to the panel of jurors accepted for cause before the exercise of peremptory challenges does not constitute reversible error. People v. Smith, 848 P.2d 365 (Colo. 1993).

X. WHEN JUROR DISCHARGED.

Annotator's note. Since section (j) of this rule is similar to § 189 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This rule gives the court power to discharge a jury under certain circumstances. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

The existence of this authority as a common-law right is recognized. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

The court does not have arbitrary power to discharge a jury after it has been impaneled and sworn; the parties are entitled to have their case heard by the jury which has been selected, and they cannot be deprived of that right unless some sufficient reason exists for the exercise of the court's power in the premises. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

XI. EXAMINATION OF PREMISES BY JURY.

Annotator's note. Since section (k) of this rule is similar to § 206 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The provisions of section (k) are clear. Kistler v. N. Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

An inspection of the premises by the jury is a matter entirely within the discretion of the trial court. Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Nogote-Northeastern Consol. Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1921).

Where the jury is permitted by the court to view the premises involved in the litigation, the jurymen are expected to look at everything upon the viewed premises and are not confined to the matters and things mentioned in the testimony given in the court room. Bijou Irrigation Dist. v. Cateran Land & Live Stock Co., 73 Colo. 93, 213 P. 999 (1923).

Applied in Kistler v. N. Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

XII. DELIBERATION OF JURY.

Law reviews. For article, ''Limitations of the Power of Courts in Instructing Juries'', see 6 Dicta 23 (March 1929).

Jury shall not separate during deliberation. Upon the close of the cause a jury shall retire for deliberation, and during such deliberation, shall not separate, although it might be in the discretion of the court to permit the jury to separate under certain circumstances. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

The mere separation of a jury will not be "per se" sufficient ground for setting aside the verdict and granting a new trial; something else must appear — that is, that there was a strong probability that the jury had been tampered with or influenced to return the verdict which is sought to be set aside. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889); Beals v. Cone, 27 Colo. 473, 62 P. 948 (1900).

The practice of calling the jury into the court room after they have deliberated longer than usual without agreeing upon a verdict and impressing upon them the importance of agreeing if possible is approved of; ordinarily a trial judge is within his rightful province when he urges agreement upon a jury at loggerheads with itself, but this process has its limits. Peterson v. Rawalt, 95 Colo. 368, 36 P.2d 465 (1934).

Reading of testimony is discretionary. The overwhelming weight of authority in this country is that the reading of all or part of the testimony of one or more of the witnesses at trial, criminal or civil, at the specific request of the jury during their deliberations is discretionary with the trial court. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Where trial testimony is read to the jury at their request during their deliberations, it is essential that the court observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury, for this would be prejudicial abuse of discretion and constitute grounds for reversal. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Where the only portion of the record designated on review is the testimony which the trial court permitted to be read to the jury during deliberation, there is nothing upon which the court can make a determination of abuse of discretion, and it must therefore presume the trial court acted properly and without error. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

A trial court has discretion to grant the equitable relief of specific performance while the jury concurrently deliberates on the award of damages in cases where the damages are in no way contingent upon the trial court's equity decision. Soneff v. Harlan, 712 P.2d 1084 (Colo. App. 1985).

XIII. PAPERS TAKEN BY JURY.

Annotator's note. Since section (m) of this rule is similar to § 211 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Amendment to section (m) that allows all exhibits admitted into evidence to be taken into the jury room undercuts previous rule of law that jury could not have unrestricted and unsupervised access to evidence. Thus, the basis no longer exists for prohibiting juror access during deliberations to videotapes, audiotapes, or written documents. People v. McKinney, 80 P.3d 823 (Colo. App. 2003), rev'd on other grounds, 99 P.3d 1038 (Colo. 2004).

The pleadings should not be sent out with the jury. Spaulding v. Saltiel, 18 Colo. 86, 31 P. 486 (1892).

It is not a good practice to allow the jury to take the declaration to their room when they retire to consider their verdict. Good v. Martin, 1 Colo. 165 (1869), aff'd, 95 U.S. 90, 24 L. Ed. 341 (1877).

Jury may take pleadings with them unless objected or excepted to. Where it is assigned for error that the court permitted the jury to take the pleadings with them when they retired, but there is no record of an objection or an exception, an appellate court cannot review alleged irregularities that were apparently waived or consented to. King v. Rea, 13 Colo. 69, 21 P. 1084 (1889).

A transcript of the defendant's voluntary confession may be taken into the jury room during deliberations if it passed the tests of admissibility and was admitted into evidence. People v. Miller, 829 P.2d 443 (Colo. App. 1991).

No error in permitting jury unfettered access to properly admitted transcripts. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

No error in permitting jury to view videotapes introduced at trial in jury room without defendant present. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

The concern about the unsupervised review of materials indicated by the prohibition in this section of depositions in the jury room also applies to the videotape of the interrogation of a witness. As a result, the review of such a videotape by the jurors in this case should have been allowed only under circumstances which would assure that statements made in the videotape were not given undue weight or emphasis. People v. Montoya, 773 P.2d 623 (Colo. App. 1989), cert. denied, 781 P.2d 647 (Colo. 1989).

The amendment to section (m) effective January 1, 1999, undercuts the rationale of People v. Montoya and, under the amended rule, written statements that are trial exhibits may be taken into the jury room. People v. McKinney, 80 P.3d 823 (Colo. App. 2003),

rev'd on other grounds, 99 P.3d 1038 (Colo. 2004).

The amendment to section (m) effective in 1999 made the analysis in People v. Montoya no longer applicable. Trial court, therefore, did not err when it permitted jurors to take victim's written statement into the jury room for deliberations. People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

Submission of deposition transcripts to the jury which are not read or otherwise used by the jurors, does not necessitate a new trial. Montrose Valley Funeral Home, Inc. v. Crippin, 835 P.2d 596 (Colo. App. 1992).

Applied in Billings v. People, 171 Colo. 236, 466 P.2d 474 (1970).

XIV. ADDITIONAL INSTRUCTIONS.

Annotator's note. Since section (n) of this rule is similar to § 212 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

No error will be presumed in denying request for further instructions. Where a jury after retiring for deliberation returns into court and requests further instructions, which request is denied by the court, and the abstract of record contains neither the instructions given nor the request for further instructions, it will be presumed that no error was committed in denying the request. Buzanes v. Frost, 19 Colo. App. 388, 75 P. 594 (1904).

Sections (l) and (n) of this rule are not violated by written reply that matter is already covered. Where a jury in the course of its deliberations sends a note to the judge requesting advice on a question, and the judge replies in writing that ''this matter is covered in your instructions'', sections (l) and (n) of this rule are not violated. Kath v. Brodie, 132 Colo. 338, 287 P.2d 957 (1955); Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

Trial courts of necessity possess a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions. Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

Unless it fairly appears that some legal right of the party complaining has under proper objection been invaded and that the invasion may have resulted in injury, a reversal will not take place upon this ground. Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

Communication should take place in open court in counsel's presence. There ought to be no communication between the judge and jury after the latter have been charged and have retired to consider their verdict unless the communication takes place in open court, and, if practicable, in the presence of counsel on the respective sides. Colo. Cent. Consol. Mining Co. v. Turck, 50 F. 888 (8th Cir. 1892).

Where the communication complained of evidently took place in open court, but the record does not show the cause of counsel's absence, whether they were absent due to their own fault, or as to whether any efforts were made to secure their presence, every presumption in favor of the regularity and propriety of the court's action must be indulged. Colo. Cent. Consol. Mining Co. v. Turck, 50 F. 888 (8th Cir. 1892).

This rule must be given a reasonable construction. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

This rule is intended simply to apply to such instructions or communications from the court to the jury as might bear upon the issues of the case and influence it in its determination for the one party or the other. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

This rule is not intended to reach, or embrace, such communications as could not be construed to be instruction as to the law in the case and which are manifestly harmless in their character. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900); People in Interest of E.S., 681 P.2d 528 (Colo. App. 1984).

An inquiry as to admissibility of verdict is not error. Where the jury after retiring send to the court by the bailiff, in the absence of counsel on both sides, a communication wherein they inquire whether a certain verdict would be admissible, to which communication the court returns by the bailiff a verbal answer ''no'', it is not reversible error as in violation of this rule. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

An agreement may be called for. This rule has no application to a communication of the judge to jury, not as to the law of the case, but an exhortation to endeavor to harmonize their differences and come to an agreement. Hutchins v. Haffner, 63 Colo. 365, 167 P. 966 (1917).

Instruction that jury "must" return verdict is error. When the jury indicates that it is in disagreement and an oral instruction precludes any possibility of a hung jury and goes far beyond the usual written third-degree instruction, which should be used with caution, then, where almost immediately after receiving this oral communication the jury returns its verdict, it can be reasonably assumed that any honest debate among the jurors is further precluded by the blunt instruction that they must return one verdict or the other with the implication that they cannot report a disagreement, so as to be prejudicial error. Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

A communication not in any way indicating the opinion of the court as to the merits

of the controversy and not tending in any degree to coercion upon the jury is entirely proper and praiseworthy, though made in the absence of counsel and without their knowledge. Hutchins v. Haffner, 63 Colo. 365, 167 P. 966 (1917).

XV. NEW TRIAL IF NO VERDICT.

When the trial court learns that the jury verdict was not unanimous and chooses to discharge the jury, the trial court had no choice but to order a new trial. Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987).

XVI. SEALED VERDICT.

Annotator's note. Since section (p) of this rule is similar to § 214 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Jurors may, by order of court, if they arrive at a verdict during recess, reduce it to writing, seal it, and separate. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

The verdict must be retained by the jury or by some member thereof and be delivered to the court. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Although a jury may be allowed to separate after having sealed a verdict, they must be called at the opening of court and asked whether they have agreed upon their verdict. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Irregularity in the reception of a verdict is not waived by a failure to object at the time it was so received. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Where one seeks reversal on the ground of irregularity in the failure of the trial judge to be present when the verdict was received, then, if he was not substantially prejudiced by the trial court's procedure, he has no right to complain of the action of the trial court in entering its judgment on the verdict. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948).

XVII. DECLARATION OF VERDICT.

Annotator's note. Since section (q) of this rule is similar to § 215 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Whether there shall be a poll of the jury rests in the sound discretion of the trial judge. Hindrey v. Williams, 9 Colo. 371, 12 P. 436 (1886); Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

If there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed. Hindrey v. Williams, 9 Colo. 371, 12 P. 436 (1886).

As a matter of practice, when a demand for a poll is made, it should be granted. Ryan v. People, 50 Colo. 99, 114 P. 306 (1911).

Rule does not require polling of jury unless a party so requests. Kading v. Kading, 683 P.2d 373 (Colo. App. 1984).

XVIII. CORRECTION OF VERDICT.

Annotator's note. Since section (r) of this rule is similar to § 216 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Objections to the form of a verdict must be made in the court and before the jury is discharged. Cowell v. Colo. Springs Co., 3 Colo. 82 (1876), aff'd, 100 U.S. 55, 25 L. Ed. 547 (1879).

An objection to the form of a verdict cannot be raised on appeal for the first time. Cowell v. Colo. Springs Co., 3 Colo. 82 (1876), aff'd, 100 U.S. 55, 25 L. Ed. 547 (1879).

Where verdict is for plaintiff, it is the duty of the plaintiff and not the defendant to see that the verdict is corrected at the proper time. Dorsett v. Crew, 1 Colo. 18 (1864).

When mistakes in the form of the verdict are brought to the notice of the court, it becomes the duty of the court to send the jury back for the purpose of returning a correct verdict. Dorsett v. Crew, 1 Colo. 18 (1864).

If the amount of indemnity awarded by the jury is incorrect and the correct amount has already been determined and is not disputed, the court may amend the verdict in order to award the determined amount. Cole v. Angerman, 31 Colo. App. 279, 501 P.2d 136 (1972).

Trial court may increase amount in verdict. Where the amount in question is undisputed or liquidated and the jury has failed to follow the instructions and returned a verdict for a lesser sum, the trial court has the power to increase the verdict to the higher figure. Cole v. Angerman, 31 Colo. App. 279, 501 P.2d 136 (1972).

Trial court may reduce amount in verdict. The action of the trial court, after receiving the verdict of the jury and remarking to them that they were discharged, in causing them to amend their verdict by reducing it to the amount claimed by the plaintiff, is not reversible error inasmuch as the same action might have been taken without the jury. Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 P. 21 (1892).

Error by clerk is amendable. Any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgment or proceedings is not an error in the express judgments pronounced by the court in the exercise of its judicial discretion, but is a clerical error and amendable. Hittson v. Davenport, 4 Colo. 169 (1878).

Word "defendant" in verdict presumed to include both defendants. Where two persons are sued as defendants and, although answering separately, make the same defense, a verdict for "the defendant" is not void for uncertainty, but must be presumed to include both defendants. Waddingham v. Dickson, 17 Colo. 223, 29 P. 177 (1892).

Nonpertinent matter may be disregarded. Where a verdict is irregular, the court may direct the jury to make necessary corrections, but it is not limited to that procedure, as it may properly disregard nonpertinent matter. Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

Any irregularity of form in verdict should be disregarded if it fairly appears that the jury intended a given verdict. Tyler v. District Court, 200 Colo. 254, 613 P.2d 899 (1980).

Court may not look beyond face of record to examine thought processes of jurors, and, if their intent is clear from the record, the verdict shall be given effect. Tyler v. District Court, 200 Colo. 254, 613 P.2d 899 (1980).

An incorrect method of expressing an intended verdict amounts to a mistake in the verdict that may properly be corrected under this rule. Kading v. Kading, 683 P.2d 373 (Colo. App. 1984).

A trial court may amend a verdict in matters of form, but not of substance. A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury. If amending a verdict to resolve an ambiguity would change the jury's underlying intent, the change is one of substance and cannot be done without a new trial. Dysert Assoc. Architecture v. Hoeltgen, 728 P.2d 756 (Colo. App. 1986).

A trial court may not set aside or amend, by way of remittitur, a jury's award for damages, so long as the verdict is consistent with the court's instruction and supported by evidence and the amount awarded is not so excessive or inadequate as to indicate bias, passion, or prejudice. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Where inconsistent verdicts indicate that the jury was misled by its instructions concerning the awarding of damages, the trial court may not resolve the inconsistency by amending the verdict, and the appropriate remedy is a new trial on the issue of damages. Hugh v. Wash. Indus. Bank, 757 P.2d 1154 (Colo. App. 1988).

XIX. VERDICT RECORDED.

Annotator's note. Since section (s) of this rule is similar to § 217 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

If the answer is in the affirmative, the sealed verdict may be delivered to the court and, if in form, the jury may be discharged from the case. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

When juror was questioned about whether the verdict in favor of defendant as reported by a written special verdict was her verdict and juror responded "no", judge should have declared a mistrial or directed the jurors to deliberate further; by engaging in extended questioning as to why the juror had said the verdict was not hers, the court and counsel improperly delved into the deliberations and mental processes of the jurors and risked unduly influencing the juror to conform to the signed verdict. Simpson v. Stjernholm, 985 P.2d 31 (Colo. App. 1998).

Until the jury is discharged, the jurors are not relieved their duties pertaining to the case. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Rule 48. Number of Jurors

The jury shall consist of six persons, unless the parties agree to a smaller number, not less than three. The parties may stipulate at any time before the verdict is returned that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Cross references: For number of jurors, see § 13-71-103, C.R.S.

ANNOTATION

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951).

Annotator's note. Since this rule is similar to § 197 of the former Code of Civil Procedure,

which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Where a party objects to a jury of three, the objection should be sustained and a jury of six impaneled to try the cause. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Unless the parties consent thereto, a jury of three cannot lawfully try a suit. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Attorney appointed in default cannot consent. In case of default where an attorney has been appointed by the court to represent the absent defendant, the attorney so appointed cannot consent for the defendant to have the cause tried by a jury of three. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Applied in People v. Peek, 199 Colo. 3, 604 P.2d 23 (1979); People v. Boos, 199 Colo. 15, 604 P.2d 272 (1979).

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made upon the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other or one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Cross references: For waiver of trial by jury, see C.R.C.P. 38(e); for entry of judgment, see C.R.C.P. 58.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962).

II. SPECIAL VERDICTS.

Where plaintiffs fail to establish their allegations that defendants are guilty of gross negligence or of willful or wanton misconduct, but there is sufficient evidence of simple negligence, it requires submission of the case to the jury. Hurst v. Crowtero Boating Club, Inc., 31 Colo. App. 9, 496 P.2d 1054 (1972).

It is not error, in a will contest, for the court to submit the case to the jury on spe-

cial interrogatories. In re Piercen's Estate, 118 Colo. 264, 195 P.2d 725 (1948).

Where no protest is made to the submission to the jury of a question any objections thereto are waived. Westing v. Marlatt, 124 Colo. 355, 238 P.2d 193 (1951).

Trial court's rejection of party's proposed jury instructions is not in error so long as the jury instructions submitted by the trial court sufficiently and properly cover the subjects contained in the proposed instructions. Staley v. Sagel, 841 P.2d 379 (Colo. App. 1992).

Appellate court has duty to attempt to reconcile jury's answers to special verdicts if it is at all possible, and where there is a view of the case that makes the jury's answers consistent, they must be resolved that way. City of Aurora v. Loveless, 639 P.2d 1061 (Colo. 1981); Williamson v. Sch. District No. 2, 695 P.2d 1173 (Colo. App. 1984).

III. GENERAL VERDICT.

The refusal to submit the interrogatories to the jury is not an abuse of discretion by the court. Lambrecht v. Archibald, 119 Colo. 356, 203 P.2d 897 (1949).

Under this rule the submission of interrogatories is discretionary and not mandatory. Lambrecht v. Archibald, 119 Colo. 356, 203 P.2d 897 (1949).

Use of special verdicts and interrogatories is discretionary. The use of special verdicts or interrogatories accompanying general verdicts, unless specifically required, is discretionary with the trial court. Felder v. Union Pac. R.R., 660 P.2d 911 (Colo. App. 1982).

Jury verdicts will not be reversed for inconsistency if the record discloses any evidentiary basis to support the verdicts. Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544 (Colo. 1988).

Rule 50. Motion for Directed Verdict

A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''The One Percent Solution'', see 11 Colo. Law. 86 (1982). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with a motion for directed verdict, see 62 Den. U. L. Rev. 230 (1985). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

This rule is substantially the same as F.R.C.P. 50. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

This rule follows the rule and practice in federal courts. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

This rule governing the direction of a verdict is identical to the former rule controlling a motion for nonsuit in effect prior to the adoption of the rules of civil procedure. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

Motions for directed verdict present a question of law, not of discretion. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

Motion of both sides for a directed verdict no longer amounts to a waiver of jury trial. Am. Nat'l Ins. Co. v. Gregg, 123 Colo. 476, 231 P.2d 467 (1951).

This rule specifically provides that ''a motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts''. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

It becomes the duty of the trial court to direct a verdict in favor of defendant and grant a dismissal of the action when a review of all the evidence establishes that there is not basis upon which a verdict in favor of plaintiff may be supported as a matter of law. Montes v. Hyland Hills Park, 849 P.2d 852 (Colo. 1992).

Granting a directed verdict is a final and legal determination of the controversy. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

Direction of verdict by trial court is presumed regular and valid. Where the trial court in directing a verdict exercises sound judicial discretion, its action is entitled to the same presumption of regularity and validity as is accorded to any other type of judgment; that error may have been committed by the trial court is never presumed, but must affirmatively be made to appear. French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955).

A jury's subsequent verdict to the contrary cannot stand if a trial court appropriately directs a verdict on an issue. Pinell v. McCrary, 849 P.2d 848 (Colo. App. 1992).

"Motion for directed verdict" is actually motion to dismiss. When the court is the trier of fact, a motion denominated a ''motion for directed verdict'' is actually a motion to dismiss pursuant to C.R.C.P. 41(b). Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Frontier Exploration v. Am. Nat., 849 P.2d 887 (Colo. App. 1992).

There are standards for directed verdict versus motion for new trial. The standards for directing a verdict and setting one aside for new trial are widely different and should not be controlled by the same conditions and circumstances. The entry of a judgment notwithstanding the verdict involves a legal standard, while the authority to grant a new trial rests in the discretion of the trial court. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

The result of setting aside a verdict and the event of directing one are entirely different and are not controlled by the same conditions or circumstances; the matter of a retrial of the issue rests, within limitations, in the discretion of the trial court, while the matter of a directed verdict rests upon legal right. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

There is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence and the obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence; in the latter case it must be so insufficient in fact as to be insufficient in law, while in the former case it is merely insufficient in fact. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

This rule allows trial courts to issue partial directed verdicts. The rule's silence on the matter does not preclude a partial directed verdict. Instead, this rule should be read in tandem with Colorado's summary judgment rule, C.R.C.P. 56, which allows partial summary judgment. Both rules share a common legal standard (judgment as a matter of law) and a common purpose (to streamline the litigation process). Bd. of County Comm'rs v. Rodgers, 2015 CO 56, 355 P.3d 1253.

The primary difference between this rule and C.R.C.P. 56, the summary judgment rule, is the timing of the motion, with the former being made during trial and the latter before. It would make little sense for judgment as to issues to be permitted prior to trial on summary judgment but not after the presentation of evidence at trial. Bd. of County Comm'rs v. Rodgers, 2015 CO 56, 355 P.3d 1253.

Like its federal counterpart, F.R.C.P. 50, this rule implicitly authorizes a trial court to issue a directed verdict regarding claims in whole or in part. The development of the counterpart federal rule is also persuasive evidence that this rule permits a trial court to direct a verdict on a claim in whole or in part. The federal summary judgment and directed verdict rules have developed in parallel fashion to permit partial judgment in both instances. Bd. of County Comm'rs v. Rodgers, 2015 CO 56, 355 P.3d 1253.

Applied in Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951); Durango Sch. Dist. No. 9-R v. Thorpe, 200 Colo. 268, 614 P.2d 880 (1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); Mucci v. Falcon Sch. Dist. No. 49, 655 P.2d 422 (Colo. App. 1982); Safeway Stores, Inc. v. Smith, 658 P.2d 255 (Colo. 1983); Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984); Daly v. Observatory Corp., 759 P.2d 777 (Colo. App. 1988), rev'd on other grounds, 780 P.2d 462 (Colo. 1989).

II. EVIDENCE.

In passing upon a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the party against whom the motion is directed. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950);

Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960); Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961); Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974); Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975); Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990); Lorenz v. Martin Marietta Corp., Inc., 802 P.2d 1146 (Colo. App. 1990), aff'd Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992); Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Every reasonable inference to be drawn from the evidence presented is to be considered in the light most favorable to such party. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960); Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Reasonable inference may be drawn from circumstantial evidence. Kopeikin v. Merchants Mortg. & Trust Corp., 679 P.2d 599 (Colo. 1984).

A motion for a directed verdict admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn from it. Western-Realco Ltd. v. Harrison, 791 P.2d 1139 (Colo. App. 1989). Co., 806 P.2d 388 (Colo. App. 1990).

Every factual dispute supported by credible evidence must be resolved in his favor, and the strongest inferences reasonably deducible from the most favorable evidence must be indulged in his favor. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

In ruling on whether an activity is inherently dangerous as a matter of law, if the state of the evidence is such that when viewed in a light most favorable to the plaintiff, the court is convinced that a jury could not find that all the following elements have been proven by a preponderance of the evidence, then it should direct a verdict against the plaintiff and in favor of the employer: (1) that the activity in question presented a special or peculiar danger to others inherent in the nature of the activity or the particular circumstances under which the activity was to be performed; (2) that the danger was different in kind from the ordinary risks that commonly confront persons in the community; (3) that the employer knew or should have known that the special danger was inherent in the nature of the activity or in the particular circumstances under which the activity was to be performed; and (4) that the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor. Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992).

Where defendant moves for directed verdict, the court views the evidence in the light most favorable to plaintiff. Jasko v. F. W. Woolworth Co., 177 Colo. 418, 494 P.2d 839 (1972); Klein v. Sowa, 759 P.2d 857 (Colo. App. 1988).

Motion for directed verdict in a jury trial admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn therefrom. Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 32 Colo. App. 384, 513 P.2d 1082 (1973); Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983).

In passing upon a motion to direct a verdict, a judge cannot properly undertake to weigh the evidence. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Roberts v. Bucher, 41 Colo. App. 138, 584 P.2d 97 (1978), rev'd on other grounds, 198 Colo. 1, 595 P.2d 239 (1979); Fagerberg v. Webb, 678 P.2d 544 (Colo. App. 1983); Christie v. San Miguel Cty. Sch. Dist., 759 P.2d 779 (Colo. App. 1988).

Party seeking to reopen evidence after party has rested and after motion for directed verdict has been made must make an offer proof as to what specific evidence the party would present and demonstrate that the evidence would cure any deficiencies in party's case. Failure to offer such proof and make such demonstration waives the right of the party to present future evidence. Justi v. RHO Condo. Ass'n, 277 P.3d 847 (Colo. App. 2011).

Court should not judge credibility of witnesses. On a motion for directed verdict at the close of a party's case, it is not for the court to judge as to the weight of the evidence or the credibility of witnesses. Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960).

The judge's duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for the party having the onus. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

When a plaintiff makes out a prima facie case, even though the facts are in dispute, it is for the jury, and not the judge, to resolve the conflict under this section. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

A motion for directed verdict should be granted only in the clearest of cases when the evidence is undisputed and it is plain no reasonable person could decide the issue against the

moving party. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

Whether new trial would be granted is not a proper test. It is not a proper test of whether the court should direct a verdict that the court, on ''weighing'' the evidence, would grant a new trial, upon motion. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

III. GRANT OF MOTION.

Directed verdict is proper only where there are no factual disputes. Williamson v. Sch. District No. 2, 695 P.2d 1173 (Colo. App. 1984).

A directed verdict may be granted only when, disregarding conflicting evidence and giving to nonmovant's evidence all the value to which it is legally entitled by indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality and materiality to support a verdict in favor of the nonmovant if such a verdict were given. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

It becomes the court's duty as a matter of law to direct a verdict. Where a trial court, from a review of all the evidence adduced, is convinced that there is no basis upon which a verdict in favor of a party may be supported and that even though a jury should return a verdict in his favor it could not be permitted to stand, it becomes the duty of the trial court, as a matter of law, to direct a verdict in favor of the other party. French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955).

A motion for directed verdict can only be granted where the evidence, when considered, compels the conclusion that the minds of reasonable men could not be in disagreement and that no evidence, or legitimate inference arising therefrom, has been received or shown upon which a jury's verdict against the moving party could be sustained. Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961); Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975); Western-Realco Ltd. v. Harrison, 791 P.2d 1139 (Colo. App. 1989); Pierce v. Capitol Life Ins. Co., 806 P.2d 388 (Colo. App. 1990); Burgess v. Mid-Century Ins. Co., 841 P.2d 325 (Colo. App. 1992).

A motion for a directed verdict should not be granted unless the evidence compels the conclusion that reasonable men could not disagree and that no evidence or inference had been received at trial upon which a verdict against the moving party could be sustained. Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 32 Colo. App. 384, 513 P.2d 1082 (1973).

A verdict should be directed only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable men could not arrive at a contrary verdict. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

A motion for directed verdict should not be granted unless the evidence compels the conclusion that reasonable jurors could not disagree and that no evidence or inference has been received at trial upon which a verdict against the movant could be sustained. Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983); Mahoney Marketing Corp. v. Sentry Builders, 697 P.2d 1139 (Colo. App. 1985); Smith v. Denver, 726 P.2d 1125 (Colo. 1986); United Bank v. One Center Joint Venture, 773 P.2d 637 (Colo. App. 1989).

Trial court's grant of motion for directed verdict on the theory of strict liability was proper since evidence was offered by plaintiff to prove that the product of defendants was unreasonably dangerous and carried no warning to that effect. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Trial judge may only direct verdict in clearest cases. A trial judge may only invade the fact-finding province of the jury to grant a directed verdict in the clearest cases. Romero v. Denver & R. G. W. Ry., 183 Colo. 32, 514 P.2d 262 (1973).

Court is justified in usurping function of jury. Where the evidence is undisputed and where reasonable men could reach but one conclusion from that evidence, the court is justified in usurping the function of the jury and directing a verdict for either party. Pioneer Constr. Co. v. Richardson, 176 Colo. 254, 490 P.2d 71 (1971).

If the evidence is of such a character as to establish willful and wanton conduct as a matter of law, the court should direct a verdict and should not submit the matter to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where there is evidence of the occurrence of an accident accompanied by "prima facie" evidence of defendant's negligence, and there is no evidence of facts absolving the defendant of negligence or of facts showing negligence on the part of the plaintiff, a directed verdict in favor of the plaintiff is proper. Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1973).

Where no evidence of damages has been introduced, a trial court properly directs a verdict against plaintiffs on their claim. Greenleaf, Inc. v. Manco Chem. Co., 30 Colo. App. 367, 492 P.2d 889 (1971).

Where the court errs in submitting case to the jury, then, since it should have granted a motion for a directed verdict, it should sustain a

motion for judgment under this rule. First Nat'l Bank v. Henning, 112 Colo. 523, 150 P.2d 790 (1944).

IV. WHEN GRANT OF MOTION IMPROPER.

Where there is substantial evidence tending to establish cause of action, it is error to direct a verdict in favor of defendant at the close of plaintiff's case. Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960).

When a plaintiff makes out a "prima facie" case, even though the facts are in dispute, it is for the jury, and not the judge, to resolve the conflict, and a direction of a verdict is error. Romero v. Denver & R. G. W. Ry., 183 Colo. 32, 514 P.2d 626 (1973).

Directed verdict held reversible error where plaintiff established "prima facie" case. Kennedy v. City & County of Denver, 31 Colo. App. 564, 506 P.2d 764 (1972).

If conduct does not, as a matter of law, establish that it was willful and wanton, the matter necessarily has to be submitted to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where a factual dispute exists, although both sides have moved for a directed verdict, the trial court has no alternative but to submit the matter to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where there is conflicting testimony and reasonable men might draw different conclusions from the testimony, the question of proximate cause is properly one for the jury. Pioneer Constr. Co. v. Richardson, 176 Colo. 254, 490 P.2d 71 (1971).

When the evidence concerning a material fact is such that reasonable minds could differ with reference thereto, it should be submitted to the jury for its determination, and a trial court's refusal to submit the matter to the jury is error calling for reversal. Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Where a doctor in a malpractice suit presents evidence that his failure to inform plaintiff of all the risks attendant to an operation was consistent with community medical standards, the determination of the adequacy of his disclosures then becomes one for the jury, and a directed verdict in favor of plaintiff would not be warranted. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

Directed verdict on issue on contributory negligence held error. Where, under conflicting evidence, a factual issue was presented as to whether plaintiff was contributorily negligent by virtue of a sudden and abrupt stopping of his vehicle in an unexpected location, the trial court erred in directing a verdict on the issue of plaintiff's contributory negligence. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Whether assault and battery occurred are jury questions. Issues of whether officer or arrestee initiated force, whether officer's force was unreasonable, and whether arrestee used reasonable force in self-defense in resisting arrest should have been submitted to jury. Valdez v. City and County of Denver, 764 P.2d 393 (Colo. App. 1988).

Where the evidence presented raised disputed issues of fact, the trial court's refusal to grant a directed verdict was correct. Horton v. Mondragon, 705 P.2d 977 (Colo. App. 1984).

V. REVIEW OF MOTION.

In reviewing a motion for directed verdict, the court must consider the evidence in a light most favorable to the party against whom the motion is directed. Sanchez v. Staats, 34 Colo. App. 243, 526 P.2d 672 (1974), aff'd, 189 Colo. 228, 539 P.2d 1233 (1975); Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

The reviewing court does so by considering all evidence in the light most favorable to the party against whom the motion is directed and by indulging every reasonable inference that can be legitimately drawn from the evidence in that party's favor. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991); Gast v. City of Fountain, 870 P.2d 506 (Colo. App. 1993).

If there is no conflicting evidence with respect to the particular issue raised by the motion for directed verdict and the only concern is the legal significance of undisputed facts, then the appellate court may make an independent determination of the issue. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

Appellate court will not consider denial of motion for directed verdict when grounds are not stated by movant. Sharoff v. Iacino, 123 Colo. 456, 231 P.2d 959 (1951).

Where the evidence does not warrant the direction of a verdict for either party, but the trial court directs a verdict for one of the parties, the judgment must be reversed and a new trial granted, notwithstanding a motion by both sides for a directed verdict. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

Rule 51. Instructions to Jury

The parties shall tender jury instructions pursuant to C.R.C.P. 16(g). All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new

trial or on appeal or certiorari. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as part of the record of the cause.

Source: Entire rule amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; entire rule amended and effective September 10, 2009.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Limitations of the Power of Courts in Instructing Juries'', see 6 Dicta 23 (March 1929). For article, ''Shall Colorado Procedure Conform with the Proposed Federal Rules of Civil Procedure?'', see 15 Dicta 5 (1938). For article, ''Colorado Criminal Procedure — Does It Meet Minimum Standards?'', see 28 Dicta 14 (1951). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''Jury Nullification and the Rule of Law'', see 17 Colo. Law. 2151 (1988). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

Annotator's note. Since this rule is similar to § 205 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The giving of an instruction for special findings by a jury is discretionary with the court. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).

Where there was no statute or rule to support the presumption created by a jury instruction, the presumption could only be properly given if it was supported by common law rules governing the admissibility and evidentiary effect of defendant electrical utility's compliance with industry standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

In the absence of a showing of abuse of discretion, no error can be predicated on the refusal to give such an instruction. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).

A judgment of the trial court refusing to give requested instruction will not be reversed unless the refusal results in substantial, prejudicial error. Armentrout v. FMC Corp., 842 P.2d 175 (Colo. 1992).

The purpose of jury instructions is to provide the jury with the applicable law so that its attention will be directed to the specific issues that are to be determined. Rio Grande S. R.R. Co. v. Campbell, 44 Colo. 1, 96 P. 986 (1908); Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

The trial court may exercise sound discretion as to the form and style in which instructions shall be given. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

The duty imposed upon the trial court necessarily involves a large discretion as to the form and style in which instructions to the jury shall be given. Moffat v. Tenney, 17 Colo. 189, 30 P. 348 (1892).

Court should state all issues and both parties' cases. A clear statement of the issues to the jury is eminently proper, but the court should be careful to state all the issues and put the case not only as it is laid by the plaintiff, but also as it is controverted by the defendant; he is entitled to have his defense and case stated. Kindel v. Hall, 8 Colo. App. 63, 44 P. 781 (1896).

A party is entitled to an instruction on his theory of the case when it is supported by competent evidence. Davis v. Cline, 177 Colo. 204, 493 P.2d 362 (1972).

A party is entitled to a jury instruction only when it is supported by the evidence and is consistent with existing law. Sufficient competent evidence, rather a mere scintilla of evidence, is required to support an instruction. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

Jury instruction that the highest degree of care was owed by the defendant gas service company in the distribution of propane gas was proper in action for negligence for gas explosion that destroyed home of insurance company's client, as was instruction on the doctrine of res ipsa loquitur; record showed that explosion would not have occurred but for negligence. U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co., 793 P.2d 602 (Colo. App. 1989).

It is error for the court to instruct a jury on questions not presented by the pleadings, or with reference to matters irrelevant to the evidence. Bijou Irrigation Dist. v. Cateran Land

& Live Stock Co., 73 Colo. 93, 213 P. 999 (1923); McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

Trial court's failure to instruct jury on loss of future earning capacity was error. Evidence was presented that the plaintiff had previously worked as a nurse aide at a specified rate of compensation, and testimony was such that a reasonable inference could be made that a return to work would be problematic. Plaintiff was not required to introduce evidence of an intention to return to work in the future. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

Trial court has discretion to issue or refuse to issue instruction on loss of future earning capacity, but the court's decision must be based on the evidence and be premised on the presence or absence of evidence regarding earnings. When there is evidence in the record the court has an obligation to present proper instruction to the jury in support of a party's theory of recovery. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

A trial court cannot in its instructions to the jury withdraw from its consideration a proper defense and, by an erroneous construction of the law, reenact a statute, disregarding its plain provisions, so as to fit the case under consideration. Potts v. Bird, 93 Colo. 547, 27 P.2d 745 (1933).

The charge of the court is to be taken as a whole. Coors v. Brock, 22 Colo. App. 470, 125 P. 599 (1912).

Instructions are to be read together and considered as a unified whole. Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934).

In construing a charge, each instruction is to be considered in connection with the entire charge. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

Court's instruction to the jury at the close of evidence outweighs any previous instruction. In determining an award for damages, the jury was justified in considering evidence previously barred by an order in limine because the court's final instructions effectively negated that order. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Tendered instruction on "inherently dangerous activity" was properly refused, where record did not indicate that installation of heat tape was an activity analogous to other inherently dangerous activities. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

All instructions should be considered in determining whether the necessary law has been correctly stated. All of the trial court's instructions to the jury are to be read and considered as a whole in determining whether all the necessary law has been correctly stated to the jury. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

Instructions to the jury are to be read and considered together in determining whether it has been adequately and correctly advised of the law. Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118 (1975).

If, when so read and considered, they constitute a fair, full, and reasonably accurate statement of the law, the fact that some isolated portions may seem to be incomplete or incorrect is immaterial. Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934).

Regardless of the fact that some instructions were not in the form suggested by the Colorado Jury Instructions, and that there was some overlapping, when read as a whole, they adequately and correctly informed the jury as to the law applicable to the case, which is the test as to whether the instructions constituted reversible error. Hotchkiss v. Preble, 33 Colo. App. 431, 521 P.2d 1278 (1974).

If, in considering the charge as a whole, an appellate court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on account of an erroneous instruction. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

An instruction, which by itself might be erroneous, may be qualified by what appears in another part of the charge. Coors v. Brock, 22 Colo. App. 470, 125 P. 599 (1912).

Jury instructions were so erroneous or so confusing or misleading as probably to lead the jury into error of such proportion as to require a new trial, where the jury was not instructed to consider separately any of the elements of the inherently dangerous activity exception and the jury was given no instruction at all on the issue of whether the accident was caused by the collateral negligence of the defendant. Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992).

An instruction may be cured. An instruction which is merely defective, incomplete, or ambiguous or which leaves room for improper inferences may be cured by another point in the charge. Nelson v. Nelson, 27 Colo. App. 104, 146 P. 1079 (1915); Block v. Balajty, 31 Colo. App. 237, 502 P.2d 1117 (1972).

The refusal to give requested instructions does not constitute error where the instructions given by the court are sufficiently comprehensive to advise the jury fully upon the questions presented for its determination. Weicker Transf. & Storage Co. v. Bedwell, 95 Colo. 280, 35 P.2d 1022 (1934).

Where a legal principle is adequately covered in other instructions given, it is not error for the court to refuse a requested specific instruction. Mohler v. Park County Sch. Dist. Re-2, 32 Colo. App. 388, 515 P.2d 112 (1973).

Where correct instructions are given covering all the points of a case, the refusal of others, though correct in themselves, is not ground of error. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

When a tendered instruction is no more than a restatement of the court's instruction, it is not error to refuse the tendered instruction. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Jury instruction which was merely a statement of the parties' pleadings and contained the trial court's admonition that the contentions of the parties in the pleadings were not to be considered by the jury as evidence was not improper or prejudicial. Schafer v. Nat'l Teal Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

A requested instruction which contains unwarranted assumptions is properly refused. Alamosa v. Johnson, 99 Colo. 134, 60 P.2d 1087 (1936).

An instruction should not be given which creates issue of fact not supported by evidence or which tends to mislead or divert minds of jury from real factual issues. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

An instruction which states that the defendant has to prove a matter by a preponderance of the evidence is incorrect, because such an instruction shifts the entire burden of proof rather than shifting only the burden of going forward with the evidence to rebut the presumption and plaintiff's ''prima facie'' case. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Where it is necessary that the jury be properly and fully instructed on a measure and counsel fails to tender suitable instructions thereon, it is the duty of the court to so instruct on its own motion. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

In instructing on its own motion, an appellate court may execute its discretion in noticing error appearing on the face of the record even though not raised by the parties. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

Tendered instruction on negligence properly refused. It was not error for the trial court to refuse defendants tendered instruction where the instruction would have been proper as to only two of plaintiff's three theories of negligence and the defendants did not attempt to limit the instructions' applicability to those two theories. Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974).

Rule restricts parties not court. This rule serves only as a restriction on parties to an action both by requiring assistance in the orderly administration of justice and by preventing a miscarriage of justice: it is not a bar to the court where the trial judge is attempting to secure substantial justice. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

The court's action in giving an example of the application of a comparative negligence instruction is not reversible error where the evidence supports the amount of the verdict, the court gave the summary closing instruction, and the defendant did not make any contemporaneous objection to the remarks. Bravo v. Wareham, 43 Colo. App. 1, 605 P.2d 58 (1979).

Where the trial court refused to make plaintiff's tendered instruction part of the record but defendant admits that the instruction was tendered and refused, this rule will not act as a technical or procedural bar on the right of the plaintiff to protest the failure to instruct on the issue raised in the tendered instruction. Martinez v. Atlas Bolt & Screw Co., 636 P.2d 1287 (Colo. App. 1981).

Trial court's improper refusal to grant defendant's tendered instruction was harmless where the instruction given by the court contained the essence of his claimed defense. People v. Berry, 703 P.2d 613 (Colo. App. 1985).

Electrical utility was not entitled to a jury instruction creating a rebuttable presumption that adherence to industry standards presumes compliance with ''accepted good engineering practice in the electric industry'', since whether the utility complied with accepted good engineering practices, or whether it exercised due care is best determined by the jury after it has examined the relevant evidence and been properly instructed concerning the effect of the utility's compliance with the industry's minimum standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Trial court committed reversible error in giving jury instruction, because there was no statutory or common law justification to support the rebuttable presumption contained in the instruction. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Failure to instruct jury on standard of care required of a practitioner with a sub-specialty or special training constituted prejudicial error. Short v. Kinkade, 685 P.2d 210 (Colo. App. 1983).

Trial court erred in refusing to instruct jury on the doctrine of res ipsa locquitur. The trial court should consider all legitimate inferences from the evidence in light most favorable to plaintiffs and submit the issue of res ipsa locquitur if the evidence reasonably permits the conclusion that negligence is the more probable explanation. Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988).

Evidence raising issue whether physician held himself out as specialist required jury instructions. Physician in medical malpractice case who advertised in the ''Yellow Pages'' under ''Family Practice, Obstetrics and Pediatrics'' and who held himself out as a family practitioner who delivered babies required jury

instructions on the standard of care applicable to specialists and the standard of care applicable to general practitioners and on the jury's duty to apply the appropriate standard of care based upon its determination on the issue of whether the physician was a specialist. Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988), aff'd, 788 P.2d 817 (Colo. App. 1992).

Where a requested jury instruction was legally correct and clearly applicable to a material question of fact in controversy, failure to give such instruction constituted reversible error. Horton v. Mondragon, 705 P.2d 977 (Colo. App. 1984).

Tendered instruction on affirmative defense neither pled nor raised at trial by defendant properly refused. Where assumption of risk is neither pled nor raised at trial by defendant, cautionary instruction that it was not a defense to plaintiff's claim was properly excluded. Cruz v. Union Pacific R. Co., 707 P.2d 360 (Colo. App. 1985).

Failure to request instructions conforming to evidence of legal theory, or to take other steps at trial to permit the jury to consider the theory, precludes plaintiff from introducing such theory on appeal. Alzado v. Blinder, Robinson & Co., 752 P.2d 544 (Colo. 1988).

Public policy supports disclosing to juries the effect that their deliberative decisions will have; thus, there was no error in instructing a jury that the effect of its findings regarding a statute of limitations could bar plaintiff's claim where the jury was also instructed that it should not be influenced by sympathy and the defendant failed to provide any evidence that the jury ignored this instruction. Salazar v. Am. Sterlizer Co., 5 P.3d 357 (Colo. App. 2000).

Applied in Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961); Jones v. Jefferson County Sch. Dist. No. R-1, 154 Colo. 590, 392 P.2d 165 (1964); Nunn v. Car-Skaden, 163 Colo. 328, 430 P.2d 615 (1967); Wales v. Howard, 164 Colo. 167, 433 P.2d 493 (1967); Norden v. Henry, 167 Colo. 274, 447 P.2d 212 (1968); Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970); First Nat'l Bank v. Campbell, 41 Colo. App. 406, 589 P.2d 501 (1978); Mobell v. City & County of Denver, 671 P.2d 433 (Colo. App. 1983).

II. NUMBERED.

Good practice requires that instructions be numbered. Kansas Pac. Ry. v. Ward, 4 Colo. 30 (1877).

Formerly, it was held that the omission to number instructions was not a fatal defect. Gibbs v. Wall, 10 Colo. 153, 14 P. 216 (1887).

A party cannot complain because instructions are irregularly numbered where no possible prejudice results to him, nor can such alleged error be reviewed when raised for the first time on appeal. Austin v. Austin, 42 Colo. 130, 94 P. 309 (1908).

III. IN WRITING.

Instructions to the jury should be written. Dorsett v. Crew, 1 Colo. 18 (1864).

The court should not orally qualify or modify jury instructions. Dorsett v. Crew, 1 Colo. 18 (1864); Gile v. People, 1 Colo. 60 (1867); Montelius v. Atherton, 6 Colo. 224 (1882); Lee v. Stahl, 9 Colo. 208, 11 P. 77 (1886).

By express consent of counsel, charge to jury may be given orally. Keith v. Wells, 14 Colo. 321, 23 P. 991 (1890).

An error is not cured by the extension of the instructions by the stenographer and the signature of the judge. Brown v. Crawford, 2 Colo. App. 235, 29 P. 1137 (1873), aff'd, 21 Colo. 272, 40 P. 692 (1895).

Where the trial court orally answers the question of a juror concerning the interpretation of a given instruction, it does not commit error where the answer is correct. Schlesinger v. Miller, 97 Colo. 583, 52 P.2d 402 (1935).

An admonition orally addressed by the presiding judge to the jury to the effect that they must be controlled by the evidence, not substituting their own judgment or impressions, is not error. Denver City Tramway Co. v. Armstrong, 21 Colo. App. 640, 123 P. 136 (1912).

IV. OBJECTIONS.

Law reviews. For article, "Necessity for Exceptions to Instructions in Colorado", see 1 Rocky Mt. L. Rev. 102 (1929).

This rule provides that parties must make objections to any proposed instructions before they are submitted to the jury and that only the grounds so specified shall be considered on appeal. Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); Am. Family Mut. Ins. Co. v. Bowser, 779 P.2d 1376 (Colo. App. 1989).

Parties cannot prevail upon the ground of error in an instruction to which they made no objection upon the trial. Phillips v. Komornic, 159 Colo. 335, 411 P.2d 238 (1966).

Plaintiff's failure to object to jury instructions constituted a waiver of any claim of error to the instruction. Martin v. Minnard, 862 P.2d 1014 (Colo. App. 1993); Gorsich v. Double B Trading Co., Inc., 893 P.2d 1357 (Colo. App. 1994); Voller v. Gertz, 107 P.3d 1129 (Colo. App. 2004).

An appellate court will not ordinarily consider objections to instructions when those objections were not made during the course

of the trial. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

Court may, in its discretion, notice error of record. This rule, providing that only grounds specified in objections to instructions will be considered on appeal, is modified by C.A.R. 1(d), permitting an appellate court at its discretion to notice any error of record whether raised by counsel or not. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956).

Discretion will be exercised by the court when necessary to do justice. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956); Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984).

The supreme court does not hold that it would not make an exception to the rule concerning objections to instructions where its enforcement would result in a miscarriage of justice. Mansfield v. Harris, 79 Colo. 164, 244 P. 474 (1926).

The contemporaneous objection rule has a salutary purpose in the orderly administration of justice; its principle is to enable trial judges to clarify or correct misleading or erroneous instructions before they are given to a jury, and thereby prevent costly retrials necessitated by obvious and prejudicial error. Scheer v. Cromwell, 158 Colo. 427, 407 P.2d 344 (1965); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982).

Objections should be timely. Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235 (1892); Colo. Utils. Corp. v. Casady, 89 Colo. 168, 300 P. 606 (1931).

When instructions are about to be given to the jury, counsel may not sit idly by and allow improper instructions to be given without proper and specific objections thereto in time for the court to correct the instructions before giving them to the jury since it is not in furtherance of justice to permit them to lie in wait and catch the court in error for the purpose of obtaining a reversal. Blanchard v. People, 74 Colo. 431, 222 P. 649 (1924).

Agreement for making objections in new trial motion is ineffectual. An agreement between the parties' attorneys approved by the court, that objections made to plaintiff's instructions for the first time in defendant's motion for a new trial should be considered as having been made before the instructions were given to the jury, is ineffectual. Thompson v. Davis, 117 Colo. 82, 184 P.2d 133 (1947).

Objections to instructions on a former trial do not eliminate the necessity of a renewal of the objections in a new trial if the party wishes to avail himself of such objections, for except by stipulation or proper order to the contrary, every judgment depends upon its own record only. Everett v. Cole, 86 Colo. 414, 282 P. 253 (1929).

Error based on instructions will not be considered where the abstract of record contains no exceptions to the giving of such instructions. Mullen v. Griffin, 60 Colo. 464, 154 P. 90 (1916); Wertz v. Lawrence, 69 Colo. 540, 195 P. 647 (1921).

To entitle a party to a consideration of an assignment of error based upon the refusal of the trial court to give requested instructions, the abstract must set out the instructions given by the court. Rollman v. Stenger, 84 Colo. 507, 271 P. 625 (1928).

Where neither the requested instructions nor those given are set out in the abstract, plaintiff in error is not entitled to a ruling on assignments of error based thereon. Federal Life Ins. Co. v. Lorton, 97 Colo. 545, 51 P.2d 693 (1935).

Failure to object waives error. It is the duty of counsel to examine or listen to the reading of instructions when given, and, if objections or errors are not called to the attention of the court at the time, they must ordinarily be deemed waived. Gilligan v. Blakesley, 93 Colo. 370, 26 P.2d 808 (1933); Scheer v. Cromwell, 158 Colo. 427, 407 P.2d 344 (1965); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996).

A party is required to make specific objections to an instruction in the trial court, to entitle him to assign error thereon on review. Schwalbe v. Postle, 80 Colo. 1, 249 P. 495 (1926); Sandner v. Temmer, 81 Colo. 57, 253 P. 400 (1927); Koontz v. People, 82 Colo. 589, 263 P. 19 (1927); Colo. Nat'l Bank v. Ashcraft, 83 Colo. 136, 263 P. 23 (1927); Small v. Clark, 83 Colo. 211, 263 P. 933 (1928); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

If objections not made in lower court, they will not be considered on review. Objections to instructions not specifically made in the lower court before they are given will not be considered on review. Baldwin v. Scott, 65 Colo. 53, 173 P. 716 (1918); Krohn v. Colo. Springs Interurban Ry., 70 Colo. 243, 199 P. 88 (1921); Bijou Irrigation Dist. v. Cateran Land & Live Stock Co., 73 Colo. 93, 213 P. 999 (1923); Blanchard v. People, 74 Colo. 431, 222 P. 649 (1925); Galligan v. Bua, 77 Colo. 386, 236 P. 1016 (1925); Clark v. Giacomini, 85 Colo. 530, 277 P. 306 (1929); Colo. Utils. Corp. v. Casady, 89 Colo. 156, 300 P. 601 (1931); Boynton v. Fox Denver Theaters, Inc., 121 Colo. 227, 214 P.2d 793, 24 A.L.R.2d 235 (1950); Sharoff v. Iacino, 123 Colo. 456, 231 P.2d 959 (1951); Kennedy-Fudge v. Fink, 644 P.2d 91 (Colo. App. 1982).

A general objection to the whole of an instruction will not prevail where such instruction contains distinct propositions, one of which is sound in law. Atchison, T. & S. F. Ry. v. Gumaer, 22 Colo. App. 495, 125 P. 589 (1912).

General exceptions to instructions "in each and every part thereof" are insufficient. Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235 (1892).

Single objection to error appearing in other instructions is sufficient. Where the attention of the trial court was sufficiently directed to objectionable words in an instruction, then the point is saved for consideration on appeal, although specific objections are not made to other instructions in which the error is repeated. Lewis v. La Nier, 84 Colo. 376, 270 P. 656 (1928).

Where one argues that instructions could have been differently arranged, he must complain of the arrangement at the time that the instructions are submitted by the parties and before they are given to the jury. Mallett v. Pirkey, 171 Colo. 271, 466 P.2d 466 (1970).

Contemporaneous objection requirement inapplicable to sua sponte grant of new trial. This rule does not apply to the trial court when it sua sponte grants a new trial; the purposes of the contemporaneous objection requirement of this rule are not violated when the trial court acts on its own initiative to order a new trial under C.R.C.P. 59(d) (now 59(c)(1)). First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

Where an objection sufficiently directs the court's attention to the asserted error, the purpose of this rule, to enable the trial judge to correct instructions before they are given to the jury, is satisfied. Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984).

"Plain error" rule should be applied sparingly where there is a full and uninhibited opportunity to object to a charge. In re Massey v. Riebold, 3 B.R. 110 (Bankr. D. Colo. 1980).

V. READ TO JURY.

This rule provides that the instructions shall be read to the jury before argument. Ress v. Rediess, 130 Colo. 572, 278 P.2d 183 (1954).

It is error to instruct a jury orally. Home Pub. Mkt. v. Newrock, 111 Colo. 428, 142 P.2d 272 (1943).

This rule clearly prohibits comment on the evidence by the trial court. Angelopoulos v. Wise, 133 Colo. 133, 293 P.2d 294 (1956).

Instructions should be on law applicable to facts. It is the duty of the court, before the argument is begun, to give the jury such instructions upon the law applicable to the facts as may be necessary for their guidance. Pickett v. Handy, 5 Colo. App. 295, 38 P. 606 (1884); Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

The existence of facts proper for the consideration of the jury must not be assumed in the instructions of the court. Kinney v. Williams, 1 Colo. 191 (1870).

Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. Sopris v. Truax, 1 Colo. 89 (1868).

Faulty instruction involves fatal error. An instruction which announces as the law what is not the law, or which assumes as proven what is not supported by the evidence, or which withdraws from the jury an issue of fact exclusively within its province involves fatal error. King Solomon Tunnel & Dev. Co. v. Mary Verna Mining Co., 22 Colo. App. 528, 127 P. 129 (1912).

It is clearly error for a court to assume in an instruction that any disputed fact in a suit is true or has been established. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

It is not required that every instruction should by express words require the jury to find "from the evidence". Sholine v. Harris, 22 Colo. App. 63, 123 P. 330 (1912).

Rule 51.1. Colorado Jury Instructions

(1) In instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instruction (CJI) as are applicable to the evidence and the prevailing law.

(2) In cases in which there are no CJI instructions on the subject, or in which the factual situation or changes in the law warrant a departure from the CJI instructions, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner which is clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible.

Editor's note: The Colorado Jury Instructions are contained in a book prepared by the Colorado Supreme Court Committee on Civil Jury Instructions.

ANNOTATION

Intent of the Colorado supreme court in promulgating these instructions was to provide clear and impartial forms for use by the trial court in preparing instructions for juries. These forms are to be used with discrimination, keeping in mind that they are not law in themselves and, in order to continually provide accurate assistance to juries, must be refined and modified in accord with changes in statutes and the body of appellate decisions. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

In promulgating the Colorado jury instructions, it was not the purpose of the Colorado supreme court to compile a restatement or an encyclopedia of prevailing law. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

Trial court did not err in refusing to give instruction in personal injury action which provided that, if the jury should find in favor of the plaintiff, it ''should not add any sum for income taxes as such an award is not taxable under federal and state tax laws'', because the subject matter of this instruction is not covered in the Colorado jury instructions as one to be given. Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (1973).

Trial court committed harmless error by instructing jury in personal injury action not to adjust amount of damages awarded in order to compensate for income taxes since damages are not taxable. Rego Co. v. McKown-Katy, 801 P.2d 536 (Colo. 1990).

Court did not abuse its discretion in providing respondeat superior doctrine to jury in its jury instructions. Where medical negligence cases involve acts or omissions during surgery, the jury should be instructed that a surgeon is vicariously liable for the negligence of subordinate hospital employees. Ochoa v. Vered, 212 P.3d 963 (Colo. App. 2009).

Jury instruction stating that "[a]n exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent" accurately reflects the law. The instruction does not impose a subjective standard of care on a physician whose exercise of judgment results in an unsuccessful outcome. Rather, it informs juries that a bad outcome that results from a physician's exercise of judgment does not by itself constitute negligence. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd, 255 P.3d 1064 (Colo. 2011).

Jury award of zero damages indicated that the jury failed to follow court instructions as the evidence was undisputed with respect to the existence and nature of the injuries sustained. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

The instructions found in the Colorado jury instructions are not to be used if they do not reflect the prevailing law. Federal Ins. Co. v. Pub. Serv. Co., 194 Colo. 107, 570 P.2d 239 (1977).

The trial court has the duty to examine the prevailing law to determine whether a Colorado jury instruction is applicable to the facts of the particular case and states the prevailing law. Federal Ins. Co. v. Pub. Serv. Co., 194 Colo. 107, 570 P.2d 239 (1977).

Where there was no statute or rule to support the presumption created by a jury instruction, the presumption could only be properly given if it was supported by common law rules governing the admissibility and evidentiary effect of defendant electrical utility's compliance with industry standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Doctrine of sudden emergency abolished. The state's negligence law no longer requires sudden emergency jury instruction. Jury instruction's potential to mislead jury outweighs minimal utility of instruction. Bedor v. Johnson, 2013 CO 4, 292 P.3d 924.

Applied in Sherwood v. Graco, Inc., 427 F. Supp. 155 (D. Colo. 1977); Price v. Sommermeyer, 41 Colo. App. 147, 584 P.2d 1220 (1978); Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982); Peterson v. Tadolini, 97 P.3d 359 (Colo. App. 2004).

Rule 52. Findings by the Court

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Neither requests for findings nor objections to findings rendered are necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions on motions under Rule 12 or 56 or any other motion except as provided in these rules or other law.

Source: Entire rule amended and comment added, May 25, 2017, effective July 1, 2017.

Cross references: For motions for judgment on the pleading and for separate or more definite statement and for motion to strike, see C.R.C.P. 12; for involuntary dismissal, see C.R.C.P. 41(b); for acceptance by court of master's findings, see C.R.C.P. 53; for summary judgment, see C.R.C.P. 56; for entry of judgment, see C.R.C.P. 58; for motions for post-trial relief, see C.R.C.P. 59.

COMMENTS

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The final sentence of the former version of the rule, ''Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b),'' was replaced because of requirements for findings and conclusions in rules other than Rule 41(b) and in some statutes. Regardless, judges are encouraged to include in decisions on motions sufficient explanation that would be helpful to the parties and a reviewing court. Thus, even where findings and conclusions are not required, the better practice is to explain in a decision on any contested, written motion the court's reasons for granting or denying the motion.

ANNOTATION

I. General Consideration.
II. Effect.
III. Amendment.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''The Applicability of the Rules of Evidence in Non-Jury Trials'', see 24 Rocky Mt. L. Rev. 480 (1952). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Post-Trial Motions in the Civil Case: An Appellate Perspective'', see 32 Colo. Law. 71 (November 2003).

This rule is applicable to judgments in custody proceedings. In Jaramillo, 37 Colo. App. 171, 543 P.2d 1281 (1975).

Finding that "cost-plus" contract had been made is necessarily against the claim that contract was for a fixed sum less the cost of materials. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

No findings of fact and conclusions of law were required where motion for costs and damages was not a motion pursuant to C.R.C.P. 41(b). City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Applied in People in Interest of G.A.T., 183 Colo. 111, 515 P.2d 104 (1973); Deas v. Cronin, 190 Colo. 177, 544 P.2d 991 (1976); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); People in Interest of A.A.T., 191 Colo. 494, 554 P.2d 302 (1976); In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979); People ex rel. MacFarlane v. Delaware Corp., 626 P.2d 1144 (Colo. App. 1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981); Esecson v. Bushnell, 663 P.2d 258 (Colo. App. 1983); ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983); Metro Nat'l Bank v. Roe, 675 P.2d 331 (Colo. App. 1983).

II. EFFECT.

The purpose of this rule is to enable an appellate court to determine the basis of a trial court's decision. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965); Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972); Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

The purpose of this rule is to apprise prospective appellate courts of the basis of the trial court's decision. Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

In order for the appellate court to determine the ground on which it reached its decision, the lower court must state on the record its reasons for a ruling. People v. Abbott, 638 P.2d 781 (Colo. 1981).

The purpose of the requirement of specific findings of fact and conclusions of law is to give the appellate court a clear understanding of the grounds for the trial court's decision. Financial Management Task Force, Inc. v. Altberger, 807 P.2d 1230 (Colo. App. 1990); City & County of Denver v. Ameritrust, 832 P.2d 1054, (Colo. App. 1992).

This rule uses mandatory words that the court ''shall'' find the facts. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

It is the duty of a trial court to see that a final judgment supported by findings of fact and conclusions of law is entered in each case heard and decided by it, so that on appeal, an appellate court can be fully advised as to the complete results of the trial. Ray v. City of Brush, 152 Colo. 428, 383 P.2d 478 (1963).

Parties need not request findings. The provisions of this rule, that requests for findings are not necessary for purposes of review, relieve the parties of the need to request findings but do not relieve a judge of the duty to make them. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

Factual findings on the record required. Before a trial court can make legal findings or conclusions, and to make such conclusions reviewable by an appellate court, the trial court must make factual findings on the record. Pasbrig v. Walton, 651 P.2d 459 (Colo. App. 1982).

Court has duty to make separate findings of fact and conclusions of law. When a matter is tried to the court without a jury, the court is under a duty to make findings of fact and to state conclusions of law separately, and even though a court has made findings, they must be sufficiently clear to indicate on appeal the basis of the court's decision. In re Estate of Lewin v. First Nat'l Bank, 42 Colo. App. 129, 595 P.2d 1055 (1979).

Trial court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its order and to enable the appellate court to determine the grounds upon which the trial court reached its decision. In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

Decisionmaker must state reasons for determination. Although written findings are not required, where significant rights are at issue, the decisionmaker must state the reasons for his determination. Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981).

Failure to comply literally with this rule is not necessarily fatally defective. Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

Brief findings and conclusions sufficient compliance with rule. Even though the findings of fact and conclusions of law are brief and sparse in detail, there is sufficient compliance with the rule if the ultimate facts have been determined and conclusions of law are entered thereon. Manor Vail Condominium Ass'n v. Town of Vail, 199 Colo. 62, 604 P.2d 1168 (1980); M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc., 40 P.3d 6 (Colo. App. 2001).

The court expressly resolved the ultimate questions of fact before it, and therefore there was sufficient compliance with the rule. Johnson v. Benson, 725 P.2d 21 (Colo. App. 1986).

This rule provides that findings of fact and conclusions of law are unnecessary on decisions of motions. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963); Leidy's Inc. v. H2O Eng'g, Inc., 811 P.2d 38 (Colo. 1991).

Where order is a decision based on post-decree motions, the trial court is under no obligation to attach findings of fact or conclusions of law. City of Boulder v. Sherrelwood, Inc., 42 Colo. App. 522, 604 P.2d 686 (1979).

Where an action is on a motion for modification of support and visitation orders, a trial court is under no duty to make written findings of fact and conclusions of law. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

A trial judge is not required to assert in detail the negative of every rejected proposition as well as the affirmative of those which he finds to be correct. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966); Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

Court's findings made in detail upon all major issues are in full compliance with section (a) of this rule. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

It is sufficient compliance with this rule if a court makes findings on the material and ultimate facts. Lininger v. Lininger, 138 Colo. 338, 333 P.2d 625 (1958); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969).

This rule is complied with if the trial court makes findings on the material and ultimate facts. Epcon Co. v. Bar B Que Baron Int'l, Inc., 32 Colo. App. 393, 512 P.2d 646 (1973).

Though it is necessary for trial courts to expressly label their findings of fact in cases involving disputed evidence, it is better practice to do it in all instances. Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

Oral findings may be sufficient to support judgment. Where a trial court makes no written detailed findings of fact or conclusions of law, but makes oral findings then when there are no disputed facts in the case, the oral findings of the court are sufficient to support the judgment. Massachusetts Bonding & Ins. Co. v. Central Fin. Corp., 124 Colo. 379, 237 P.2d 1079 (1951).

Written findings of fact and conclusions of law are not imposed by section (a) of this rule and C.A.R. 10(a). Dunbar v. County Court, 131 Colo. 483, 283 P.2d 182 (1955).

If a court makes oral findings and written ones are desired by either party, then they should make such a request in writing. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

The findings of the trial court may be either oral or written at the discretion of the trial court. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo.

561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

The court has a duty to make either oral or written findings. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

If made orally, the statements must be transcribed in full. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

Where all of the findings of fact and conclusions of law entered orally have been reported in the transcript, then, if they are sufficiently comprehensive to provide a basis for a review, the requirements of this rule have been satisfied. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

The court's findings must be so explicit as to give an appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which it reached its decision. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); People v. Abbott, 638 P.2d 781 (Colo. 1981).

Findings of fact by a trial court sitting without a jury must be made so explicit as to give a reviewing court an opportunity to determine on what ground the trial court reached its decision, and whether that decision was supported by competent evidence. Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings or a partial summary judgment. As such, no findings of fact and conclusions of law were required. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Defendant's motion to reopen the divorce decree was not a motion pursuant to C.R.C.P. 41(b), and therefore no findings of fact and conclusions of law were required to accompany the ruling on this motion. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and are supported by the evidence. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Johnson v. Benson, 725 P.2d 21 (Colo. App. 1986).

Where record would not support that trial court made findings about probable cause or the absence thereof, or that the trial court made factual findings of exigent circumstances or the absence thereof, the trial court's findings presented an inadequate basis upon which to resolve these issues, requiring the trial court's order to be vacated and the case to be remanded for further findings as to these issues. People v. Mendoza-Balderama, 981 P.2d 168 (Colo. 1999).

Standard for determining harmless error. The standard for determining harmless error is whether the error, defect, irregularity, or variance affected substantial rights of the defendant. People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

It is only when the findings themselves are inadequate and do not indicate the basis for the trial court's decision that the judgment will be reversed. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

It is not error for a trial court to adopt advisory verdicts in its findings of fact, and the adoption of such a verdict by the court is equivalent to its findings on the questions thereby determined. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968).

When a trial judge signs the findings, the responsibility for their correctness becomes his, and the findings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

The supreme court does not approve the practice of uncritical adoption of findings prepared by litigants; but if, after careful study, a trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

Where the findings of a trial court are verbatim those submitted by the successful litigant, an appellate court will scrutinize them more critically and give them less weight than if they were the work product of the judge himself, or, at least bear evidence that he has given them careful study and revision. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

Any court finding that complaint is "true" is sufficient. Any finding by a court that the evidence supports the allegations of the complaint, that the allegations of the complaint are true, or which recites verbatim the pleading of an ultimate fact in the complaint is sufficient to comply with this rule. Lininger v. Lininger, 138 Colo. 338, 333 P.2d 625 (1958); Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

Where a court sets forth the allegations of a complaint and then finds that plaintiff failed to prove them, a finding of no evidence to support a specific allegation complies with this rule. McCray v. City of Boulder, 165 Colo. 383, 439 P.2d 350 (1968).

Comments of trial court at close of trial, although not formally labeled "findings of fact", are sufficient to constitute such where the facts recited and conclusions announced are amply supported by the evidence. Nemer v. Anderson, 151 Colo. 411, 378 P.2d 841 (1963).

Where the record shows no compliance with this rule, remarks and rulings of the court do not constitute a judgment under the rule. Ray v. City of Brush, 152 Colo. 428, 383 P.2d 478 (1963).

Entering a judgment is not sufficient setting forth of conclusion of law to properly inform an appellate court of a trial court's reasons. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

It is no finding of fact at all to merely state that the facts are in the record. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

Where the necessary findings of fact are lacking when a party seeks relief in an appellate court, the correct procedure is not to dismiss a writ but rather to vacate the judgment and remand the case to a trial court for appropriate findings of fact; if this cannot be done, then the judgment is reversed and remanded for a new trial. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Commercial Claims, Ltd. v. Clement Bros., 709 P.2d 88 (Colo. App. 1985).

Trial court's failure to make specific factual findings, so that appellate court is unable to determine the grounds on which decision was based, is error and cause may be remanded. Estate of Hickle v. Carney, 748 P.2d 360 (Colo. App. 1987).

Where custodial orders of a trial court are silent on the question of character and fitness of either parent to have custody of the children, the trial court should have made findings of fact thereon, and lacking such findings the supreme court is without compass to ascertain whether the trial court acted properly, so that the judgment will be reversed with directions that findings of fact be made. Songster v. Songster, 150 Colo. 466, 374 P.2d 197 (1962).

Findings of fact shall not be set aside upon review unless clearly erroneous. Broncucia v. McGee, 173 Colo. 22, 475 P.2d 336 (1970); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

The credibility of the witnesses, the sufficiency, probative effect, and weight of all the evidence, and the inferences and conclusions to be drawn therefrom are all within the province of the trial court whose conclusions will not be disturbed on review unless so clearly erroneous as to find no support in the record. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight, probative effect and sufficiency of the evidence. Hence, the factual findings of the trial court will be accepted on review unless they are clearly erroneous and not supported by the record. Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983); Wulf v. Tibaldo, 680 P.2d 1348 (Colo. App. 1984).

Failure to give a jury instruction on the credibility of a child's testimony at the time child's hearsay statement is admitted is not plain error in a prosecution for aggravated incest and sexual assault on a child, so long as such instruction was given as a jury instruction at the conclusion of the evidence. People v. Flysaway, 807 P.2d 1179 (Colo. App. 1990).

An appellate court's conclusion from the evidence might differ from that of the trial court. In a trial to the court, the sufficiency, probative effect, and weight of all the evidence and the inferences and conclusions to be drawn therefrom are conclusions for the trial court; although an appellate court's conclusions from the evidence might differ, the trial court's determination will not be disturbed on review unless so clearly erroneous as to find no support in the record. Warren v. Farmers Alliance Mut. Ins. Co., 31 Colo. App. 292, 501 P.2d 135 (1972).

An appellate court is not allowed to substitute its conclusions. There being sufficient evidence to support the fact findings of the trial court and the evidence being conflicting, an appellate court is not allowed to substitute its conclusions on the facts for those of the lower court. Retail Hdwe. Mut. Fire Ins. Co. v. Securities Corp., 97 Colo. 487, 51 P.2d 598 (1935).

Where the evidence in the record is conflicting, but there is sufficient evidence to support the trial court's finding, in that case, an appellate court will not substitute its opinion for that of the trial court. Famularo v. Bd. of County Comm'rs, 180 Colo. 333, 505 P.2d 958 (1973).

An appellate court may not impress its contrary finding upon a trial court where the record contains evidence to support the trial court's finding which is also in accord with law. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

Where the evidence is conflicting, it is the sole responsibility of the trier of the fact to resolve the factual issues. Broncucia v. McGee, 173 Colo. 22, 475 P.2d 336 (1970).

Findings of fact by a court should respond to and be within the issues, and a finding outside the issues cannot be supported and cannot be used to formulate a judgment. Credit Inv.

& Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Neither this section nor § 13-21-102.5 (3)(a) require the trial court to make specific findings of clear and convincing evidence for not reducing the award of noneconomic damages. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Defendant's motion for costs and damages was not a motion pursuant to C.R.C.P. 41(b), and therefore, no findings of law were required. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Facts are to be determined by the court from the evidence, and not settled by conclusions of witnesses. Royal Tiger Mines Co. v. Ahearn, 97 Colo. 116, 47 P.2d 692 (1935).

Finding based on choice of plausible views is not erroneous. A court's finding based upon a choice between two plausible views of the weight of the evidence, or upon a choice between conflicting inferences from the evidence, is not clearly erroneous. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Court findings which are inadequate as a matter of law cannot be upheld on review. Redman & Scripp, Inc. v. Douglas, 170 Colo. 208, 460 P.2d 231 (1969).

C.R.C.P. 53(e)(2), binds a court to accept the findings of a master just as effectively as section (a) of this rule binds an appellate court to accept findings of a trial court. Hutchinson v. Elder, 140 Colo. 379, 344 P.2d 1090 (1959).

Trial court's findings held supported by the evidence. Howard v. White, 144 Colo. 391, 356 P.2d 484 (1960); Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966); Pastor v. San Juan Sch. Dist. No. 1, 699 P.2d 418 (Colo. App. 1985); Martinez v. Continental Enterprises, 730 P.2d 308 (Colo. 1986).

Findings and conclusions held insufficient under section (a). H.M.O. Sys. v. Choicecare Health Servs., Inc., 665 P.2d 635 (Colo. App. 1983).

Applied in Light v. Rogers, 125 Colo. 209, 242 P.2d 234 (1952); Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968); Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977); Matter of Estate of Van Winkle, 757 P.2d 1134 (Colo. App. 1988); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000); Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

III. AMENDMENT.

Either party may make motion. Section (b) of this rule, providing for amendment of findings or additional findings upon motion, allows either party to make such a motion. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

The trial judge may decline to adopt any of the proposed changes by simply denying the motion. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

If he believes that his findings and conclusions, already announced, are proper and sufficient, his denial of the motion without explanation is not error. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

This rule does not require the trial court to act singly upon each of the proposed changes, additions, or modifications, nor to state any reason for its ruling thereon. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

The purpose of section (b) of this rule is to clarify matters for the appellate court's better understanding of the basis of the decision of the trial court. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule merely provides a method for amplifying and expanding the findings of fact. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule does not provide a method for reversal of the judgment or a finding of contrary facts. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule is not intended as a vehicle for securing a rehearing on the merits. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

There is nothing in section (b) of this rule that obviates filing motion for new trial. There is nothing in section (b) of this rule to indicate that even a motion to amend findings, let alone mere objections thereto, obviates the necessity for filing a motion for new trial under C.R.C.P. 59. Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963); Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963); Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

This rule should be regarded similarly to motion for new trial. Section (b) of this rule, authorizing the filing of a motion to amend or make additional findings, should be regarded similarly to a motion for a new trial. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

This rule and C.R.C.P. 59 are not two separate rules on the same subject matter; rather each serves a distinctly different procedural purpose. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

A motion under this rule may be joined with a motion for a new trial under C.R.C.P. 59. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

Successful party may question finding on review without having objected. Where the judgment in the trial court is for a party, that party is not bound by the court's finding but may question it on review even though the

record disclosed neither objection nor exception thereto in the lower court. C. I. T. Corp. v. K. & S. Fin. Co., 111 Colo. 378, 142 P.2d 1005 (1943).

This rule states that in a trial to the court without a jury objections to the court's findings are not necessary in order to preserve for appellate review the question of sufficiency of the evidence to support the findings. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963); Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963).

It is not essential to an appeal that there be any motion to amend. Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963).

There was error in denying motion for additional findings. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954).

Applied in Green v. Hoffman, 126 Colo. 104, 251 P.2d 933 (1952); Greathouse v. Jones, 158 Colo. 516, 408 P.2d 439 (1965).

Rule 53. Masters

(a) Appointment.

(1) **Scope.** A reference to a master shall be the exception and not the rule. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by the appointed district judge.

(2) **Disqualification.** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under the Colorado Code of Judicial Conduct, Rule 2.11, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) **Possible Expense or Delay.** In appointing a master, the court must consider the proportionality of the appointment to the issues and needs of the case, consider the fairness of imposing the likely expenses on the parties, and protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) **Notice.** Before appointing a master, the court must give the parties notice and an opportunity to be heard. If requested by the Court, any party may suggest candidates for appointment.

(2) **Contents.** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) **Issuing.** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under the Colorado Code of Judicial Conduct, Rule 2.11; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) **Amending.** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(5) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 14 days after the date of the order of reference and shall notify the parties or their attorneys.

(c) Master's Authority.

(1) **In General.** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) **Sanctions.** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues a written order must file it and promptly serve a copy on each party. The clerk must enter the written order on the docket. A master's order shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise. A report is final upon issuance. A master's report shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(f) Action on the Master's Order, Report, or Recommendations.

(1) **Opportunity for a Hearing; Action in General.** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) **Time to Object or Move to Modify.** A party may file objections to or a motion to modify the master's proposed rulings, order, report or recommendations no later than 7 days after service of any of those matters, except when the master held a hearing and took sworn evidence, in which case objections or a motion to modify shall be filed no later than 14 days after service of any of those matters.

(3) **Reviewing Factual Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) **Reviewing Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) **Reviewing Procedural Matters.** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) **Fixing Compensation.** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) **Payment.** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocating Payment.** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

Source: Entire rule amended October 8, 1992, effective January 1, 1993; (e)(1) amended and effective July 1, 1993; entire rule amended and effective April 14, 2005; (d)(1) and (e)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases

pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended December 7, 2017, effective January 1, 2018.

Cross references: For appointment of referees in cases under the workers' compensation law, see § 8-43-208, C.R.S.; for when referee appointed in registration of land titles, see § 38-36-127, C.R.S.; for sanctions for failure to make discovery, see C.R.C.P. 37; for subpoenas for attendance of witnesses, see C.R.C.P. 45; for sanctions for civil contempt, see C.R.C.P. 107; for interrogatories to parties, see C.R.C.P. 33; for admissibility of evidence, see C.R.C.P. 43(a); for parties, see C.R.C.P. 17 to 25.

COMMENTS

2018

See also C.R.C.P. 122 Case Specific Appointment of Appointed Judges pursuant to C.R.S. § 13-3-111.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Trials: Rules 38-53'', see 23 Rocky Mt. L. Rev. 571 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''The Use of Court Appointed Experts and Masters in Civil Cases'', see 46 Colo. Law. 25 (Jan. 2017). For article, ''The New and Improved CRCP 53: Special Master Appointments'', see 47 Colo. Law. 10 (Nov. 2018).

Annotator's note. Since this rule is similar to this rule as it existed prior to its 2017 amendment and to rules antecedent to that rule, relevant cases construing those rules have been included in these annotations.

This rule and the sections of the former Code of Civil Procedure it supersedes are substantially the same. Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977, cert. denied, 342 U.S. 870, 72 S. Ct. 113, 96 L. Ed. 654, reh'g denied, 342 U.S. 895, 72 S. Ct. 199, 96 L. Ed. 671 (1951).

The relationship between a master and the trial court is the same relationship as exists between a trier of fact and an appellate reviewing body. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Applied in United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982); In re Westlake, 674 P.2d 1386 (Colo. App. 1983); In re Brantley, 674 P.2d 1388 (Colo. App. 1983).

II. APPOINTMENT AND COMPENSATION.

The appointment of a master is a discretionary matter, not a matter of right. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Master's fee of $2,500 held unjustified in circumstances of case. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

III. REFERENCE.

This rule and federal rule identical. Because this rule, and F.R.C.P. 53(b) are identical, federal decisions are persuasive authority on procedural matters. Curtis, Inc. v. District Court, 182 Colo. 73, 511 P.2d 463 (1973).

Referral of a case to a master is declared to be the exception and not the rule. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Masters should not be appointed as a routine matter in cases where the issues are not complex and the facts are not complicated. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

Circumstances in divorce action insufficient to warrant reference to master. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

The showing of an exceptional condition requiring the reference of a case to a master is not necessary under section (b) of this rule where, subsequent to the appointment of a master, the parties make a voluntary stipulation that the master should act as arbitrator, and he continues in the case as arbitrator rather than as

master. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

A reference may be ordered when the trial of an issue of fact requires the examination of any long account on either side. Wilson v. Union Distilling Co., 16 Colo. App. 429, 66 P. 170 (1901).

Possibly, conditions might exist which would render a refusal to order a reference an abuse of judicial discretion and therefore erroneous. Wilson v. Union Distilling Co., 16 Colo. App. 429, 66 P. 170 (1901).

Denial of belated request for referral held not error. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Order for reference properly entered in action for accounting. In an action for accounting where defendant objected to the appointment of a referee unless and until the plaintiff had rendered an account to it, the court properly exercised its right in overruling the objection and entering an order for reference on the pleadings; no substantial prejudice resulting therefrom, error based upon the claim of premature reference could not be successfully urged on review. Lallier Const. & Eng'r Co. v. Morrison, 93 Colo. 305, 25 P.2d 729 (1933).

The mere fact that an accounting may be necessary is not sufficient in itself to justify a reference to a master if it appears that the matter is simple and would not consume an undue amount of the court's time. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Even where an accounting possesses the requisite complexity and difficulty, there is no license in this rule to refer all the issues presented in a case to a master. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

The issuance of a writ to mandate the vacation of a reference order to a master is necessary where the court is proceeding in excess of its power, for to await the final judgment based on the master's report would be too late and any appeal at that point a futile act, as the expenditure of both time and money would already have occurred, and there would then be no way to undo what had already been erroneously done. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

In a civil action which involved disclosure of trade secrets and confidential information concerning plaintiff's record keeping and information systems, the plaintiff is entitled to have the judge hear the evidence initially and not through a report from a referee. Curtis, Inc. v. District Court, 182 Colo. 73, 511 P.2d 463 (1973).

IV. POWERS.

Where the order of reference is general and the master is given authority to determine issues of law and of fact, his powers are coextensive with those of the court. Belmont Mining & Milling Co. v. Costigan, 21 Colo. 471, 42 P. 647 (1895).

Delegation of decision making is abdication of constitutional responsibilities. Where the trial court's order appointing the master in effect delegates the decision making as well as the fact finding function to the master, the judge abdicates his constitutional responsibilities and duties. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Reference of all the issues presented may be sanctioned only under the most compelling circumstance. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Where the order of reference is limited, the cause being referred with authority to take the testimony and report the same with findings of fact thereon at the next term of court, the order further fixing the time during which the parties should present their evidence, then the master has no power to grant a continuance nor has he authority to pass upon a question as to the sufficiency of the complaint. Belmont Mining & Milling Co. v. Costigan, 21 Colo. 471, 42 P. 647 (1895).

Where a court orders a certified public accountant to audit and file a report, but the record lacks any order of reference as contemplated by this rule which would set forth the scope of the auditor's authority, it is assumed that the auditor or master is to perform the limited function of auditing the ''reserve account'', as provided in section (b) pertaining to matters of account in actions tried without a jury. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Trial court was correct in dismissing a report of the master which was not requested by the trial court because production of such report was outside the master's powers as set forth in the order of appointment. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

This rule provides that a master may rule upon the admissibility of evidence unless otherwise directed by the order of reference. Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).

V. PROCEEDINGS.

This rule contemplates that a hearing rather than an "ex parte" investigation shall be held. Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).

Witnesses may be examined at evidentiary bearings. When a master is appointed, this rule contemplates that the master will conduct evidentiary hearings at which witnesses may be examined and cross-examined. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

The word "hearing" contemplates not only the privilege to be present when the matter is being considered, but also the right to present one's contention and support the same by proof and argument. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967).

The master occupies the position of finder of fact. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

In case of death of the master before findings are made, it is necessary that his successor begin the proceedings anew or that the trial court hold hearings on its own before making findings. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

A successor master who fails to conduct a hearing "de novo" lacks jurisdiction to enter any findings or conclusions. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Mutual consent cannot confer jurisdiction where it is absent. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

It is error for the court to appoint one to succeed another as master with the admonition to make findings and recommendations based upon the transcript of the hearings held before the first master, inasmuch as the newly appointed master has to conduct his own hearings and in general conduct a hearing "do novo" on the matters in controversy before he can properly make findings and recommendations to the court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

VI. REPORT.

A. Contents and Filing.

Master's duty to report findings. It is a master's duty to conduct hearings, receive evidence, listen to the testimony on the issues involved, and then report his findings of fact and conclusions to the trial court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Bald conclusions are not sufficient. Where the master's report does not contain findings of fact relating to many of the issues that would be significant and is replete with conclusions, the bald conclusions are not sufficient to support a recommendation or a court order based upon the recommendations. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

Referee's report is recommendation, not order. The report of the referee is not an order; it is a recommendation. The referee has no power to enter orders or decrees. In re Debreceni, 663 P.2d 1062 (Colo. App. 1983); In re Petroff, 666 P.2d 1131 (Colo. App. 1983).

Until the report is acted on by the court, no legal consequence may be attached to it. In re Debreceni, 663 P.2d 1062 (Colo. App. 1983).

Without further court action, the referee's decision is not a judgment, much less a final judgment. In re Petroff, 666 P.2d 1131 (Colo. App. 1983).

Court may receive further evidence. Following the filing of a master's report, the court may receive further evidence, and it may also recommit the report to the master with instructions. When an item has been omitted from the master's accounting, evidence concerning that item may be properly admitted. Rasheed v. Mubarak, 695 P.2d 754 (Colo. App. 1984).

Notice must be given of filing of orders. Handwritten orders which served to notify party of what permanent orders included did not fulfill notice requirement since they did not serve to notify party that referee's report was final and had been turned over to court for final consideration. Barron v. District Court, 683 P.2d 353 (Colo. 1984).

This rule requires the trial court to hold a hearing on all motions or objections to a master's report before taking any action on such report. But, where the trial court had heard defendant's objections to the report and had consistently held the master to his original grant of authority, the trial court did not err in refusing to hold a hearing on defendant's objections to the report. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

B. Nonjury Actions.

Section (e)(2) of this rule binds a trial court to accept the findings of a master just as effectively as C.R.C.P. 52(a), binds an appellate court to accept findings of a trial court. Hutchinson v. Elder, 140 Colo. 379, 344 P.2d 1090 (1959); Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

Section (e)(2) of this rule prohibits the trial court from rejecting the master's report without a hearing to determine whether the master's findings were clearly erroneous, and then ordering a jury trial over the objection of the parties. Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Master's findings accepted unless clearly erroneous. Once a court has referred the determination of permanent orders to a master, the court is bound to accept the master's findings of fact unless clearly erroneous. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Dobler v. District Court, 806 P.2d 944 (Colo. 1991); In re Schelp, 194 P.3d 450 (Colo. App. 2008), rev'd on other grounds, 228 P.3d 151 (Colo. 2010).

Appellate courts should accept master's findings. Under customary practice and this rule of procedure an appellate court should accept a master's findings unless clearly erroneous. People ex rel. Kent v. Denious, 118 Colo. 342, 196 P.2d 257 (1948).

References of all the issues presented reduce the function of the judge to that of a reviewing court. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Where the order appointing a master gives him no specific power to make findings of fact, but in his report he reports the evidence taken by him together with his findings of fact, his findings are not conclusive either upon the trial court or an appellate court. Michael v. Tracy, 15 Colo. App. 312, 62 P. 1048 (1900).

Only if clearly erroneous, that is, only if clearly unsupported by the evidence in the record, may such findings be disturbed by the trial court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971); Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Even if the trial court disagrees with the conclusions reached, it is not free to tamper with the findings of a master if, based upon the evidence, a reasonable man might have reached the same conclusions as did the master. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Where a master has been appointed, his findings should not be disturbed merely because the trial court is of a different opinion or is dissatisfied with the master's findings. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); Dobler v. District Court, 806 P.2d 944, (Colo. 1991).

When there is any testimony consistent with the findings, it must be treated as unassailable except when ''clearly erroneous''. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

The basis for the rule that the court must accept the master's report and conclusions unless the same are clearly not supported by the evidence is that the master is presumed to be the best judge of the credibility of witnesses and the weight to be given to their testimony. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

A trial court's substitution of its conclusion for a master's is erroneous because on a question of fact, insofar as it depends upon conflicting testimony, credibility of witnesses, and demeanor of witnesses, the master is the only one who can reach a conclusion in this area. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

When proper exceptions are filed, the findings of a master do not become the findings of a court unless approved by the court. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

If the sufficiency of the evidence to sustain the findings of a master is challenged, a court cannot determine this question without an examination of the testimony taken and reported by the master. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The object of permitting exceptions to be filed is to give the party filing them an opportunity to point out to the court wherein the report of a master is erroneous. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The authority of a court thus invoked cannot be exercised capriciously. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The court cannot act intelligently without an examination of the questions raised by the exceptions. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

When they challenge the sufficiency of the evidence to sustain the findings of a master, it is both the province and duty of a court to examine the testimony and review the conclusions. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

Failing to examine the testimony and review the conclusions, over proper exceptions, the court has no authority to approve the report. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

Amendment to timely filed objection permitted. There is no prohibition against filing an amendment to a timely filed objection to a master's report before a hearing on that objection has occurred. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982).

The court may reject report after hearing. Under section (e)(2) of this rule, the trial court is granted, among other alternatives, the authority to reject the master's report after hearing. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

The court can make new findings after a new hearing. Under section (e)(2) of this rule, when the trial court rejects the master's report, it can only make new findings after it has conducted a hearing of its own. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

This is a mandatory procedure in cases where the court rejects or modifies the master's report. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Approved findings bind appellate court just as jury verdict. Findings approved by a trial court are entitled to the same weight and are just as binding on an appellate court as the verdict of a jury. Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977, cert. denied, 342 U.S. 870, 72 S. Ct. 113, 96 L. Ed. 654, reh'g denied, 342 U.S. 895, 72 S. Ct. 199, 96 L. Ed. 671 (1951).

The findings of a master, as to their conclusive effect in an appellate court, stand as a verdict of a jury or the findings of a court. Crater v. McCormick, 4 Colo. 196 (1878); Kimball v. Lyon, 19 Colo. 266, 35 P. 44 (1893);

Groth v. Kersting, 4 Colo. App. 395, 36 P. 156 (1894).

Where a master hears evidence and makes findings of fact thereon and his findings are approved by the trial court, the findings are entitled to the same weight and are just as binding on an appellate court as the verdict of a jury or findings of the trial court made upon oral testimony. Noble v. Faull, 26 Colo. 467, 58 P. 681 (1899).

There being sufficient evidence to support the findings and judgment, an appellate court is bound by the findings and judgment in the court below. Peck v. Alexander, 40 Colo. 392, 91 P. 38 (1907).

Where findings are supported by the evidence and are not manifestly against the weight of the evidence, they will not be disturbed by an appellate court. Perdew v. Creditors of Coffin's Estate, 11 Colo. App. 157, 52 P. 747 (1898).

Findings accepted unless master or court was governed by bias or prejudice. Findings of a master, when based upon conflicting evidence, will not be interfered with upon appeal if there is legal evidence to sustain them, unless it appears that the master or the trial court was governed by bias or prejudice or influenced by passion. Noble v. Faull, 26 Colo. 467, 58 P. 681 (1899).

Section (e)(2) of this rule inapplicable in dependency proceeding. Section (e)(2) of this rule, which provides that in an action tried without a jury the court shall accept a master's or referee's findings of fact unless clearly erroneous, is inapplicable in a dependency proceeding because that is a statutory proceeding in which the statute supersedes the conflicting rule. People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976).

Applied in Thompson v. McCormick, 169 Colo. 151, 454 P.2d 934 (1969); P.F.P. Family Holdings v. Stan Lee Media, 252 P.3d 1 (Colo. App. 2010).

C. Stipulation.

Stipulation that master should act as arbitrator instead held all right. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

Even though use of a "master" pursuant to this rule conflicts with § 38-44-108 for resolving a disputed boundary, because the parties stipulated for the entry of judgment upon final approval of the surveyor's report by the trial court, the parties waived their rights to object to the trial court's determination of the disputed boundary. Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986).

CHAPTER 6

Judgment

ANALYSIS BY RULE

CHAPTER 6

JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and order to or from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party considering any relevant factors which may include the needs and complexity of the case and the amount in controversy. But costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) Against Partnership. Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served.

(f) After Death, How Payable. If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate.

(g) Against Unknown Defendants. The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint.

(h) Revival of Judgments. A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 14 days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 4. If the judgment debtor answer, any issue so presented shall be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the

revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

Source: (d) and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (d) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For effect of an order of dismissal, see C.R.C.P. 41(a) and (b); for pleadings, see C.R.C.P. 7(a); for masters' reports, see C.R.C.P. 53(e); for default judgments, see C.R.C.P. 55; for creditors' claims against estates, see part 8 of article 12 of title 15, C.R.S.; for service of process by publication, see C.R.C.P. 4(h)(4); for provisions encompassing process, see C.R.C.P. 4.

COMMENTS

1989

[1] The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words ''or exceed in amount'' to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

2015

[2] Rule 54(d) is amended to require that cost awards be ''reasonable'' by directing courts to consider any relevant factors, which may include the needs and complexity of the case, and the amount in controversy.

[3] The reasonableness requirement is consistent with §13-16-122, C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards.

[4] Cost shifting must be addressed in the Case Management Order required by C.R.C.P. 16.

ANNOTATION

I. General Consideration.
II. Definition; Form.
III. Multiple Claims or Parties.
IV. Demand for Judgment.
V. Costs.
VI. Against Partnership.
VII. Revival of Judgments.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Certification Under Rule 54(b): Risky Efficiency'', see 13 Colo. Law. 997 (1984). For article, ''The Final Judgment Rule And Attorney Fees'', see 17 Colo. Law. 2139 (1988). For article, ''The 'Finality' of an Order When a Request for Attorney Fees Remains Outstanding'', see 43 Colo. Law. 41 (May 2014).

Section (b) of this rule is an exception to the rule that an appellate court has jurisdiction only over appeals from final judgments. But the exception is quite limited and must be construed consistently with the historical policy against allowing piecemeal appeals. A court correctly certifies a ruling that does not resolve all claims in a case as final under section (b) only if the ruling is on an entire claim for relief and ultimately disposes of the claim and if the court expressly determines that there is no just reason to delay an appeal on the ruling. Galindo v. Valley View Ass'n, 2017 COA 78, 399 P.3d 796.

Where the damages to which plaintiff is entitled can only be estimated at the pleading stage and the defendant is given notice of the various elements of the damages claim, then recovery is not to be limited to the amount listed in the complaint. DeCicco v. Trinidad Area Health Ass'n, 40 Colo. App. 63, 573 P.2d 559 (1977).

Rule inapplicable to C.R.C.P. 120 foreclosure sale. Because a statutory public trustee foreclosure does not involve foreclosure through the court, and because there is no appeal from the limited order of a C.R.C.P. 120, court on a motion authorizing the public trustee to conduct a foreclosure sale, this rule is inapplicable to such a foreclosure. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Rule as basis for jurisdiction. Bd. of County Comm'rs v. Anderson, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 534 P.2d 1201 (1975); Silverman v. Univ. of Colo., 36 Colo. App. 269, 541 P.2d 93 (1975); United Bank of Denver Nat'l Ass'n v. Shavlik, 189 Colo. 280, 541 P.2d 317 (1975); First Com. Corp. v. Geter, 37 Colo. App. 391, 547 P.2d 1291 (1976); City of Delta v. Thompson, 37 Colo. App. 205, 548 P.2d 1292 (1975); Chavez v. Zanghi, 42 Colo. App. 417, 598 P.2d 152 (1979); Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981); Fort Collins Nat'l Bank v. Fort Collins Nat'l Bank Bldg., 662 P.2d 196 (Colo. App. 1983).

Applied in Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950); Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), modified, 191 Colo. 252, 552 P.2d 13 (1976); Shaw v. Aurora Mobile Homes & Real Estate, Inc., 36 Colo. App. 321, 539 P.2d 1366 (1975); Ginsberg v. Stanley Aviation Corp., 37 Colo. App. 240, 551 P.2d 1086 (1975); Page v. Clark, 40 Colo. App. 24, 572 P.2d 1214 (1977); Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977); In re Heinzman, 40 Colo. App. 227, 579 P.2d 638 (1977); Mancillas v. Campbell, 42 Colo. App. 145, 595 P.2d 267 (1979); In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979); Tipton v. Zions First Nat'l Bank, 42 Colo. App. 534, 601 P.2d 352 (1979); Gray v. Reg'l Transp. Dist., 43 Colo. App. 107, 602 P.2d 879 (1979); Ellis v. Rocky Mt. Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979); Haines v. United Sec. Ins. Co., 43 Colo. App. 276, 602 P.2d 901 (1979); Einarsen v. City of Wheat Ridge, 43 Colo. App. 232, 604 P.2d 691 (1979); Naiman v. Warren A. Flickinger & Assocs., 43 Colo. App. 279, 605 P.2d 63 (1979); Ellerman v. Kite, 626 P.2d 696 (Colo. App. 1979); First Nat'l Bank v. Collins, 44 Colo. App. 228, 616 P.2d 154 (1980); Fuqua Homes, Inc. v. Western Sur. Co., 44 Colo. App. 257, 616 P.2d 163 (1980); Cibere v. Indus. Comm'n, 624 P.2d 920 (Colo. App. 1980); Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981); Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981); Broyles v. Fort Lyon Canal Co., 638 P.2d 244 (Colo. 1981); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982); City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982); United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982); People in Interest of W.M., 643 P.2d 794 (Colo. Ct. App. 1982); F.J. Kent Corp. v. Town of Dillon, 648 P.2d 669 (Colo. App. 1982); Aspen-Western Corp. v. Bd. of County Comm'rs, 650 P.2d 1326 (Colo. App. 1982); Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982); Frank v. First Nat'l Bank, 653 P.2d 748 (Colo. App. 1982); Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982); Ortega v. Bd. of County Comm'rs, 657 P.2d 989 (Colo. App. 1982); City of Colo. Springs v. Berl, 658 P.2d 280 (Colo. App. 1982); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983); Bd. of County Comm'rs v. Pennobscot, Inc., 662 P.2d 1091 (Colo. 1983); Wickham v. Wickham, 670 P.2d 452 (Colo. App. 1983); Slovek v. Bd. of County Comm'rs, 697 P.2d 781 (Colo. App. 1984); People v. Mountain States Tel. & Tel. Co., 739 P.2d 850 (Colo. 1987); People in Interest of B.J.F., 761 P.2d 297 (Colo. App. 1988); Galindo v. Valley View Ass'n, 2017 COA 78, 399 P.3d 796; Cielo Vista Ranch I, LLC v. Alire, 2018 COA 160, 433 P.3d 596.

II. DEFINITION; FORM.

Validity of a judgment depends on the court's jurisdiction of the person and the subject matter of the issue it decides. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

It is not approved practice for a trial court to make no independent conclusions of law, but rather make its conclusions by incorporating party's brief. Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

III. MULTIPLE CLAIMS OR PARTIES.

Law reviews. For note, "Res Judicata — Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961).

Section (b) is identical to corresponding federal rule. Since section (b) of this rule is identical to the corresponding federal rule, the federal cases interpreting F.R.C.P. 54(b) are persuasive here. Moore & Co. v. Triangle Constr. & Dev. Co., 44 Colo. App. 499, 619 P.2d 80 (1980); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994); State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005).

The proper function of a reviewing court in section (b) cases is for the court to fully review whether the trial court completely re-

solved a single claim for relief; however, some deference should be given where the trial court has made its reasoning clear. State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005).

Section (b) creates an exception to the requirement that an entire case must be resolved by a final judgment before an appeal is brought. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998); Galindo v. Valley View Ass'n, 2017 COA 78, 399 P.3d 796 ; Cielo Vista Ranch I, LLC v. Alire, 2018 COA 160, 433 P.3d 596.

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

A judgment is not final for purposes of issue preclusion until certiorari has been resolved both in the Colorado supreme court and the United States supreme court. Certiorari can be resolved in any of three ways: (1) The parties fail to file a timely petition for certiorari; (2) the court denies the petition for certiorari; or (3) the court issues an opinion after granting certiorari. Barnett v. Elite Props. of Am., 252 P.3d 14 (Colo. App. 2010).

Jurisdiction to hear appeal depends on correctness of certification. An appellate court's jurisdiction to entertain an appeal of a trial court's section (b) certification depends upon the correctness of the certification itself. Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

A cost and fee order rendered after certification of a final judgment on the merits under section (b) is itself a final, appealable judgment and does not require separate certification as a final judgment on the merits under section (b). Reyher v. State Farm Mut. Auto. Ins. Co., 2012 COA 58, 280 P.3d 64.

A premature notice of appeal does not render void for lack of jurisdiction acts of the trial court taken during the interval between the filing of the invalid notice of appeal and the dismissal of the appeal by the court of appeals. Woznicki v. Musick, 94 P.3d 1243 (Colo. App. 2004), aff'd, 136 P.3d 244 (Colo. 2006).

Where the trial court incorrectly entered a default judgment the certification of that judgment pursuant to section (b) was likewise improper. Although the court had jurisdiction to decide the legal sufficiency of the section (b) certification, the court lacked jurisdiction to consider the issues raised by the appellant regarding the adequacy of service on him and the denial of his motion to set aside the default judgment. Salomon Smith Barney, Inc. v. Schroeder, 43 P.3d 715 (Colo. App. 2001).

Previously, a judgment disposing of less than the entire case could be final and subject to review only where it was a final determination of a distinct claim arising out of a different transaction or occurrence from the other claims involved. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

Rule grants trial courts the authority to certify a ruling as a final judgment on less than an entire case, without altering the requirements of finality of judgment as to any other claim. Steven A. Gall, P.C. v. District Court, 965 P.2d 1268 (Colo. 1998).

An order dismissing an action as to two of the defendants and directing that plaintiffs should have a stated time within which to ''Prepare the record in order to apply to the supreme court for appeal'' is a final judgment to review. Ruhter v. Steele, 120 Colo. 367, 209 P.2d 771 (1949).

Where several items alleged in a complaint all resulted from a single transaction or occurrence, these items of damage still constituted a single claim, and the determination of one of the several asserted legal rights was not a final judgment. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

In cases which have been consolidated for the purpose of trial, a judgment entered in one case only is not a final appealable judgment absent a specific certification that there is no just reason for delay by the court pursuant to section (b). Mission Viejo Co. v. Willows Water Dist., 818 P.2d 254 (Colo. 1991).

Section (b) of this rule prevents or imposes conditions on the entry of final judgment on less than all of the pending claims. Harvey v. Morris, 148 Colo. 489, 367 P.2d 352 (1961).

Trial court may direct entry of final judgment where more than one claim exists. Section (b) of this rule allows a trial court to direct entry of a final judgment upon one or more but less than all of the claims on certain conditions where more than one claim exists. Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Final adjudication of a particular claim in a case involving multiple claims or multiple parties may be certified as a final judgment. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

This rule directs what must be done where multiple claims are involved and less than all of them decided. Fidelity & Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

This rule specifically provides that where multiple claims are involved and less than all of them are decided, in order to effect a final judgment or final disposition of the matters decided, the trial court must expressly determine that there is no just reason for delay and must

expressly direct the entry of a judgment with respect to those claims which are decided. Blackburn v. Skinner, 156 Colo. 41, 396 P.2d 968 (1964).

In order for a trial court to enter a final judgment on less than all of the claims pending before it pursuant to this rule, the order certified as final must dispose of an "entire claim". Thus, if only a single claim is asserted, but multiple remedies are sought based upon that single claim, an order denying one remedy, but not disposing of the requests for other remedies, cannot be made a final judgment by the entry of a certification pursuant to this rule. Virdanco, Inc. v. MTS Intern., 791 P.2d 1236 (Colo. App. 1990).

In order for a judgment to be "final" with respect to a whole, single claim, that order must fix all damages stemming from that claim. Thus, if the court's order purports to award some damages, but reserves the right to award additional damages at a later date, that order does not dispose of an entire claim and cannot be made a final judgment under this rule. Virdanco, Inc. v. MTS Intern., 791 P.2d 1236 (Colo. App. 1990).

Where the express language required by this rule does not appear in the order of judgment, an appeal must be dismissed. Blackburn v. Skinner, 156 Colo. 41, 396 P.2d 968 (1964).

If an order does not constitute final adjudication of a claim, certification of it as such does not operate to make it so. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Order awarding attorney fees as sanctions under C.R.C.P. 11 and § 13-17-102 held not to be a claim for relief; thus appeal of order was dismissed. State Farm Fire & Cas. Co. v. Bellino, 976 P.2d 342 (Colo. App. 1998); State ex rel. Suthers v. CB Servs. Corp., 252 P.3d 7 (Colo. App. 2010).

Colorado rules and decisions discourage the piecemeal review of a cause. Vandy's Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Purpose of requiring that an entire claim for relief be finally adjudicated before certification is proper is to avoid the dissipation of judicial resources through piecemeal appeals. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Number of precautionary appeals cut. The change from the old version of the rule was made largely to reduce the number of precautionary appeals taken as a result of the difficulty of determining whether several claims arose from a single transaction or occurrence. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

This rule expressly provides that in the absence of an express direction by a trial court for the entry of final judgment, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and an order or other form of decision is subject to revision at any time before entry of judgment adjudicating all of the claims. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959); Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

By its terms, C.R.C.P. 56(d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to that rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under section (b) of this rule. Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

Except as provided in section (b) of this rule, a final judgment is one which ends the particular action in which it is entered, leaving nothing further to be done in determining the rights of the parties involved in the action. Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

"Final judgment" defined. Only those orders which finally resolve a claim may be certified as final judgments pursuant to this section. Ball Corp. v. Loran, 42 Colo. App. 501, 596 P.2d 412 (1979).

A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees, and certification pursuant to this rule is not a prerequisite to appellate review of the merits of a case if a judgment has been entered and only the issue of attorney fees remains to be determined. Baldwin v. Bright Mortg. Co., 757 P.2d 1072 (Colo. 1988).

Determination of relief required for final judgment. A trial court's order determining that defendants are liable does not constitute the final resolution of a claim for purposes of this section unless and until the trial court determines what relief, if any, may be secured. Ball Corp. v. Loran, 42 Colo. App. 501, 596 P.2d 412 (1979).

A default judgment that completely disposes of petitioner's claim against defendant individually constitutes a final and appealable judgment for certification under this rule even though other plaintiffs' claims are unresolved. Kempter v. Hurd, 713 P.2d 1274 (Colo. 1986).

A judgment is not final which determines the action as to less than all of the defendants, except as provided in section (b) of this rule.

Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960).

When a summary judgment disposes of less than the entire action, the judgment is not final unless the trial court expressly determines that there is no just reason for delay and directs the entry of a final judgment. Manka v. Martin, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

However, all defendants are potentially jointly and severally liable and subject to judgment as to which finality rule applies unless there has been a specification of only joint liability. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

Before an appeal can be brought, all claims for relief in a case must be resolved by final judgment unless section (b) or another rule or statutory section is applicable. Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982).

Denial of a motion for summary judgment is not a final appealable order. Town of Grand Lake v. Lanzi, 937 P.2d 785 (Colo. App. 1996).

A final judgment can only enter when the trial court has nothing further to do to determine the rights of the parties involved, unless the judgment meets the requirements of section (b) of this rule. Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Trial court erred in certifying summary judgment in third-party action as final since, at time of judgment, attorney fees, interest, and costs which were part of primary action had not yet been determined. Corinthian Hill Metro. Dist. v. Keen, 812 P.2d 721 (Colo. App. 1991).

This rule applies only to a final decision of one or more, but not all, claims for relief. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Because a certification pursuant to section (b) applies to a final decision of one or more but not all claims for relief, the trial court retains jurisdiction over those portions of the case not affected by the judgment certified as final for appeal. Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998).

The effect of this rule is to permit the trial court to advance the time when such a final decision could be appealed. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Trial court makes determination of finality. Under this rule the trial court, not the parties or their counsel, may make the required determination of finality. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

The trial court had discretion to certify its adjudication of two allegations, in spite of pending counterclaims. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The timing of such a release is vested by this rule in the discretion of the trial court as the one most likely to be familiar with the case and with any justifiable reasons for delay. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A substantial delay between the entry of a ruling and the filing of the section (b) motion caused by nonmovant's failure to prosecute the case does not prevent the court from certifying the ruling as final. LoPresti v. Brandenburg, 267 P.3d 1211 (Colo. 2011).

Certification of final judgment is appropriate only when more than one claim for relief is presented in an action, or when multiple parties are involved, and there are claims or counterclaims remaining to be resolved. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

In deciding whether to issue a section (b) certification with respect to a decision which does not dispose of the entire case in a multiple claims action, a trial court must engage in a three-step process. First, it must determine that the decision to be certified is a ruling upon an entire ''claim for relief''. Next, it must conclude that the decision is final in the sense of an ultimate disposition of an individual claim. Finally, the trial court must determine whether there is just reason for delay in entry of a final judgment on the claim. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Troxel v. Town of Basalt, 682 P.2d 501 (Colo. App. 1984); Pub. Serv. Co. of Colo. v. Linnebur, 687 P.2d 506 (Colo. App. 1984), aff'd, 716 P.2d 1120 (Colo. 1986); Lytle v. Kite, 728 P.2d 305 (Colo. 1986); Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997); Carothers v. Archuleta County Sheriff, 159 P.3d 647 (Colo. App. 2006); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

Certification under section (b) of this rule is improper if the ruling sought to be appealed disposes of one or more claims against some, but not all, of the parties who may be jointly, but not severally, liable and there remains in the trial court a claim or claims against one or more of the remaining parties who, because of the certification, are not before the appellate court. Hall v. Bornschelgel, 740 P.2d 539 (Colo. App. 1987).

For certification under section (b) to be proper, a full adjudication of rights and liabilities regarding appealed claim is necessary. Co-

rinthian Hill Metro. Dist. v. Keen, 812 P.2d 721 (Colo. App. 1991).

Certification under section (b) is not required before a judgment can be given preclusive effect for purposes of collateral estoppel. Carpenter v. Young, 773 P.2d 561 (Colo. 1989).

Absent certification by the trial court under this rule, a judgment that disposes of fewer than all of the claims in an action may not be appealed. Estate of Burford v. Burford, 935 P.2d 943 (Colo. 1997).

A decree of dissolution when entered by the district court is final to dissolve the marriage even when the district court refuses to certify the decree as a final judgment appealable under this rule. Estate of Burford v. Burford, 935 P.2d 943 (Colo. 1997).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Section (b) governs the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Court has discretion in determining "just reason for delay". The task of assessing whether there is just reason for delay is committed to the trial court's sound judicial discretion, and review of a trial court's ruling on that question is limited to an inquiry into whether that discretion has been abused. Hardin Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Georgian Health Center v. Colonial Paint, 738 P.2d 809 (Colo. App. 1987).

It is within the trial court's discretion to determine whether there is just reason for delay, and such determination will not be disturbed absent an abuse thereof. The trial court's assessment of equities will be disturbed only if its conclusion was clearly unreasonable. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

The discretion accorded the trial court under this rule is limited, and does not permit the court to declare that which is not final under the rules to be final. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court's determinations that a claim for relief is the subject of the decision sought to be certified and that the decision is final are not truly discretionary as the correctness of these two determinations is fully reviewable by an appellate court because the trial court cannot in the exercise of its discretion, treat as final that which is not final. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Kelly v. Mid-Century Ins. Co., 695 P.2d 752 (Colo. App. 1984); Lytle v. Kite, 728 P.2d 305 (Colo. 1986).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. Halter v. Waco Scaffolding & Equip. Co., 797 P.2d 790 (Colo. App. 1990).

Discretion must be exercised with extreme care. Trial court's decision in certifying one of its orders must be exercised with extreme care where a pending counterclaim is involved, and this is particularly true where the counterclaim arguably arises from the same transaction or occurrence as the adjudicated claim. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Order denying motion for summary judgment not final order. Since an order denying a motion for summary judgment is not a final order, a trial court is without power to declare it to be final and appealable. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Certification by a trial court is not binding upon the appellate courts. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Where a trial court issues a certificate, a reviewing court has no jurisdiction unless the trial court has power to do so, but the trial court's determination that it has such power is not binding upon the appellate court. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

An appellate court thus will review de novo the legal sufficiency of a trial court's certification. Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

In order to effect a final judgment, thus rendering it reviewable, a trial court should (1) expressly determine that there is no just reason for delay and (2) expressly direct the entry of a judgment. Fidelity & Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

Trial court properly concluded that there was no just reason for delay in entering final judgment for the defendant because it had granted summary judgment in favor of the defendant on all of plaintiffs' claims. The trial court made its order in favor of the defendant a final judgment for purposes of section (b). It was not necessary for the trial court to address the defendant's counterclaim once it had disposed of the plaintiffs' claims. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994), cert. denied, 513 U.S. 1155, 115 S. Ct. 1112, 130 L. Ed. 2d 1076 (1995).

Finality under this rule contemplates more than the rendition of a judgment. Fidelity &

Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

A determination under this rule must be made in order to pave the way for the filing of an appeal. Allied Colo. Enters. Co. v. Grote, 156 Colo. 160, 397 P.2d 225 (1964).

Failure to procure an express finding by a trial court so that an appeal can be properly pursued is fatal. Smith v. City of Arvada, 163 Colo. 189, 429 P.2d 308 (1967).

Where, in granting a motion for summary judgment, a court expressly determines that there is no just reason for delay, directs that it be a final judgment, and dispenses with the necessity of filing a motion for new trial, there is created justifiable cause for review by an appellate court under section (b) of this rule. Hynes v. Donaldson, 155 Colo. 456, 395 P.2d 221 (1964).

District court did not give legally sufficient reasons for finding that there was no just reason for delay. Court's reasons did not show that any party would suffer hardship or injustice unless an immediate appeal of the default judgment on the single counterclaim was allowed. Therefore, the court abused its discretion in certifying the counterclaim under section (b). Allison v. Engel, 2017 COA 43, 395 P.3d 1217.

Where appealed claims are factually distinct from the retained claims — i.e., they arise from different transactions or occurrences — multiple ''claims for relief'' are present, and the current rule may be applied just like the old rule. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Appealable unit is claim for relief. Under the present version of F.R.C.P. 54(b) and section (b) of this rule, the appealable judicial unit is a ''claim for relief'', and a ''claim, counterclaim, cross-claim or third-party claim'' may be a separate unit. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Where dismissed claims and a retained counterclaim are not so inherently inseparable or intertwined, certification of dismissal of the claims was not an abuse of discretion. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The trial court may not certify an order as a final judgment pursuant to this rule after the notice of appeal has been filed. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975), overruled in Musick v. Woznicki, 136 P.3d 244 (Colo. 2006).

Trial court not authorized to enter judgment without assertion of claim for relief. This rule does not authorize the trial court to enter judgment against a party when no claim for relief has been asserted against that party by the party in whose favor the judgment is to be entered. A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc., 622 P.2d 113 (Colo. App. 1980).

Order dismissing class action aspects of the case determined the legal insufficiency of the complaint as a class action, and therefore, in its legal effect, it is ''tantamount to a dismissal of the action as to all members of the class other than [petitioners]''. Levine v. Empire Sav. & Loan Ass'n, 192 Colo. 188, 557 P.2d 386 (1976).

Trial court's order granting class action certification is not an ultimate disposition of an individual claim. Soto v. Progressive Mtn. Ins. Co., 181 P.3d 297 (Colo. App. 2007).

Trial court's C.R.C.P. 54(b) certification of its order granting class action certification as a final judgment was improper. Soto v. Progressive Mtn. Ins. Co., 181 P.3d 297 (Colo. App. 2007).

Decree of dissolution of marriage final. Section 14-10-105 provides that the Colorado rules of civil procedure apply to dissolution proceedings except as ''otherwise specifically provided'' in article 10 of title 14; and § 14-10-120 provides that a decree of dissolution of marriage is ''final'' when entered, subject to the right of appeal. The trial court is authorized to enter an order pursuant to section (b) of this rule, making the decree final for purposes of appeal. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Upon the entry of an order under section (b) of this rule, a decree of dissolution of marriage may be appealed prior to entry of permanent orders on the issues of child custody, support, and division of property. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Claims in a forcible entry and detainer action wherein damages as well as possession are sought are sufficiently severable that a final and appealable order may be issued as to possession while the claim for damages (rent owed) is reserved for future determination. Sun Valley Dev. Co. v. Paradise Valley Country Club, 663 P.2d 628 (Colo. App. 1983).

An asset sale order in the course of a receivership proceeding disposes of a claim for purposes of rule. The district court properly certified the sale orders under section (b). Colo. Cmty. Bank v. Hoffman, 2013 COA 146, 338 P.3d 390.

Complaint asserting single legal right states only single claim, even though multiple remedies may be sought for the alleged violation of that legal right. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Messenger v. Main, 697 P.2d 420 (Colo. App. 1985).

Where the plaintiff requests different remedies for relief, injunction, and damages, but the multiple remedies sought are to redress the violation of one legal right, only one claim is asserted, which, by virtue of its singularity, is not certifiable under section (b). Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982).

For purposes of applying section (b), a ''claim'' is the aggregate of operative facts which give rise to a right enforceable in the courts, and the ultimate determination of multiplicity of claims rests on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

More pragmatically stated, claims for relief are ''multiple claims'' for purposes of section (b) when a claimant pleads claims for which his possible recoveries are more than one and when a judgment rendered on one of his claims would not bar a judgment on his other claims. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

An adverse ruling on a motion for determination of questions of law regarding the preclusive effect of a previous judgment and the burden of proof is not a final, appealable order when the only claim for relief was for the change of a water right and the ruling did not result in a denial or approval of the change application. Cherry Creek Valley v. Greeley Irr. Co., 2015 CO 30M, 348 P.3d 434.

Disposition of only one of several elements of damages sought does not constitute an appealable ruling, even when purportedly certified as final under section (b). Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Order dismissing availability of treble damages under the Colorado Antitrust Act was not a final disposition and therefore not ripe for appeal where claims for misappropriation and unjust enrichment were undecided by the trial court. Smith v. TCI Commc'ns, Inc., 981 P.2d 690 (Colo. App. 1999).

Trial court's entry of certification under section (b) cannot transform an interlocutory decision into a final one absent dismissal of the arbitrable claims. Ferla v. Infinity Dev. Assocs., LLC, 107 P.3d 1006 (Colo. App. 2004).

Plaintiff does not waive right to appeal by requesting and obtaining a certification of final judgment pursuant to section (b) if plaintiff chooses not to file an interlocutory appeal of an order denying class certification pursuant to § 13-20-901. Devora v. Strodtman, 2012 COA 87, 282 P.3d 528.

Order preventing pursuit of claim for punitive damages is not final judgment. Partial summary judgment of the issue of punitive damages is an interlocutory rather than a final judgment for purposes of certification under section (b). Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Summary judgment for portion of claim cannot be made final under rule. If the trial court enters a summary judgment for only a portion of a claim or counterclaim or any other order that falls short of fully adjudicating at least one claim or counterclaim, the order cannot be made final under this rule, despite an ''express determination'' and an ''express direction''. Moore & Co. v. Triangle Constr. & Dev. Co., 44 Colo. App. 499, 619 P.2d 80 (1980).

Barring extraordinary circumstances, a judgment subject to section (b) certification must be so certified in order to be considered final and sufficient to transfer jurisdiction to the court of appeals. Trial court retains jurisdiction to determine substantive matters when a party files a premature notice of appeal of a nonfinal judgment. Musick v. Woznicki, 136 P.3d 244 (Colo. 2006) (overruling Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975)).

Trial court's language held to sufficiently comply with the requirements of section (b). Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

Rule as basis for jurisdiction. Comstock v. Colo. Nat'l Bank, 37 Colo. App. 468, 552 P.2d 514 (1976), modified on other grounds, 194 Colo. 28, 568 P.2d 1164 (1977); Crownover v. Gleichman, 38 Colo. App. 96, 554 P.2d 313 (1976), aff'd, 194 Colo. 48, 574 P.2d 497 (1977), cert. denied, 435 U.S. 905, 98 S. Ct. 1450, 55 L. Ed. 2d 495 (1978); Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976); McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978).

Plaintiff's attempted removal to federal court, which was without the slightest color of right or merit, did not deprive state trial court of jurisdiction to certify partial summary judgment under section (b), nor did it deprive state court of appeals of jurisdiction to hear the appeal of the grant of partial summary judgment. As a general rule, removal of an action to federal court divests the state court of its jurisdiction over the dispute while the removal petition is pending in federal court. However, there is a narrow exception to the general rule that precludes state courts from proceeding further when removal has been effected. A state court is not deprived of jurisdiction where a party's notice of removal to a federal court indicates, on its face and as a matter of law, that the party's attempt at removal is without the slightest color of right or merit. McDonald v. Zions First Nat'l Bank, N.A., 2015 COA 29, 348 P.3d 957.

Trial court improperly certified rulings on two claims as appealable final judgments when it made only a conclusory ruling that there was no just reason for delay and neither the factual record nor the law supported that ruling. A trial court's failure to explain the reasoning underlying its ruling that there is no just reason for delay does not deprive an appellate court of jurisdiction, but does make it impossible for an appellate court to deferentially re-

view the trial court's decision only for abuse of discretion, as would normally be the case, and requires the appellate court to instead carefully scrutinize the decision without according it deference. Galindo v. Valley View Ass'n, 2017 COA 78, 399 P.3d 796.

Applied in Hudler v. New Red Top Valley Ditch Co., 121 Colo. 489, 217 P.2d 613 (1950); Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952); McGlasson v. Hilton, 155 Colo. 237, 393 P.2d 733 (1964); Perlman v. Great States Life Ins. Co., 164 Colo. 493, 436 P.2d 124 (1968); Cyr v. District Court, 685 P.2d 769 (Colo. 1984); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d 450 (Colo. App. 2005); State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005); Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Gunnison County Bd. of County Comm'rs v. BDS Int'l, LLC., 159 P.3d 773 (Colo. App. 2006); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

IV. DEMAND FOR JUDGMENT.

Annotator's note. Since section (c) of this rule is similar to § 187 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (c) is identical and modeled after F.C.R.P. 54(c). Dlug v. Wooldridge, 189 Colo. 164, 538 P.2d 883 (1975).

Under section (c) of this rule, a judgment by default may not be different in kind or exceed in amount that prayed for in the demand for judgment. Barnard v. Gaumer, 146 Colo. 409, 361 P.2d 778 (1961); Toplitsky v. Schilt, 146 Colo. 428, 361 P.2d 970 (1961); Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964).

Section 5-12-102 contains no requirement that town request statutory interest in its pleadings for court to award interest pursuant to section (c). Town of Breckenridge v. Golforce, Inc., 851 P.2d 214 (Colo. App. 1992).

Both legal and equitable relief may be given in one action and in one judgment or decree. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co., 155 Colo. 232, 393 P.2d 749 (1964).

Where a party has misconceived his remedy and is seeking relief to which he is not entitled under the law, this does not mean that his petition should be dismissed, for, if, under the allegations of the petition, he is entitled to any relief, a court upon a hearing may grant him the relief to which he is entitled regardless of the prayer in the petition. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

The question, therefore, is not whether a party has asked for the proper remedy, but whether under his pleadings he is entitled to any remedy. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

The rules of civil procedure were intended to deemphasize the theory of a "cause of action" and to place the emphasis upon the facts giving rise to the asserted claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

The substance of a claim rather than the appellation applied to the pleading by the litigant is what controls. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

If from the allegations of a complaint the plaintiff is entitled to relief under any "theory", it is sufficient to state a claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Court will grant relief entitled. If a plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

Court has duty to grant relief to which party entitled. Under this rule it is the duty of the court to grant relief to which a party is entitled, even though not specifically demanded in the prayer. Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health, 122 Colo. 147, 220 P.2d 872 (1950).

Should a court determine that the precise relief requested is not appropriate, other means may be formulated. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

If a plaintiff declares his intention to seek a particular form of relief and to refuse all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he demands. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

Relief demanded as limiting relief granted. Snell v. Pub. Utils. Comm'n, 108 Colo. 162, 114 P.2d 563 (1941).

Equitable relief not precluded. Although the plaintiffs originally sought damages in an action at law, equitable relief was not precluded where a change in circumstances altered the posture of the case and rendered the original relief sought inappropriate. Rice v. Hilty, 38 Colo. App. 338, 559 P.2d 725 (1976); Booth v. Bd. of Educ., 950 P.2d 601 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 639 (Colo. 1999).

If the evidence justifies an award, the particular theory pleaded will not prevent the

award. Johnson v. Bovee, 40 Colo. App. 317, 574 P.2d 513 (1978); Nix v. Clary, 640 P.2d 246 (Colo. App. 1981).

Recovery is not limited to the amount specified in the complaint, and final judgment should be in the amount to which plaintiff is entitled where amount of damages can only be estimated at the pleading stage and defendant is provided with notice of the elements of the damage claim. Worthen Bank & Trust v. Silvercool Serv. Co., 687 P.2d 464 (Colo. App. 1984).

Applied in Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Morrissey v. Achziger, 147 Colo. 510, 364 P.2d 187 (1961); Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

V. COSTS.

Law reviews. For article, ''Obtaining Costs for Clients Part 1'', see 14 Colo. Law. 1974 (1985).

Section (d) violates neither the due process nor equal protection guarantees contained in the federal and state constitutions. The classification between governmental and non-governmental entities is rationally related to the goal of protecting the public treasury. County of Broomfield v. Farmers Reservoir, 239 P.3d 1270 (Colo. 2010).

Consistency with the principle of discretion in the assessment of costs is preserved by section (d) of this rule. Greenwald v. Molloy, 114 Colo. 529, 166 P.2d 983 (1946).

Generally, when costs are necessarily incurred in preparing for trial and because of litigation, reasonable costs may be awarded to the prevailing party, and trial courts may exercise their discretion in awarding such costs under this rule. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

No discretionary authority in clerk to determine amounts allowable as expert witness fees or attorney fees. Discretionary authority is judicial function not properly delegable to the clerk of court. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

To omit an award of costs in a judgment is a proper form for a trial judge to use in ''directing'' that no costs be allowed a prevailing party. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

Although the omission of an award of costs is a proper form for denial of costs, the court must direct the denial. Coldwell Banker Com. Group v. Hegge, 770 P.2d 1297 (Colo. App. 1988).

The specific limitation in the second sentence of § 13-16-113 (2) cannot reasonably be interpreted as a general prohibition extending to all motions for summary judgment brought under C.R.C.P. 56, and the defendant's entitlement to an award of costs was properly considered under section (d). Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

An award of costs is not prohibited by this rule even if a party is not entitled to costs under § 13-16-104. Weeks v. City of Colo. Springs, 928 P.2d 1346 (Colo. App. 1996).

Because express provision for the award of costs was made in § 13-16-104, this rule is inapplicable to the extent it makes the awarding of costs discretionary. Nat'l Canada Corp. v. Dikeou, 868 P.2d 1131 (Colo. App. 1993).

There is no indication that the provision in § 13-64-402 creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff is meant to supplant a prevailing party's right to recover costs. Mullins v. Kessler, 83 P.3d 1203 (Colo. App. 2003).

A prevailing party is one that has succeeded upon a significant issue presented by the litigation and has achieved some of the benefits sought in the lawsuit. Nat'l Canada Corp. v. Dikeou, 868 P.2d 1131 (Colo. App. 1993).

The party in whose favor the decision or verdict on liability is rendered is the prevailing party, even where plaintiff received no monetary or other benefit from the jury's verdict. Weeks v. City of Colo. Springs, 928 P.2d 1346 (Colo. App. 1996).

The test for determining a prevailing party in a contract case does not apply to a tort case. Pastrana v. Hudock, 140 P.3d 188 (Colo. App. 2006).

Where party prevails on some but not all of multiple claims, the trial court has broad discretion to determine which, if any, party was ''the'' prevailing party. Archer v. Farmer Bros. Co., 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004); Pastrana v. Hudock, 140 P.3d 188 (Colo. App. 2006).

''Prevailing party'' may include a defendant who does not assert counterclaims and, under certain circumstances, may include a defendant who is found partly liable. Archer v. Farmer Bros. Co., 90 P.3d 228 (Colo. 2004); Gonzales v. Windlan, 2014 COA 176, 411 P.3d 878.

A water court has the discretion to award costs to the prevailing party in a case to determine whether an application for water rights shall be granted. Once a case is before the water judge, it changes character. The application for water rights becomes litigation at the point it has moved from the jurisdiction of the water referee to the water court, and thus the water court is within its discretion to award costs. Fort Morgan v. GASP, 85 P.3d 536 (Colo. 2004).

"Prevailing party" status for award of costs must await the resolution of the claims pending in the water court. Matter of Appli-

cation for Water Rights, 891 P.2d 981 (Colo. 1995).

Costs are not taxable against the sovereign unless the general assembly so directs. Shumate v. State Pers. Bd., 34 Colo. App. 393, 528 P.2d 404 (1974); McFarland v. Gunter, 829 P.2d 510 (Colo. App. 1992); Smith v. Furlong, 976 P.2d 889 (Colo. App. 1999).

Costs may not be awarded against state entities pursuant to section (d) in the absence of express legislative authority for such awards. Central Colo. Water v. Simpson, 877 P.2d 335 (Colo. 1994).

A water court has the discretion to award costs against a mutual ditch company because a mutual ditch company is not a subdivision of the state. County of Broomfield v. Farmers Reservoir, 239 P.3d 1270 (Colo. 2010).

School district is exempt from an award of costs. Trial court erred in awarding costs against school district, which is a political subdivision of the state, because there was no express provision allowing for the costs. Lombard v. Colo. Outdoor Ed. Center, Inc., 266 P.3d 412 (Colo. App. 2011).

Notwithstanding section (d) of this rule, § 13-16-111 allows a prevailing plaintiff in a C.R.C.P. 106(a)(4) action to recover costs against the state, its officers, or agencies. Branch v. Colo. Dept. of Corr., 89 P.3d 496 (Colo. App. 2003).

Section 24-4-106 (7) does not take precedence over this rule. While § 24-4-106 (7) permits the court ''to afford such other relief as may be appropriate'', this provision cannot be construed to authorize assessment of costs against the state so as to take precedence over section (d). Shumate v. State Pers. Bd., 34 Colo. App. 393, 528 P.2d 404 (1974).

In state's action to recover costs for treatment in state institutions, the trial court was without jurisdiction to assess court costs against the executive branch of the state, or its officers. State ex rel. Fort Logan Mental Health Ctr. v. Harwood, 34 Colo. App. 213, 524 P.2d 614 (1974).

An award of costs is proper against a municipal corporation. Kussman v. City & County of Denver, 671 P.2d 1000 (Colo. App. 1983).

Costs in challenge of driver's license revocation not recoverable. The trial court has no power to award costs to the plaintiff in a case challenging revocation of a driver's license under § 42-4-1202 (3)(b), because there is no specific statutory provision allowing for such an award. Lucero v. Charnes, 44 Colo. App. 73, 607 P.2d 405 (1980).

Trial courts may exercise discretion to award costs to prevailing party unless there is a statute or rule specifically prohibiting the award of costs. Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981).

Trial court properly exercised its discretion by awarding costs to prevailing party under section (d) in case involving review of denial of motion to set aside order creating special district under title 32. Absent a prohibition in a statute or rule that specifically prohibits an award of costs, trial courts may exercise their discretion to award any reasonable costs to the prevailing party. The legislature did not provide for taxation of any costs against a property owner or other party who sought to invoke its rights under title 32. Thus, the trial court did not err in awarding reasonable costs to the prevailing party. Marin Metro. Dist. v. Landmark Towers Ass'n, 2014 COA 40, 412 P.3d 620.

Prevailing plaintiff properly charged with defendant's post-offer costs where jury awarded plaintiff less than the defendant's offer. Whitney v. Anderson, 784 P.2d 830 (Colo. App. 1989).

The prevailing party for the award of costs is the one in whose favor the decision or verdict on liability is rendered even if the other party also prevailed in part on some of the claims involved in the case. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

Even if each of the parties can arguably be viewed as having prevailed in part, the award of costs in such a situation is committed to the sole discretion of the trial court. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

When a party prevailed on only one fairly minor issue and lost on every other substantial issue, the trial court did not abuse its discretion in finding that the party was not a prevailing party. Farmers Reservoir & Irrigation Co. v. City of Golden, 113 P.3d 119 (Colo. 2005).

The discretion of the trial court to award costs to a prevailing party is not limited to specific claims upon which the party prevailed, thus even if the prevailing party's expert witness fees were incurred solely in connection with a claim that was dismissed by the court, the award of those fees is proper. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

Costs of third-party defendant properly divided between plaintiff and defendant when both had claims against third-party defendant since dismissal of the claims made third-party defendant the prevailing party against both. Cobai v. Young, 679 P.2d 121 (Colo. App. 1984); Poole v. Estate of Collins, 728 P.2d 741 (Colo. App. 1986).

Costs attributable to expert witness fees for expert witnesses that did not testify at trial were properly awarded. These costs were valuation expenses necessarily incurred by reason of the litigation and were necessary for the proper preparation for trial. Fowler Irrevo-

cable Trust 1992-1 v. City of Boulder, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

Costs may be awarded in tort action under the Governmental Immunity Act. Lee v. Colo. Dept. of Health, 718 P.2d 221 (Colo. 1986).

Trial court did not err in awarding plaintiff his costs pursuant to section (d) in his tort action under the Colorado Governmental Immunity Act. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Trial court in a far better position to determine whether the challenged costs were reasonable and necessary. Trial court did not abuse its discretion in awarding costs for: (1) Discovery deposition fees; (2) copies of discovery depositions; (3) copies of medical records for injuries not claimed at trial; (4) certain expert fees; (5) fees associated with photographs; and (6) non-itemized copy fees. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Even if court of appeals were to agree with RTD that trial court erred in awarding $2.65 in costs on the basis of mathematical errors that originated in plaintiff's bill of costs, any error falls within the scope of the maxim de minimus non curat lex. Hence, court declines to expend judicial resources remanding for correction of this negligible error. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Post-trial motion for the award of attorney fees is analagous to a request for taxing costs and should follow procedures established by section (d) of this rule and C.R.C.P 121, sec. 1-22. A trial court may address the issue of the award of attorney fees for services rendered in connection with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to "reserve" the issue. Roa v. Miller, 784 P.2d 826 (Colo. App. 1989).

Attempt to have costs assessed pursuant to section (d) and C.R.C.P. 121, 1-22, was ineffective where court had previously reserved matter of costs for future hearing pursuant to C.R.C.P. 68. Seymour v. Travis, 755 P.2d 461 (Colo. App. 1988).

Costs may be assessed against the nonprevailing party where the purpose for imposing costs is to sanction counsel for improper conduct which led to a mistrial. Koehn v. R.D. Werner Co., Inc., 809 P.2d 1045 (Colo. App. 1990).

Section (d) of this rule and § 13-16-104 are modified by § 13-17-202 (1)(a)(II), which does not allow a party who rejects a settlement offer and recovers less at trial to recover his or her costs, even though that party is determined to be the prevailing party. Bennett v. Hickman, 992 P.2d 670 (Colo. App. 1999).

An offer of settlement as to "all claims" unambiguously includes attorney fees and costs if the only claim for attorney fees and costs appears in the complaint. The offer of settlement need not explicitly reference attorney fees and costs. Bumbal v. Smith, 165 P.3d 844 (Colo. App. 2007).

Court construed the Health Care Availability Act in harmony with § 13-16-105 and section (d) of this rule to allow a prevailing defendant to recover costs in a medical negligence action. Mullins v. Kessler, 83 P.3d 1203 (Colo. App. 2003).

Where a judgment has been successfully appealed, an award of costs previously entered on that judgment is no longer valid because, upon remand, that judgment no longer exists. Where a judgment has been successfully appealed, the identity of the prevailing party is still unknown, and only after the stage of the proceedings where a prevailing party can be identified will a court's order awarding costs be valid. Here, the judgment underlying the award of costs in the first action was reversed, and the case was remanded for further proceedings. As a result, the board of county commissioners was no longer the prevailing party, and the order awarding costs, which was dependent on and ancillary to that vacated judgment, was reversed. The parties returned to the same positions they were in before the filing of the first action. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

A trial court may award costs to a prevailing party for an expert witness who does not testify, but the court must find that such costs were reasonable. Because homebuilders concede that costs associated with two cost-accounting experts retained by board of county commissioners in the second action are reasonable, trial court's award of such costs is affirmed. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

In view of issue at trial of whether fees charged by board were reasonable in relation to direct and indirect costs of building department, and knowledge of board's uniform building code expert in this area, trial court's award of costs for this witness was reasonable. The expert witness offered advice that may have been relevant to the preparation for the second action, and the board limited the expert witness' involvement in this case. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

A ruling on a class certification is essentially a procedural one that does not ask whether the underlying claims are legally or factually meritorious, so such a ruling does not trigger the award of costs and fees under section (d). Reyher v. State Farm Mut. Auto. Ins. Co., 2012 COA 58, 280 P.3d 64.

VI. AGAINST PARTNERSHIP.

Law reviews. For note, ''Necessity of Resorting to Firm Assets Before Levying on the Assets of an Individual Partner'', see 8 Rocky Mt. L. Rev. 134 (1936).

Annotator's note. Since section (e) of this rule is similar to § 14 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

A court has jurisdiction of partner who is served to proceed to final judgment against him. A judgment having been entered against a partnership and execution thereon having been returned unsatisfied, then, under the provisions of this rule a court has, and continues to have, jurisdiction of a partner who has been served with summons for the purpose of proceeding to final judgment against him. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

No personal judgment can be obtained against the partners not served, for, as to them, the judgment rendered could bind only their interests in the partnership property. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901); Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905); Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Section 13-50-105 is permissive and not mandatory, as partnership or a limited partnership may sue or be sued either in its common name or by naming its partners. Frazier v. Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

Section 13-50-105 and section (e) of this rule contain clear requirements that an individual partner must be named, personally served, and subjected to the jurisdiction of the court to seek recovery from the individual. Plaintiffs actually knew the identity of some of the individual partners but made a conscious decision not to name and serve them. The plaintiffs' judgment was enforceable only against the assets of the partnership. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

VII. REVIVAL OF JUDGMENTS.

Law reviews. For article, ''Executions and Levies on Tangible Property'', see 27 Dicta 143 (1950).

Revived judgments must be entered within 20 years after the entry of the judgment sought to be revived or the court will lose its jurisdiction to do so. Mark v. Mark, 697 P.2d 799 (Colo. App. 1984).

A creditor may obtain a judgment lien at any time during the twenty-year life of a judgment, but if more than six years have passed since the entry of judgment, the creditor must revive the judgment and record the transcript of the revived judgment. Sec. Credit Servs., LLC v. Hulterstrom, 2019 COA 7, 436 P.3d 593.

By its plain language section (h) requires notice to be served on the judgment debtor and provides the judgment debtor the opportunity to have issues tried and determined by the court. Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

Where a judgment has been entered reducing child support arrears to a fixed sum, such judgment may be revived within 20 years after it was entered, regardless of the date that each child support payment became due. Santarelli v. Santarelli, 839 P.2d 525 (Colo. App. 1992).

Judgment lien, based on a domesticated out-of-state judgment, must be revived under Colorado procedural law for the lien to be extended. To extend a judgment lien beyond six years after the date of judgment, Colorado procedural law requires a judgment to be revived pursuant to section (h) and a transcript of the revival to be filed with the clerk and recorder. Wells Fargo Bank, N.A. v. Kopfman, 205 P.3d 437 (Colo. App. 2008), aff'd, 226 P.3d 1068 (Colo. 2010).

When a motion to revive a judgment is filed in sufficient time for the procedures of section (h) to be completed before the expiration of the original judgment, but court delays prevent a revived judgment from being entered before the judgment's expiration, then a revived judgment should be entered nunc pro tunc as of a date the motion could have been decided had there been no court delays. Robbins v. Goldberg, 185 P.3d 794 (Colo. 2008).

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. A party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, guardian ad litem, conservator, or such other representative who has appeared in the action. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. However, before judgment is entered, the court shall be satisfied that the venue of the action is proper under Rule 98.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross Claimants. The provisions of this Rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against an Officer or Agency of the State of Colorado. No judgment by default shall be entered against an officer or agency of the State of Colorado unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(f) Judgment on Substituted Service. In actions where the service of summons was by publication, mail, or personal service out of the state, the plaintiff, upon expiration of the time allowed for answer, may upon proof of service and of the failure to plead or otherwise defend, apply for judgment. The court shall thereupon require proof to be made of the claim and may render judgment subject to the limitations of Rule 54(c).

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

Cross references: For venue, see C.R.C.P. 98; for relief from judgment for mistakes, inadvertence, surprise, excusable neglect, fraud, etc., see C.R.C.P. 60(b); for demand for judgment, see C.R.C.P. 54(c); for evidence, see C.R.C.P. 43.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Motions for Default Judgments'', see 24 Colo. Law. 1295 (1995).

Annotator's note. Since this rule is similar to § 186 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Not being present at trial is not an act of default as contemplated under this rule. Kielsmier v. Foster, 669 P.2d 630 (Colo. App. 1983).

Judgment entered pursuant to stipulation not default judgment. Where parties deal at arm's length and are represented by counsel who agree to the entry of judgment and there is no fraud on the attorney's part or any professional dereliction of duty inimical to the best interests of the parties, a judgment entered pursuant to their stipulation is not a default judgment, but is a stipulated judgment. In re George, 650 P.2d 1353 (Colo. App. 1982).

Allegations in a motion for default judgment under this rule are sufficient to assert a basis for relief for judgment on the basis of fraud. Salvo v. De Simone, 727 P.2d 879 (Colo. App. 1986).

Defaulting codebtor allowed to participate in verdict and judgment against bank on bank's counterclaim against debtors since bank failed to apply for an entry of judgment by default against debtor. Pierson v. United Bank of Durango, 754 P.2d 431 (Colo. App. 1988).

Motion for default judgment should have been denied where defendant's answer, though filed late, was filed before default had been entered and before the trial court had ruled on the motion for default judgment. Colo. Compensation Ins. Auth. v. Raycomm Transworld Indus., Inc., 940 P.2d 1000 (Colo. App. 1996).

Motion to strike answer tantamount to default judgement. When trial court struck defendants' answer brief, it effectively denied them the opportunity to litigate their claim, and such motion was unwarranted by defendants' actions. Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

Trial court lacks jurisdiction to enter default judgment against a defendant while an appeal is pending. Anstine v. Churchman, 74 P.3d 451 (Colo. App. 2003).

Applied in Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976); Johnston v. District Court, 196 Colo. 1, 580 P.2d 798 (1978); City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978); Norsworthy v. Colo. Dept. of Rev., 197 Colo. 527, 594 P.2d 1055 (1979); Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); O'Brien v. Eubanks, 701 P.2d 614 (Colo. App. 1984), cert. denied, 474 U.S. 904, 106 S. Ct. 272, 88 L. Ed. 2d 233 (1985); Denman v. Burlington Northern R. Co., 761 P.2d 244 (Colo. App. 1988).

II. ENTRY.

Clerk to enter default. Section (a) of this rule provides that the clerk of the court in which an action is pending shall enter default when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

A trial court may not enter an order of default when a defendant answers and actively litigates but fails to appear for trial. Instead, a court may receive evidence in the defendant's absence and render judgment on the merits. Rombough v. Mitchell, 140 P.3d 202 (Colo. App. 2006).

III. JUDGMENT.

A. By the Clerk.

This rule provides that "judgment by default" may be entered by the clerk in those circumstances specifically mentioned. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

This rule is not in conflict with the constitution as an invasion of the province of the judiciary, the theory being that the judgment is the sentence which the law itself pronounces as the sequence of statutory conditions, and the judgment, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, namely, the act and determination of the court itself. The courts of many of the states have acted under similar statutory provisions for many years past, and the validity of such judgment has been upheld by repeated decisions of the highest courts of these states. Phelan v. Ganebin, 5 Colo. 14 (1894).

This rule was never intended to deprive the court of its power to render a judgment, but only to give the clerk authority to enter it. Griffing v. Smith, 26 Colo. App. 220, 142 P. 202 (1914); Plaza del Lago Townhomes Ass'n v. Highwood Builders, 148 P.3d 367 (Colo. App. 2006).

B. By the Court.

Default judgments are drastic. Default judgments — particularly in those actions where the defendant has answered and the case is at issue — are serious and drastic. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The ramifications which may ensue may cause loss of time and expense of courts and litigants, as well as, possibly, the denial of inherent rights. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters a default judgment where a defendant has appeared, the requirements of this rule as well as the grounds urged for a default judgment, must be considered with utmost care. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters judgment by default in a case in which the defendant has appeared, the plaintiff must provide the notice required. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975).

No party should be defaulted unless grounds authorizing it are authoritatively established and are so clear that litigants may know without question that they are subject to default if they do not act in a certain manner. Missouri ex rel. De Vault v. Fidelity & Cas. Co., 107 F.2d 343 (8th Cir. 1939).

Court not representative of nonappearing party. Where the defendants fail to answer a complaint or to make any effort to appear before the trial court, the trial court is not obliged to, and indeed should not, assume a position adversarial to the plaintiffs and representative of the parties declining to appear. Homsher v. District Court, 198 Colo. 465, 602 P.2d 5 (1979).

Plaintiff's motion for default judgment is denied without a hearing where no cause of action is pleaded. Schenck v. Van Ningen, 719 P.2d 1100 (Colo. App. 1986).

A judgment by default is not designed to be a device to catch the unwary or even the negligent. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

A default judgment entered in violation of this rule is void. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Where the defendant's attorney has filed an appearance with the court, the defendant has appeared for purposes of the notice requirement of this rule, and if a defendant is not served with notice, a default judgment entered against him is void. Schaffer v. Martin, 623 P.2d 77 (Colo. App. 1980).

The failure to give required notice is error. The action of a trial court in entering default judgment on its own motion without the requisite three days' notice to defendant constitutes prejudicial reversible error. Emerick v. Emerick, 110 Colo. 52, 129 P.2d 908 (1942).

Although it is not specifically assigned as error, nevertheless it is cogent when considering the question of whether the court had the authority to enter the default judgment and also whether it exceeded its jurisdiction in doing so. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The requirements of this rule have been fastidiously adhered to by the supreme court. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The requirements of this rule, stating that a three-day written notice of application for default judgment shall be given, have been scrupulously adhered to by this court. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977); Southerlin v. Automotive Elec. Corp., 773 P.2d 599 (Colo. App. 1988).

"Appeared in the action" as used in section (b) requires the defendant to communicate with the court in a manner that demonstrates defendant is aware of and intends to participate in the proceedings. Plaza del Lago Townhomes Ass'n v. Highwood Builders, 148 P.3d 367 (Colo. App. 2006).

The essence of an appearance as used in section (b)(2) (now (b)) is a cognitive submission of oneself to the jurisdiction of the court. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Ordinarily, a defendant enters a general appearance in a case by seeking relief which acknowledges jurisdiction or by other conduct manifesting consent to jurisdiction. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Presence requesting continuance to employ counsel does not constitute appearance. Presence in court without counsel resulting in a continuance to allow time to employ counsel did not constitute an appearance within the meaning of section (b)(2) (now (b)). People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Purpose of the notice requirement of section (b)(2) (now (b)) of this rule is to protect those parties who, although delinquent in filing pleadings within the time periods specified, have indicated a clear purpose to defend by entry of their appearance. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975); Best v. Jones, 644 P.2d 89 (Colo. App. 1982); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Responsive pleading is timely when tendered to the clerk of the court following service of the three-day written notice required pursuant to section (b)(2) (now (b)) of this rule and prior to the entry of default judgment. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975).

Judgment obtained by default is entitled to complete legal effect. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

The notice provision in section (b) of this rule is applicable to divorce cases. The notice provision in section (b) of this rule as to serving party against whom default judgment is sought with notice of application therefor at least three days prior to hearing thereon applies in divorce cases, and if not followed it is ground for reversal. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

The taking of evidence and entry of judgment in the absence of a party who knows his case is set for trial is not proceeding under the default provisions of this rule, but is instead a trial on the merits. Davis v. Klaes, 141 Colo. 19, 346 P.2d 1018 (1959); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

If a party is absent, his failure to appear does not entitle him to additional notice. Davis v. Klaes, 141 Colo. 19, 346 P.2d 1018 (1959); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

It is an abuse of discretion to enter a default judgment without notice to the parties themselves where their attorney has been discharged and has filed an application to withdraw. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Notice not necessary where defendants did not make any contact with the court before

entry of judgment against them. Realty World-Range Realty, Ltd. v. Prochaska, 691 P.2d 761 (Colo. App. 1984).

The supreme court is disinclined to apply technical concepts in determining whether a party has entered an appearance for purposes of the notice requirement of section (b)(2) of this rule. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

Colorado has taken a liberal approach in determining what constitutes an "appearance" under section (b)(2). Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

"Appearance" must be responsive to court action. To be entitled to notice of application for judgment under section (b)(2), a party's appearance must be responsive to the plaintiff's formal court action. The plaintiff's knowledge that the defendants plan to resist the suit is not enough. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Letter from defendant to court may be sufficient "appearance" under section (b)(2) to entitle the defendant to three days' notice and a hearing. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Unsigned letter faxed to the court by defendant's son was sufficient "appearance" to trigger the notice requirement of section (b)(2). BS & C Enters., L.L.C. v. Barnett, 186 P.3d 128 (Colo. App. 2008).

Corporate officer's attempt to file documents is appearance. An attempt by an officer of a corporation to file documents with the court, while not technically an appearance on behalf of the corporation, is an ''appearance'' sufficient to trigger the notice requirement of section (b)(2). Best v. Jones, 644 P.2d 89 (Colo. App. 1982).

Appearance in small claims court is not appearance in county court. The defendant's appearance by attorney with regard to the same claim in the small claims court and the county court is not sufficient to trigger the requirement for notice under section (b)(2), because the the county court and the district court are separate and distinct courts, and actions in each court are separate and distinct lawsuits. An appearance in the former does not constitute an appearance in the latter. Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983).

Payment of docket fee is not prerequisite to entry of appearance for the purpose of entitling a party to notice before entry of default judgment. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Right to notice not extinguished by untimely answer. A party's right to notice under section (b)(2) is not extinguished by the fact that his appearance in the action was not made within the time required for an answer under C.R.C.P. 12(a) prior to entry of default. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Where a party is not represented by a lawyer, a court should be reluctant to foreclose the opportunity of a litigant to present some defense. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

Judgment of default vacated for failure to give notice required by this rule. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977); Westbrook v. Burris, 757 P.2d 1142 (Colo. App. 1988).

Failure to comply with the notice provision of this rule mandates vacation of the entry of default as well as the default judgment, thus rendering further proceedings on the default issue unwarranted. Schaffer v. Martin, 623 P.2d 77 (Colo. App. 1980).

Express finding of proper venue not required. The requirement in section (b)(2) that the court ''be satisfied'' that venue is proper is not tantamount to a requirement that an express, written finding be made. Although it might be preferable to include such a finding in the order granting the default, it is not required by the rule. Wagner Equip. Co. v. Mountain States Mineral Enters., Inc., 669 P.2d 625 (Colo. App. 1983).

Improper venue is not a jurisdictional defect that renders a default judgment void. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Hearing on motion for default not necessary where court has all materials required by rules and is satisfied as to sufficiency of service and that defendant is in default. Crow-Watson No. 8 v. Miranda, 736 P.2d 1260 (Colo. App. 1986).

No hearing on a motion for default judgment is necessary where only liquidated as opposed to unliquidated damages are involved and defendant, possessed with all of the information available to the court for rendering a judgment, fails to respond. Crow-Watson No. 8 v. Miranda, 736 P.2d 1260 (Colo. App. 1986).

Defaulting party has right to appear and present mitigating evidence at hearing on damages. Since, before a default judgment is entered, the court is required to conduct a hearing and take evidence on the amount of damages and section (b)(2) allows the defaulting party to receive notice of and attend such hearing, our adversary system requires that the defaulting party should be allowed to cross-examine witnesses and present mitigating evidence. Kwik Way Stores, Inc. v. Caldwell, 709 P.2d 36 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 745 P.2d 672 (Colo. 1987).

A trial court is not required to take evidence before entering a default judgment, assuming that the court is satisfied as to suffi-

ciency of service and the fact that defendant is actually in default. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant who fails to answer within the required time thereby admits the allegations of the complaint, and allegations deemed admitted need not be proved. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A court under this rule has wide discretion as to whether a hearing is necessary prior to entry of a default judgment. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

District court is without discretionary power to deny a motion for default judgment where the opposing party, not an agency of the state, fails to comply with a court order requiring that a certain act be done within a specified time and, after expiration of that time, fails to establish that such failure to act was a result of excusable neglect. Sauer v. Heckers, 34 Colo. App. 217, 524 P.2d 1387 (1974).

If the court decides to hold a hearing, it also has discretion as to the type of hearing and the degree of its formality. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

While it may be better practice to have a reporter present when testimony is offered prior to the entry of a default judgment, section (b)(2) (now (b)) does not require it. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

It is the duty of the trial court to make sufficient findings to enable the appellate court to clearly understand the basis of the trial court's decision and to enable it to determine the ground on which it rendered its decision granting a default judgment. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

There must be proof of cause for divorce. The interest of the public in divorce cases, including the possibility of collusive arrangements therein, is such that a divorce may not be granted on a judgment by default without proof of a cause for divorce. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

In default cases where testimony is taken, it must be by the court or referee. Hotchkiss v. First Nat'l Bank, 37 Colo. 228, 85 P. 1007 (1906).

Default may be entered for failing to give deposition. Judgment by default may be entered against a party who wilfully fails to appear in response to a proper notice to have his deposition taken under this rule. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Judgment by default is the penalty for failure to have desposition taken. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Before this penalty is imposed, there must be given an opportunity to show cause for nonappearance. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Contempt is not a penalty that goes along with default judgment. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Neither the Colorado Children's Code nor C.R.C.P. 107 authorizes default judgment as a sanction against a parent for failing to appear at a dependency and neglect adjudicatory hearing. People in Interest of K.J.B., 2014 COA 168, 342 P.3d 597.

It is necessary to assess damages. Upon default in an action where the taking of an account, or the proof of any fact, is necessary to enable the court to assess damages or give judgment, final judgment need not be rendered, and ordinarily is not, until the amount of damages is assessed in some appropriate manner. Melville v. Weybrew, 108 Colo. 520, 120 P.2d 189 (1941), cert. denied, 315 U.S. 811, 62 S. Ct. 795, 86 L. Ed. 1210, reh'g denied, 315 U.S. 830, 62 S. Ct. 913, 86 L. Ed. 1224 (1942).

A court is required under this rule to take evidence and to determine the amount of damages. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

Exemplary damages or execution against the body cannot be awarded in the absence of a specific finding, based upon evidence, that the special circumstances which warrant the extraordinary remedy are in fact present. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

IV. SETTING ASIDE DEFAULT.

Law reviews. For comment on Self v. Watt appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on Coerber v. Rath appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note. (1) Since section (c) of this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

(2) For specific grounds and time to vacate default judgments, see the annotations under C.R.C.P. 60.

Negligence of counsel generally constitutes "good cause shown" for setting aside a default under section (c). Trujillo v. Indus. Comm'n, 648 P.2d 1094 (Colo. App. 1982).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. Koin v. Mutual Benefit Health & Accident Ass'n, 96 Colo. 163, 41 P.2d 306 (1935); Mountain v. Stewart, 112 Colo. 302, 149 P.2d 176 (1944); Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959); Walker v. Assocs. Loan Co., 153 Colo. 261, 385

P.2d 421 (1963); Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); Gen. Aluminum Corp. v. District Court, 165 Colo. 445, 439 P.2d 340 (1968); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970); Snow v. District Court, 194 Colo. 335, 572 P.2d 475 (1977).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. Where that discretion is abused, an appellate court will set aside the trial court's order. Craig v. Rider, 651 P.2d 397 (Colo. 1982); Plaisted v. Colo. Springs Sch. Dist. #11, 702 P.2d 761 (Colo. App. 1985).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

Section (c) of this rule and C.R.C.P. 60 (b) leave the matter of setting aside default judgments to the discretion of the trial judge. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Same standards apply under section (c) of this rule and under C.R.C.P. 60(b). In considering either type of motion, the trial court should base its decision on (1) whether the neglect that resulted in the entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious defense; and (3) whether relief from the challenged order would be consistent with considerations of equity. Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

There is a presumption of regularity applicable to trial court ruling setting aside default. Credit Inv. & Loan Co. v. Guar. Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

The ruling on setting aside default will not be disturbed unless it appears that there has been an abuse of discretion. Koin v. Mutual Benefit Health & Accident Ass'n, 96 Colo. 163, 41 P.2d 306 (1935); Mountain v. Stewart, 112 Colo. 302, 149 P.2d 176 (1944); Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

The court must refrain from vacating a default judgment until after the opened judgment results in a new judgment on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

If a judgment results in favor of the defendant after a trial on the merits, then the original default judgment is vacated — the judgment and judgment lien are dissolved as though they never existed. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

When a judgment is opened the defendant is allowed to answer to the merits of the claim, but the original judgment and judgment lien remain in effect as security pending the resolution of the trial on the merits. Thus, if a judgment results in plaintiff's favor after the original judgment is opened for a trial on the merits, his judgment lien will remain in full force and effect as if the original default judgment had not been opened. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

To warrant reversal it must appear that there was an abuse of discretion. Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

An abuse of discretion in refusing to set aside a default judgment must be shown to warrant reversal. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Without a clear portrayal of an abuse of discretion, an appellate court will not reverse. Credit Inv. & Loan Co. v. Guar. Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

An appellate court has never hesitated to overrule a trial court where that discretion has been abused. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

The discretion of the court in determining an application to vacate a default is not a capricious or arbitrary discretion, but is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of justice. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956).

The discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A successor judge may vacate default judgment when the original judge would have had an adequate legal basis to do so. Sumler v. District Ct., City & County of Denver, 889 P. 2d 50 (Colo. 1995).

Where there is nothing to indicate that setting aside a default and ordering a trial on the merits would unwarrantedly prejudice plaintiffs, a trial court abuses its discretion in refusing to set aside a default judgment.

Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Denial of a motion to set aside entry of default was an abuse of discretion where the motion provided a good faith explanation for defendant's behavior, was filed less than three weeks after entry of default, alleged a potentially meritorious defense, and plaintiff conceded that no prejudice would result from setting the default aside. Singh v. Mortensun, 30 P.3d 853 (Colo. App. 2001).

A reason for refusing to set aside a default is defendants' delay in making their motion. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Where a defendant knows of the judgment against him and does not take prompt steps to vacate the same, but makes numerous efforts to satisfy or compromise such judgment, then these actions being contradictory and inconsistent, the refusal of the trial court to set aside the judgment is not an abuse of discretion. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Parties cannot be permitted to disregard the process of the court and after a default judgment is rendered against them come in at their convenience and upon the mere allegation of the existence of a meritorious defense have judgment rendered against them vacated. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959).

Where an application to vacate a default judgment is made promptly, a defense on the merits should be permitted. Drinkard v. Spencer, 72 Colo. 396, 211 P. 379 (1922); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, presents to the trial court a petition to have the judgment set aside and for leave to file an answer — it appearing from the petition that he was not a party to the original proceeding, that he would be prejudiced by the judgment if it were permitted to stand, and that he has a good defense to the action — the petition should be granted, since a denial constitutes prejudicial, reversible error. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Brown v. Deerksen, 163 Colo. 194, 429 P.2d 302 (1967).

There must be evidence and justification for any delay. Where a trial court, after a lapse of many years from entry of judgment, sets it aside upon the application of the defendant without evidence or showing of justification for delay in moving to vacate such judgment, the plaintiff is entitled to have original judgment reinstated. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

The burden is upon the defendant to establish the grounds on which he relies to set aside a default entered against him by clear and convincing proof. Browning v. Potter, 129 Colo. 478, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

A motion to set aside a default judgment is a simple procedural motion taking place within the context of a substantive civil action; therefore, § 13-25-127, which governs the burden of proof for civil actions, is inapplicable to a motion to set aside a default judgment. Borer v. Lewis, 91 P.3d 375 (Colo. 2004).

In enacting § 13-25-127, the general assembly did not legislatively override the "clear and convincing" burden of proof that has been applied to proceedings to set aside default judgments. To decide otherwise would require the court to find § 13-25-127 unconstitutional as an impermissible infringement on the judiciary's authority to promulgate procedural rules. Borer v. Lewis, 91 P.3d 375 (Colo. 2004).

One must show facts that would produce a different judgment. One seeking to have a default judgment set aside must set forth facts which, if established, would produce a judgment other than the one entered. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

The court should vacate judgment. Where a default judgment has been entered and it is made to appear that in justice to a defendant he is entitled to be heard, and that the tendered defense, if established, would defeat the action, the trial court should vacate the judgment. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

Trial court erred in denying defendants' motion to vacate default judgment where defendants received no actual or constructive notice of court order authorizing plaintiffs to amend their complaint, where plaintiffs failed to serve defendants with a copy of the amended complaint after the court's order was issued, and where the allegations in the amended complaint against defendants were the same as in the original complaint and were specifically denied in defendant's answer to the original complaint. Roberts v. Novinger, 815 P.2d 996 (Colo. App. 1991).

Where a default judgment is set aside on jurisdictional grounds, it also must be vacated. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Lack of notice of a default judgment supporting a judgment lien is not a jurisdictional defect that renders the judgment and lien void. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000).

Excusable neglect and meritorious defense ground for setting aside default judgment. The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of ''excusable neglect'' supported by a specific statement of meritorious defense. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

A meritorious defense must be set forth. It is necessary in a proceeding to set aside a default judgment for the moving party to set forth a meritorious defense. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

There is a failure to show good cause without meritorious defense. One against whom a default judgment has been entered must allege a meritorious defense to the plaintiff's claim, otherwise there is a failure to show good cause. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

A meritorious defense does not have to be proven in the hearing to set aside the judgment, for what is necessary is that the defendant allege facts which, if proven true, would alter the judgment entered. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

A motion to set aside a default judgment should be considered in a manner calculated to promote substantial justice. Burlington Ditch, Reservoir & Land Co. v. Fort Morgan Reservoir & Irrigation Co., 59 Colo. 571, 151 P. 432 (1915); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963); F. & S. Constr. Co. v. Christlieb, 166 Colo. 67, 441 P.2d 656 (1968); Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where it is clear from the absence of evidence in the record that it is impossible to determine if substantial justice has been done, then, in the interest of substantial justice, the plaintiff should be required to prove his claim and the defendant should be given an opportunity to present his defense. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Default must be first set aside in proper proceeding. Where a defendant has made default, and judgment has been entered against him, he is not entitled to file pleadings contesting the allegations of plaintiff until his default and the judgment entered thereon have been set aside in a proper proceeding; such a defendant has no standing in court to move for a new trial, either for cause or as a matter of right. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Where defendants' motions do not attack the summons, but are directed instead to the default judgment, praying for an order authorizing the defendants to plead to the complaint, then, by this action, the defendants subject themselves to the jurisdiction of the court. Barra v. People, 18 Colo. App. 16, 69 P. 1074 (1902); Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913); Isham v. People, 82 Colo. 550, 262 P. 89 (1927); Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

A party who seeks to set aside a default judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

Court acquires jurisdiction, but only to plead or answer, not to validate void default judgment. Since a general appearance has no retroactive force, then where a general appearance is made by defendants in seeking to set aside the default the court therefore acquires jurisdiction over them, but only to grant time to plead or answer to the complaint, and so the general appearance does not validate a void default judgment. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957); Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Presumption of judgment's validity also includes required notices. The presumption of validity of a judgment entered by a court, which admittedly had jurisdiction of the parties and of the subject matter of the action, carries with it the presumption that notices required by this rule to be given in connection with the entry of judgment by default were complied with. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Lack of notice is a serious procedural error that can, in some instances, violate the due process rights of the defaulting party and, therefore, require vacating the default judgment. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000).

The burden is upon the party seeking to vacate a judgment to overcome the presumption of validity. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Since the motion to set aside arose after the judgment was entered, the burden to prove a lack of jurisdiction because of inadequate service of process is on the party challenging the service of process and the resulting lack of jurisdiction. White Front Auto Sales, Inc. v. Mygatt, 810 P.2d 234 (Colo. App. 1990).

Overcoming the presumption of validity is not accomplished by presenting a record which fails to show that notice was served. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Where the notice of trial is served upon an attorney who states that he intends to withdraw from the case, a trial court abuses its discretion in refusing to set aside a default judgment. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. Stiger v. District Court, 188 Colo. 403, 535 P.2d 508 (1975).

Verified answer in sufficient detail to be specifically informative is considered generally to amount to a meritorious defense for purposes of setting aside a default judgment. Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence causing default judgment excusable where attorney's gross negligence could not be imputed to his client. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

When no appeal was taken from an order denying a motion to set aside default judgment, all matters in controversy were finally adjudicated and a second motion to set aside the default judgment was a nullity and should be stricken. Federal Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on motion to set aside a default judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with equitable considerations, such as the protection of action taken in reliance on the order and the prevention of prejudice by reason of evidence lost or impaired by the passage of time. A consideration of all these factors together in a single hearing would provide the most complete information upon which to base the exercise of informed discretion and would be the preferable procedure in most cases. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

The preferred procedure is to consider all three criteria in single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Motion to set aside default judgment under section (c) of this rule on basis of failure to prosecute and motion to vacate judgment under C.R.C.P. 60(b) on basis of excusable neglect are sufficiently analogous to justify application of same standards to either motion; thus, same three criteria which are legal standard are applicable in both motions. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Party must justify default before asserting meritorious defense. A party in default is not entitled to have an adverse judgment set aside simply because of a weakness in the other party's judgment; rather, the defaulting party must first stand upon the strength of his own justification for being in default and is not entitled to assert a meritorious defense until he successfully does so. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's negligence is not "excusable". Negligence on the part of the one of the parties or its employees cannot be deemed ''excusable neglect''. Wagner Equip. Co. v. Mountain States Mineral Enters., Inc., 669 P.2d 625 (Colo. App. 1983).

A stockbroker's failure to file a timely answer was due to his own carelessness and does not constitute ''good cause shown'' or ''excusable neglect''. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to C.R.C.P. 60(b)(1) and (b)(3). Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Excusable neglect means more than ordinary negligence or carelessness; it occurs where there is a failure to take proper steps at the proper time as a result of some unavoidable occurrence. Plaisted v. Colo. Springs Sch. Dist. #11, 702 P.2d 761 (Colo. App. 1985).

Lack of prejudice to the plaintiff, absent other factors indicating good cause, is insufficient to show an abuse of discretion in deny-

ing a motion to set aside a default. Snow v. District Court, 194 Colo. 335, 572 P.2d 475 (1977); Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Even though motion of defaulting party contains allegations which, if proven, would constitute a meritorious defense, the trial court is not required to set aside the default judgment when it affords that party a full and fair opportunity to present and argue the alleged meritorious defense and concludes that the defense is not proven. Michael Shinn & Assocs., Inc. v. Dertina, 697 P.2d 422 (Colo. App. 1985).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Rule as basis for jurisdiction. Kopel v. Davie, 163 Colo. 57, 428 P.2d 712 (1967).

V. OFFICER OR AGENCY OF STATE.

The department of corrections' mere failure to respond timely is insufficient grounds for a default judgment. Since the department is a state agency, the plaintiff must establish his claims with sufficient evidence before a default judgment may enter. Reeves v. Colo. Dept. of Corr., 155 P.3d 648 (Colo. App. 2007).

Section (e) does not require an adversary hearing after notice to the state. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

Evidence held sufficiently "satisfactory to the court" to meet the requirements of section (e). Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

VI. JUDGMENT ON SUBSTITUTED SERVICE.

A plaintiff fails to follow this rule where he does not apply for the judgment by written motion setting forth with particularity the grounds in support of the motion and the relief sought as required by C.R.C.P. 7(b). Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where a plaintiff contends that an affidavit, filed when an oral motion for default is made, constitutes the required proof, such is not the case when the affidavit is basically a form statement and has only one phrase relating to the plaintiff's claim for relief, for even if otherwise acceptable, such an affidavit offers nothing as to the nature of the grounds of proof of plaintiff's claim. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

A default judgment cannot be entered in plaintiff's favor without plaintiff making some showing of the right to such. Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978).

Rule 56. Summary Judgment and Rulings on Questions of Law

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 21 days from the commencement of the action or after filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the claiming party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, move with or without supporting affidavits for a summary judgment in the defending party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. Unless otherwise ordered by the court, any motion for summary judgment shall be filed no later than 91 days (13 weeks) prior to trial. A cross-motion for summary judgment shall be filed no later than 70 days (10 weeks) prior to trial. The motion may be determined without oral argument. The opposing party may file and serve opposing affidavits within the time allowed for the responsive brief, unless the court orders some lesser or greater time. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It

shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If there is no response, summary judgment, if appropriate, shall be entered.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Determination of a Question of Law. At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

Source: (a), (b), (c), (f), and (g) amended July 9, 1992, effective October 1, 1992; (a) and (c) amended and effective June 28, 2007; (a) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For depositions and discovery, see C.R.C.P. 26 to 37; for civil contempt, see C.R.C.P. 107.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945). For article, ''Use of Summary Judgments and the Discovery Procedure'', see 24 Dicta 193 (1947). For article, ''Pre-Trial in Colorado in Words and at Work'', see 27 Dicta 157 (1950). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For ar-

ticle, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For note, ''Comments on Last Clear Chance — Procedure and Substance'', see 32 Dicta 275 (1955). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''One Year Review of Contracts'', see 39 Dicta 161 (1962). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''One Year Review of Torts'', see 40 Den. L. Ctr. J. 160 (1963). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964). For article, ''The One Percent Solution'', see 11 Colo. Law. 86 (1982). For article, ''A Litigator's Guide to Summary Judgments'', see 14 Colo. Law. 216 (1985). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with conversion of a motion to dismiss into a motion for summary judgment, see 62 Den. U. L. Rev. 220 (1985). For comment, ''Anderson v. Liberty Lobby, Inc.: Federal Rules Decision or First Amendment Case?'', see 59 U. Colo. L. Rev. 933 (1988). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

The obvious purpose to be served by this rule is to further the prompt administration of justice, expedite litigation by avoiding needless trials, and enable one speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purpose of delay. Blaine v. Yockey, 117 Colo. 29, 184 P.2d 1015 (1947).

The summary judgment rule is designed to pierce through the allegations of fact in the pleadings. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

This rule is designed to avoid an unnecessary trial. This rule allowing summary judgment is designed to pierce through the allegations of fact in pleadings and to avoid an unnecessary trial where the matter submitted in support of a motion for summary judgment shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law under section (c). Terrell v. Walter E. Heller Co., 165 Colo. 463, 439 P.2d 989 (1968); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991).

The function of this rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

This rule provides a method whereby it is possible to determine whether a genuine cause of action or defense thereto exists and whether there is a genuine issue of fact warranting the submission of the case to a jury. Blaine v. Yockey, 117 Colo. 29, 184 P.2d 1015 (1947).

Violation of section (c) of this rule, providing the opportunity for a response from the opposing party, found to be harmless error under the circumstances. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

Issue of sovereign immunity properly decided under C.R.C.P. 12(b)(1) rather than this rule since sovereign immunity issue is one of subject matter jurisdiction. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995).

Judgments by confession on notes are not affected. Cross v. Moffat, 11 Colo. 210, 17 P. 771 (1888).

Judgment of dismissal for failure to state claim upon which relief can be granted may be entered upon motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

C.R.C.P. 56 is applicable in a termination of parental rights proceeding under the Children's Code. Because termination of the parent-child relationship is a drastic remedy that affects a parent's liberty interest, a court deciding a summary judgment motion seeking to terminate parental rights must apply the standard of clear and convincing evidence to the applicable statutory criteria. People in Interest of A.E., 914 P.2d 534 (Colo. App. 1996).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings, or a partial summary judgment. As such, no findings of fact and conclusions of law were required. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

This rule applies to dependency and neglect. No genuine issue of material fact existed on date of adjudication of dependency and neglect case and, therefore, trial court properly adjudicated child dependent and neglected pursuant to summary judgment rule. In Interest of S.B., 742 P.2d 935 (Colo. App. 1987), cert. denied, 754 P.2d 1177 (Colo. 1988).

This rule applies to eminent domain proceedings. Allowing summary judgment in appropriate eminent domain cases does not abridge a landowner's constitutional right to demand a jury. City of Steamboat Springs v. Johnson, 252 P.3d 1142 (Colo. App. 2010).

Party wishing to file a motion for summary judgment in dependency and neglect proceeding cannot comply with both § 19-3-505 (3) and section (c) of this rule. Pursuant to C.R.C.P. 81, the timing of § 19-3-505 (3) con-

trols. People ex rel. A.C., 170 P.3d 844 (Colo. App. 2007).

Under the doctrine of res judicata, a final judgment on the merits is considered conclusive in any subsequent litigation involving either the same parties or those in privity with them, the same subject matter, and same claims for relief. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

The preclusive effect of the doctrine of res judicata applies not only to the claims and issues that were actually decided, but also to any claims or issues that could have been raised in the first proceeding. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

The function of the doctrines of res judicata and collateral estoppel is to avoid relitigation of the same claims or issues because of the cost imposed upon the parties by multiple lawsuits, the burden upon the judicial system, and need for finality in the judicial process; however, the requirement that the same parties or their privies must have appeared in the first proceeding is intended to avoid penalizing one who did not appear. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

Res judicata does not apply to bar state action where state and federal claims were based on different claims for relief, and state claims were not truly ''available to the parties'' in the prior federal action because state claims could only have been asserted in federal court as pendent to federal claims for relief, and federal claim was dismissed on motion for summary judgment, requiring dismissal of pendent state claims. City & County of Denver v. Block 173, 814 P.2d 824 (Colo. 1991).

Claim to quiet title in certain usufructuary rights was absolutely barred by the doctrine of res judicata where there was a prior judgment involving the same subject matter and cause of action and the plaintiffs were in privity with the parties to the previous action. Rael v. Taylor, 832 P.2d 1011 (Colo. App. 1991).

Res judicata did not apply where corporate plaintiff seeking to enforce agreement in second case was not identical to the individual shareholder who relied upon the agreement in the first case and was not in privity with shareholder since the corporation was asserting its own claim and there was nothing in the record to suggest that the corporation's claim was adjudicated in the first case. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

Collateral estoppel. Findings of federal district court insufficient to support summary judgment on state claims where identity of issues necessary to invoke collateral estoppel was absent between issues actually and necessarily decided by the federal district court and those necessary to preclude summary judgment on landowner's ''bad faith'' claims in state court. City & County of Denver v. Block 173, 814 P.2d 824 (Colo. 1991).

Water court's ruling granting summary judgment to defendants on grounds of collateral estoppel was error because the issue raised in the current litigation was neither actually determined in prior litigation between the parties nor necessarily implied in the final judgment issued in prior litigation between the parties. Reynolds v. Cotten, 2012 CO 27, 274 P.3d 540.

Collateral estoppel and res judicata may apply to give preclusive effect to an arbitration award. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

Collateral estoppel or ''issue preclusion'' should be argued as part of a motion for summary judgment under this rule, not a motion to dismiss for failure to state a claim under C.R.C.P. 12(b). Bristol Bay Prod., LLC v. Lampack, 2013 CO 60, 312 P.3d 1155.

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Applied in Eklund v. Safeco Ins. Co. of Am., 41 Colo. App. 96, 579 P.2d 1185 (1978); Posey v. Intermountain Rural Elec. Ass'n, 41 Colo. App. 7, 583 P.2d 303 (1978); Martin v. County of Weld, 43 Colo. App. 49, 598 P.2d 532 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 221, 599 P.2d 950 (1979); Nelson v. Strode Motors, Inc., 198 Colo. 366, 600 P.2d 74 (1979); Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980); Ruff v. Kezer, 199 Colo. 182, 606 P.2d 441 (1980); First Hyland Greens Ass'n v. Griffith, 618 P.2d 745 (Colo. App. 1980); Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981); People in Interest of K.A.J., 635 P.2d 921 (Colo. App. 1981); In re George, 650 P.2d 1353 (Colo. App. 1982); Wheeler v. County of Eagle ex rel. County Comm'rs, 666 P.2d 559 (Colo. 1983); Knoche v. Morgan, 664 P.2d 258 (Colo. App. 1983); DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984); Am. West Motel Brokers, Inc. v. Wu, 697 P.2d 34 (Colo. 1985); Frontier Exploration v. Blocker Exploration, 709 P.2d 39 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 740 P.2d 983 (Colo. 1987); Churchey v. Adolph Coors Co., 725 P.2d 38 (Colo. App. 1986), aff'd in part and rev'd in part on other grounds, 759 P.2d 1336 (Colo. 1988); Cooper v. Peoples Bank & Trust Co., 725 P.2d 78 (Colo. App. 1986); Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986); Giralt v. Vail Vill. Inn Assocs., 759 P.2d 801 (Colo. App. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989); Jardel Enters., Inc. v. Triconsultants, Inc., 770

P.2d 1301 (Colo. App. 1988); DeRubis v. Broadmoor Hotel, Inc., 772 P.2d 681 (Colo. App. 1989); Kane v. Town of Estes Park, 786 P.2d 411 (Colo. 1990); AF Prop. v. Dept. of Rev., 852 P.2d 1267 (Colo. App. 1992); Dickman v. Jackalope, Inc., 870 P.2d 1261 (Colo. App. 1994); Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996); Bankr. Estate of Morris v. COPIC Ins. Co., 192 P.3d 519 (Colo. App. 2008); People v. Wunder, 2016 COA 46, 371 P.3d 785.

II. FOR CLAIMANT.

Law reviews. For article, ''Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment'', see 40 Den. L. Ctr. J. 192 (1963).

Summary judgment is proper where adverse party fail to respond by affidavit or otherwise to moving party's affidavit. GTM Invs. v. Depot, Inc., 694 P.2d 379 (Colo. App. 1984).

Applied in People ex rel. Flanders v. Neary, 113 Colo. 12, 154 P.2d 48 (1944).

III. FOR DEFENDING PARTY.

Section (b) of this rule, does not require that a defendant plead before he files a motion for summary judgment. Welp v. Crews, 149 Colo. 109, 368 P.2d 426 (1962).

Since this rule authorizes a motion for summary judgment by the defendant "at any time" and since the theory of the motion is that the defending party is entitled to judgment as a matter of law, there is normally no necessity to serve an answer, whose function is to develop issues, until the motion for summary judgment is disposed of. Welp v. Crews, 149 Colo. 109, 368 P.2d 426 (1962).

This rule authorizes a defending party to file a motion for summary judgment prior to answering the complaint. Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Where a defendant files only a motion for summary judgment, he neither files an answer nor does he ask the trial court for leave to plead a defense, and, if no request is made for an evidentiary hearing, he cannot complain that the trial court denied him the opportunity of presenting a defense when he in fact made no effort to present one. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

A motion to dismiss based on an affirmative defense should be converted to a motion for summary judgment if the court considers matters outside the complaint when ruling on the motion. If the bare allegations of the complaint reveal that the affirmative defense applies, the court need not convert the motion. Prospect Dev. v. Holland & Knight, 2018 COA 107, 433 P.3d 146.

Where a defendant raises several defenses in the trial court which are not ruled upon there, when the trial court grants a motion for summary judgment, they cannot be considered as sources of error on appeal of the granted motion. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

By arguing the merits of defendant's motions for summary judgment without raising an objection in the trial court as to the manner in which an affirmative defense thereby is asserted, plaintiffs effectively waive any objection they may have to this procedure. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

A motion for summary judgment goes to merits of action and is inconsistent with special appearance for motion to quash service of process for lack of in personam jurisdiction. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

A case is properly determined on a motion for summary judgment where the pleadings, the affidavits, and the deposition filed in the matter show that no genuine issue of material fact exists, the court properly determines as a matter of law that a statute bars plaintiff's action, and defendant is entitled to judgment. Nicks v. Electron Corp., 29 Colo. App. 114, 478 P.2d 683 (1970); Phelps v. Gates, 40 Colo. App. 504, 580 P.2d 1268 (1978).

When a defendant's motion for summary judgment becomes untenable in view of his conduct in the matter at issue, a trial court commits error in granting the motion. W. R. Hall Transp. & Storage Co. v. Gunnison Mining Co., 154 Colo. 72, 388 P.2d 768 (1964).

Summary judgment may be based on expiration of statute of limitations. Maes v. Tuttolimondo, 31 Colo. App. 248, 502 P.2d 427 (1972).

Plaintiff's failure to allege facts will support summary judgment. The absence of specific factual allegations will support a summary judgment for the defendant on the issue that plaintiff's claim was barred by the statute of limitations, even though plaintiff contends that there are issues of material fact because there might possibly be facts which would toll the statute of limitations and avoid the plea, if he alleges no such facts and raises no such issues. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

Section (b) of this rule does not require affidavits in support of the motion for summary judgment, and judgment can be rendered on the pleadings where there is no dispute as to the facts. Torbit v. Griffith, 37 Colo. App. 460, 550 P.2d 350 (1976).

The defense of res judicata may, in a proper case, be raised and disposed of by a summary judgment proceeding. Kaminsky v.

Kaminsky, 145 Colo. 492, 359 P.2d 675, 95 A.L.R.2d 643 (1961); Brennan v. City & County of Denver, 156 Colo. 215, 397 P.2d 876 (1964).

To sustain the defense of res judicata, facts in support of it must be affirmatively shown either by the evidence adduced at the trial or by way of uncontroverted facts properly presented either in a motion for summary judgment or by a motion to dismiss under C.R.C.P. 12(b) where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under this rule 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963).

The fact that plaintiffs' Jefferson county action for rescission of their partnership agreement with defendants was pending resolution on appeal did not mean that it was not a final judgment for purposes of res judicata in their Adams county action for breach of contract. Miller v. Lunnon, 703 P.2d 640 (Colo. App. 1985), overruled in Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005) (overruling Miller v. Lunnon, 703 P.2d 640 (Colo. App. 1985)).

C.R.C.P. 12(b), provides that, if, on a motion asserting the defense to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in this rule. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

A judgment of dismissal for failure to state a claim upon which relief can be granted may be entered upon a motion for summary judgment. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950); Enger v. Walker Field, Colo. Pub. Airport Auth., 181 Colo. 253, 508 P.2d 1245 (1973).

It is wholly immaterial whether the trial court considers the judgment of dismissal proper under the provisions of C.R.C.P. 12 or this rule, if the defendant was entitled to judgment under either rule. Haigler v. Ingle, 119 Colo. 145, 200 P.2d 913 (1948).

The judgment must specifically disclose the inadequacy of the complaint. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

A trial court does not err in granting a motion for summary judgment on the ground that the claim made is a compulsory counterclaim which should have been raised in an earlier case and is therefore barred. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

Where no material issue of fact was before the trial court in regard to a specific determination, summary judgment in favor of the defendant was proper. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Because the department of health care policy and financing's claim was not time barred and a corrected notice was sent to the estate in time to allow the affected parties a full opportunity to be heard, the estate was not entitled to dismissal of the department's claim on summary judgment. In re Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004).

Applied in People ex rel. Knott v. City of Montrose, 109 Colo. 487, 126 P.2d 1040 (1942); Klancher v. Anderson, 113 Colo. 478, 158 P.2d 923 (1945); Mitchell v. Town of Eaton, 176 Colo. 473, 491 P.2d 587 (1971); Dominguez v. Babcock, 696 P.2d 338 (Colo. App. 1984), aff'd, 727 P.2d 362 (Colo. 1986); Cain v. Guzman, 761 P.2d 295 (Colo. App. 1988).

IV. MOTION AND PROCEEDINGS.

A. In General.

Law reviews. For comment on Norton v. Dartmouth Skis appearing below, see 34 Rocky Mt. L. Rev. 259 (1962). For note, "The Use of Summary Judgment in Colorado", see 34 Rocky Mt. L. Rev. 490 (1962).

Provisions inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under C.R.C.P. 121 § 1-15, concerning confession of motions are inapplicable to motions, for summary judgment under this rule. Seal v. Hart, 755 P.2d 462 (Colo. App. 1988).

When the record is not adequate to permit a conclusion that no material fact dispute exists, the entry of summary judgment is inappropriate. Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989).

For conflict between this rule and second judicial district rule 24, which provides that in filing a motion for summary judgment the moving party shall file a memorandum brief in support of the motion and that the adverse party may serve an answer brief within 10 days after service of the movant's brief, but failure to so do is not to be considered as a confession of the motion and which allows for oral argument if a request therefor is endorsed upon the briefs, see Loup-Miller Constr. Co. v. City & County of Denver, 38 Colo. App. 405, 560 P.2d 480 (1976).

Failure to give an opportunity to respond to authority cited in support of or in opposi-

tion to a motion is harmless unless prejudice is shown. Benson v. Colo. Comp. Ins. Auth., 870 P.2d 624 (Colo. App. 1994).

Ten-day period is essential. It is essential that in order to avoid surprise and to allow for a full and considered response, the party against whom the motion for summary judgment is directed be allowed the full period in which to serve his affidavits. Jardon v. Meadowbrook-Fairview Metro. Dist., 190 Colo. 528, 549 P.2d 762 (1976) (decided prior to the 1983 amendment).

The 10-day provision in section (c) was inserted in the rule to avoid surprise and to allow for a full and considered response. Cherry v. A-P-A Sports, Inc., 662 P.2d 200 (Colo. App. 1983).

On a motion for summary judgment where no factual issue is present, no motion for new trial is necessary. Brooks v. Zabka, 168 Colo. 265, 450 P.2d 653 (1969).

A motion to reconsider a summary judgment order is properly characterized as a motion for new trial under C.R.C.P. 59(d)(4). Zolman v. Pinnacol Assurance, 261 P.3d 490 (Colo. App. 2011).

A motion under C.R.C.P. 59 is not a prerequisite to appeal from a summary judgment. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Nonmovant is entitled to notice of issue regarding which evidence must be introduced to avoid granting of summary judgment; lacking such notice, summary judgment cannot be granted. Wallman v. Kelley, 976 P.2d 330 (Colo. App. 1998); Antelope Co. v. Mobil Rocky Mountain, Inc., 51 P.3d 995 (Colo. App. 2001).

B. Purpose and Effect.

The purpose of a motion for summary judgment is to save litigants the expense and time connected with a trial when, as a matter of law based upon admitted facts, one of the parties cannot prevail. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Wright v. Bayly Corp., 41 Colo. App. 313, 587 P.2d 799 (1978).

This rule was designed to enable parties and courts to expedite litigation by avoiding needless trials. In re Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976); DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984).

The intent and purpose of this rule is that, where the facts are undisputed or so certain as not to be subject to dispute, a court is in position to determine the issue strictly as a matter of law. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

Where there is no genuine issue as to any material fact, the issues are properly resolved as matters of law. Enger v. Walker Field, Colo. Pub. Airport Auth., 181 Colo. 253, 508 P.2d 1245 (1973).

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. Peterson v. Halsted, 829 P.2d 373 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

No matter how enticing in an area of congested dockets is a device to dispose of cases without the delay and expense of traditional trials with their sometime cumbersome and time consuming characteristics, summary judgment was not devised for, and must not be used as, a substitute for trial. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986).

A summary judgment denies a litigant the right to trial of his case and should therefore not be granted where there appears any controversy concerning material facts. McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (1971); McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984); Smith v. Cutty's Inc., 742 P.2d 347 (Colo. App. 1987).

The summary judgment procedure is not intended to deprive a litigant of the right to trial on the merits of the case. Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948).

When defendants file their motion for summary judgment they admit thereby all facts properly pleaded by plaintiff, as they appeared in the record at that time, but such admissions imputed by law are confined to consideration of such motion only and within the limits of movants' theory of the law of the case. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

C. Evidence and Burden of Proof.

In considering motion for summary judgment, trial court must accept plaintiffs'

pleadings as true unless the depositions and admissions on file, together with the affidavits, clearly disclose there is no genuine issue as to any material fact, with any doubts being resolved in plaintiffs' favor. Norton v. Leadville Corp., 43 Colo. App. 527, 610 P.2d 1348 (1979).

On the hearing of a motion for summary judgment the material allegations of the nonmoving party's pleadings must be accepted as true, even in the face of denial by the moving party's pleadings. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

The material allegations of a complaint must be accepted as true even in the face of denials in the answer. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947); Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948); Carter v. Thompkins, 133 Colo. 279, 294 P.2d 265 (1956).

There shall be no assessment of credibility of proposed evidence. Neither the trial court nor an appellate court may attempt any assessment of the credibility of proposed evidence in conjunction with a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

This rule is properly to be exercised only where the facts are clear and undisputed, leaving as the sole duty of the court the determination of the correct legal principles applicable thereto. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

Summary judgment is appropriate only in the clearest of cases, where no doubt exists concerning the facts. Roderick v. City of Colo. Springs, 193 Colo. 104, 563 P.2d 3 (1977).

Summary judgment is appropriate where the admitted facts demonstrate that a party cannot prevail. Kuehn v. Kuehn, 642 P.2d 524 (Colo. App. 1981).

Summary judgment is proper only when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Backus v. Apishapa Land & Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); W. Am. Ins. Co. v. Baumgartner, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991); Kenna v. Huber, 179 P.3d 189 (Colo. App. 2007), rev'd on other grounds, 205 P.3d 1158 (Colo. 2009); Suss Pontiac-GMC, Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

Summary judgment is appropriate in cases where a public official or public figure seeks to recover damages resulting from a defamatory statement. DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980).

Summary judgment is appropriate only when there is no genuine issue as to any material fact. Norton v. Leadville Corp., 43 Colo. App. 527, 610 P.2d 1348 (1979).

Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact. All doubts as to the existence of such an issue must be resolved against the moving party. Ridgeway v. Kiowa Sch. Dist. C-2, 794 P. 2d 1020 (Colo. App. 1989); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Christoph v. Colo. Comm. Corp., 946 P.2d 519 (Colo. App. 1997); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998).

Absence of genuine issue of fact must be apparent. To authorize the granting of summary judgment the complete absence of any genuine issue of fact must be apparent. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Koon v. Steffes, 124 Colo. 531, 239 P.2d 310 (1951); Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Travers v. Rainey, 888 P.2d 372 (Colo. App. 1994); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000); Vigil v. Franklin, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005).

Summary judgment is proper when the nonmoving party points to unsworn expert reports, C.R.C.P. 26 disclosures, allegations in the pleadings, and arguments of counsel made in its prior motion for summary judgment because these items lack verification and are not competent to dispel the argument that there were no facts to support the allegations. In contrast, the moving party supported their motion with sworn testimony of experts and sworn testimony of the nonmoving party's C.R.C.P. 30(b)(6) designee that had no evidence to support the nonmoving party's claims. D.R.

Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

"Clear and convincing" standard of proof applies in determining a motion for summary judgment in a libel action brought by a public official or public figure. Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988).

Where the undisputed evidence permits off-setting inferences, the party against whom a motion for summary judgment is made is entitled to all favorable inferences which may be reasonably drawn from the evidence. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

A motion for summary judgment should be denied if under the evidence reasonable men might reach different conclusions. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

A summary judgment should never be entered, save in those cases where the movant is entitled to such beyond all doubt, and the facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or debate; they must show affirmatively that plaintiff would not be entitled to recover under any and all circumstances. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1946); Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

In assessing a summary judgment motion a court must view all facts in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party. Vigil v. Franklin, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004).

Summary judgment is proper when movant's direct, positive, and uncontradicted evidence is opposed only by an unsupported contention that a contrary inference from the evidence might be possible. Iowa Nat'l Mut. Ins. Co. v. Boatright, 33 Colo. App. 124, 516 P.2d 439 (1973).

It is error for trial court to treat moving party's factual allegations as true when granting summary judgment. Han Ye Lee v. Colo. Times, Inc., 222 P.3d 957 (Colo. App. 2009).

Determination of propriety of summary judgment. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2000); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005); Suss Pontiac-GMC, Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

Summary judgment was proper when deeds in question conveyed easements of specified width and set forth legal descriptions of their exact locations. Trial court properly refused to consider extraneous circumstances to vary the explicit terms. Pickens v. Kemper, 847 P.2d 648 (Colo. App. 1993).

Ultimate burden of persuasion in connection with motion for summary judgment always rests on moving party. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Kelly v. Central Bank & Trust Co., 794 P.2d 1037 (Colo. App. 1989); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Boyett v. Smith, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).

The party moving for a summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact in order to prevail. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); Murphy v. Dairyland Ins. Co., 747 P.2d 691 (Colo. App. 1987); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Moving party has initial burden of producing and identifying those portions of record and affidavits that demonstrate the absence of any genuine issue of material fact. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Boyett v. Smith, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); Johnston v. Cigna Corp., 916 P.2d 643 (Colo. App. 1996); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997).

Party moving for summary judgment may satisfy initial burden of production by demonstrating that there is absence of evidence in record to support nonmoving party's case, where party moves for summary judgment on issue on which he would not bear ultimate bur-

den of persuasion at trial. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

Absent any significant probative evidence to defeat a properly supported motion for summary judgment, discrediting testimony is normally not sufficient to defeat the motion. Kelly v. Central Bank & Trust Co., 794 P.2d 1037 (Colo. App. 1989).

All doubts thereon must be resolved against the moving party. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Koon v. Steffes, 124 Colo. 531, 239 P.2d 310 (1951); Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98, 36 A.L.R.2d 874 (1952); Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Roderick v. City of Colo. Springs, 193 Colo. 104, 563 P.2d 3 (1977); Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982); Tapley v. Golden Big O Tires, 676 P.2d 676 (Colo. 1983); Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986); Banyai v. Arruda, 799 P.2d 441 (Colo. App. 1990); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

In determining whether summary judgment is proper, the trial court must resolve all doubts as to whether an issue of fact exists against the moving party. Jones v. Dressel, 623 P.2d 370 (Colo. 1981); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991); Johnston v. Cigna Corp., 916 P.2d 643 (Colo. App. 1996); AviComm, Inc. v. Colo. Pub. Utils. Comm'n, 955 P.2d 1023 (Colo. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999).

Party against whom a motion is made is entitled to all favorable inferences which may reasonably be drawn from the evidence. Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); AviComm, Inc. v. Colo. Pub. Utils. Comm'n, 955 P.2d 1023 (Colo. 1998); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999).

It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. Although the party resisting summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts presented, the moving party's request must be granted where the facts are undisputed and the opposing party cannot prevail as a matter of law. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Once the moving party affirmatively shows specific facts probative of its right to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there is a genuine issue for trial. Durnford v. City of Thornton, 29 Colo. App. 349, 483 P.2d 977 (1971); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981); Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

Once the movant shows that genuine issues are absent, the burden shifts, and unless the opposing party demonstrates true factual controversy, summary judgment is proper. Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982); Pearson v. Sublette, 730 P. 2d 909 (Colo. App. 1986); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

Once party moving for summary judgment has met initial burden of production, burden shifts to nonmoving party to establish that there is triable issue of fact. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Burden is on opposing party. Once a movant makes a convincing showing that genuine issues are lacking, this rule requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Webster v. Mauz, 702 P.2d 297 (Colo. App. 1985); Knittle v. Miller, 709 P.2d 32 (Colo. App. 1985); Closed Basin Landowners' Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

Only if the moving party meets his burden of establishing that no genuine issue of any material fact exists is a case appropriate for summary judgment, and if the moving party meets his burden, the opposing party may, but is not required to, submit an opposing affidavit; obviously, it is perilous for the opposing party to neither proffer an evidentiary explanation nor file a responsive affidavit. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978).

Burden showing that material issue of fact existed was met in an action for principal and interest due on promissory notes where record contained an affidavit of the borrower stating

that the bank made representations that the proceeds from second loan made to the borrower would be used to repay the initial loan made to such borrower. Federal Deposit Ins. Corp. v. Cassidy, 779 P.2d 1382 (Colo. App. 1989).

In response to a motion for summary judgment, an adverse party must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial. Brown v. Teitelbaum, 831 P.2d 1081 (Colo. App. 1991); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

Sham affidavit doctrine permits a court under certain circumstances to disregard an affidavit submitted by a party in response to a summary judgment motion where that affidavit contradicts the party's previous sworn deposition testimony. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

The sham affidavit doctrine is based on the premise that, had prior deposition testimony been incorrect, the affiant should have corrected the deposition under C.R.C.P. 30(e) and, having not utilized that opportunity, should ordinarily not be allowed to later contradict that testimony simply to survive summary judgment. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

Contradictory affidavits should be considered in light of totality of the circumstances test. Affidavit that directly contradicts affiant's own earlier deposition testimony can be rejected as sham affidavit only if it fails to include an explanation for the contradiction that could be found credible by a reasonable jury. This determination cannot be limited to any set of factors, but must be considered in light of the totality of the circumstances, and such determination is a matter of law to be reviewed de novo. Andersen v. Lindenbaum, 160 P.3d 237 (Colo. 2007).

In determining whether an affidavit presents a sham issue of fact, the court should consider (1) whether the affiant was cross-examined during his or her earlier testimony, (2) whether the affiant had access to the pertinent evidence at the time of his or her earlier testimony or whether the affidavit was based on newly discovered evidence, and (3) whether the earlier testimony reflected confusion which the affidavit attempted to explain. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

Affidavit containing specific factual allegations of widespread practice of systematic denial without justification of worker's compensation claims raises a genuine issue of material fact as to whether the worker's due process rights have been violated. Walter v. City & County of Denver, 983 P.2d 88 (Colo. App. 1998).

Plaintiff's speculation that further discovery may uncover specific facts showing that there is a genuine issue for trial is insufficient. An affirmative showing of specific facts, uncontradicted by any counter affidavits, requires a trial court to conclude that no genuine issue of material fact exists. WRWC, LLC v. City of Arvada, 107 P.3d 1002 (Colo. App. 2004).

Summary judgment inappropriate when burden not met. While a party against whom a summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate. Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. App. 1986).

An affirmative showing of specific facts probative of right to judgment uncontradicted by any counter affidavits submitted leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. Terrell v. Walter E. Heller & Co., 165 Colo. 463, 439 P.2d 989 (1968); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991).

Where no counter affidavit is filed to indicate any genuine issue as to a material fact when the affidavit and depositions clearly disclose that plaintiff's complaint cannot be sustained, then as a matter of law a summary judgment is proper. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Reisig v. Resolution Trust Corp., 806 P.2d 397 (Colo. App. 1990).

Where plaintiff's counter affidavit filed does not touch the facts determinative of the issue of presence for the purpose of service and on this issue as framed by the pleading his reply to defendant's answer and affirmative defenses state the mere legal conclusion that the defendant is outside of the state and not subject to service, no facts are alleged, and summary judgment is proper. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

There is not any material issue of fact to be resolved, where the answer states that the motion to vacate the judgment or for a new trial has not been ruled upon, when subsequent to this statement, there is filed in support of the motion for summary judgment an attorney's affidavit to the effect that the motion had been ruled upon, to which is attached a copy of the order denying said motion, certified by the clerk of the court under the seal of the court to be a true copy of the order as it appears in the records of that court, although had defendant filed a counter affidavit there might remain a real issue. Carter v. Carter, 148 Colo. 495, 366 P.2d 586 (1961).

Failure of party opposing summary judgment to file responsive affidavit does not relieve moving party of burden to establish that summary judgment is appropriate. People v. Hernandez & Assocs., Inc., 736 P.2d 1238 (Colo. App. 1986).

Oral argument not necessary. Trial court did not err in resolving the question on the basis of submitted written arguments. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

To prevail on a summary judgment motion on the basis that the statute of limitations had run, the defendant must establish a lack of disputed facts as to when the plaintiff knew or should have known of the alleged fraud. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993).

D. When Motion may be Granted.

A summary judgment may be granted only where there is no genuine issue as to any material fact. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Lutz v. Miller, 144 Colo. 351, 356 P.2d 242 (1960); City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); Pritchard v. Temple, 168 Colo. 555, 452 P.2d 381 (1969); First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992); Harless v. Geyer, 849 P.2d 904 (Colo. App. 1992).

To warrant the granting of summary judgment, the situation must be such that no material factual issue remains in the case. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959); Huydts v. Dixon, 199 Colo. 260, 606 P.2d 1303 (1980); Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986); Crouse v. City of Colo. Springs, 766 P.2d 655 (Colo. 1988).

Generally, when presented with a summary judgment issue, a court must decline to enter such a judgment if there exists a genuine dispute over any material fact. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

A summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Morland v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Wright v. Bayly Corp., 41 Colo. App. 313, 587 P.2d 799 (1978); Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982); Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Closed Basin Landowners' Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987); Wayda v. Comet Intern. Corp., 738 P.2d 391 (Colo. App. 1987); Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (1989); Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367 (Colo. App. 1994); Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997); Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998); Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2000); Lewis v. Emil Clayton Plumbing Co., 25 P.3d 1254 (Colo. App. 2000).

Summary judgment is a drastic remedy and is only warranted upon a clear showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Bailey v. Clausen, 557 P.2d 1207 (Colo. 1976); Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594 (Colo. 1984); Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Greenwood Trust Co. v. Conley, 938 P.2d 1141 (Colo. 1997); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999); Waskel v. Guar. Nat'l Corp., 23 P.3d 1214 (Colo. App. 2000); Goodwin v. Thieman, 74 P.3d 526 (Colo. App. 2003).

Summary judgment is a drastic remedy and should be granted only where the evidential and legal prerequisites are clearly established. Gleason v. Guzman, 623 P.2d 378 (Colo. 1981).

Where a factual issue has been raised as to a material fact, the matter should not have been disposed of by summary judgment. Brodie v. Mastro, 638 P.2d 800 (Colo. App. 1981).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Trial court has discretion to enter summary judgment simultaneously with denying nonmovant's request for discovery. Section (f) neither requires nor prohibits collapsing the rulings; therefore, the trial court has discretion. The ruling may be reviewed under the abuse of discretion standard. Bailey v. Airgas-Intermtn., Inc., 250 P.3d 746 (Colo. App. 2010).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance

policy exclusions, summary judgment is appropriate. Nikolai v. Farmers Alliance Mut. Ins., 830 P.2d 1070 (Colo. App. 1991).

Where the proceedings have indicated that a genuine issue exists, the supreme court has consistently rejected appealing shortcuts, even though it is likely that on a trial the trier will resolve the disputed issues as one of fact in the same manner as when thought to have been one of law alone, and the supreme court just as consistently rejected any notions that pretense or apparent formal controversy can thwart applications of this rule or hamstring the court in determining whether it is a proper case for it. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Moving party must be entitled to summary judgment as matter of law. A party is entitled to a summary judgment when there are pleadings, affidavits, depositions, or admissions on file showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Durnford v. City of Thornton, 29 Colo. App. 349, 483 P.2d 977 (1971); In re Estate of Mall v. Father Flanagan's Boys' Home, 30 Colo. App. 296, 491 P.2d 614 (1971); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972); Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976)); Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

Entry of summary judgment under this rule is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In re Bunger v. Uncompahgre Valley Ass'n, 192 Colo. 159, 557 P.2d 389 (1976); Koch v. Sadler, 759 P.2d 792 (Colo. App. 1988); Cung La v. State Farm Auto Ins. Co., 830 P.2d 1007 (Colo. 1992); Suss Pontiac-GMC, Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

When a party is entitled to prevail as a matter of law, summary judgment is proper. Happy Canyon Inv. Co. v. Title Ins. Co., 38 Colo. App. 385, 560 P.2d 839 (1976).

A summary judgment is proper only where there is no genuine issue as to any material fact, which may be indicated by the pleadings, affidavits, depositions, and/or admissions, and where the moving party is entitled to judgment as a matter of law. Bailey v. Clausen, 192 Colo. 297, 557 P.2d 1207 (1976); Pearson v. Sublette, 730 P.2d 909 (Colo. App. 1986); Krane v. Saint Anthony Hosp. Sys., 738 P.2d 75 (Colo. App. 1987).

The phrase "as a matter of law", as used in section (c), contains no distinction between legal and equitable principles, so, if there is no question concerning material facts, and the only contention arises over the application of a rule of law, whether ''legal'' or ''equitable'' in nature, a summary judgment may be entered. Linch v. Game & Fish Comm'n, 124 Colo. 79, 234 P.2d 611 (1951).

Material fact defined. In the context of a summary judgment proceeding, an issue of material fact is one, the resolution of which will affect the outcome of the case. Krane v. Saint Anthony Hosp. Sys., 738 P.2d 75 (Colo. App. 1987).

Where there is no genuine issue of material fact in dispute, summary judgment is proper. Varela v. Colo. Milling & Elevator Co., 31 Colo. App. 49, 499 P.2d 1206 (1972); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

A summary judgment is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute. Edwards v. Price, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed. 2d 773 (1977).

Where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is warranted. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Where the pleadings and the deposition clearly show that as a matter of law one is not entitled to the relief he seeks, then, under such circumstances, it was proper for the court to grant summary judgment. Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963).

Unless the depositions and admissions on file, together with the affidavits, clearly disclose that there is no genuine issue as to any material fact, as a matter of law, the summary judgment should be entered. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947); Carter v. Thompkins, 133 Colo. 279, 294 P.2d 265 (1956); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

Summary judgment was properly issued where briefs contained sufficient information upon which the judge could base his decision, even though the hearing did not address all of the issues before the court. Lane v. Arkansas Valley Publ'g Co., 675 P.2d 747 (Colo. App. 1983), cert. denied, 467 U.S. 1252, 104 S. Ct. 3534, 82 L. Ed. 2d 840 (1984).

Issuance of summary judgment after a hearing that was held within eight days of filing of motion and after parent's offer of proof as to what he would state in opposing affidavits comported with the rule that permits a party to file opposing affidavits within fifteen days. People in Interest of B.M., 738 P.2d 45 (Colo. App. 1987).

It is also proper where plaintiff failed to file a responsive brief or obtain additional time to file and never acted to postpone ruling or to indicate that he intended to challenge the facts

submitted by the defendant prior to the court's ruling on the motion. Ceconi v. Geosurveys, Inc., 682 P.2d 68 (Colo. App. 1984); Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986).

Proximate cause deemed "matter of law" only in clearest cases. Proximate cause is a "matter of law" for the court only in the clearest cases when the facts are undisputed and it is plain that all intelligent persons can draw but one inference from them. Moon v. Platte Valley Bank, 634 P.2d 1036 (Colo. App. 1981).

If scope and interpretation of insurance policy language, which is question of law, is dispositive of claim, summary judgment of dismissal is justified. W. Am. Ins. Co. v. Baumgartner, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991).

Summary judgment on claim of negligent infliction of emotional distress proper where no proof of physical injury and plaintiff not in zone of danger. Card v. Blakeslee, 937 P.2d 846 (Colo. App. 1996).

E. When Motion Should be Denied.

Trial courts should not grant motions or deny a trial where there is the slightest doubt. Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial where there is the slightest doubt as to the facts. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Factual question raised by expert precludes summary judgment. Where a plaintiff in an automobile product liability action presents an expert who raises a factual question about the reasonableness of the defendant manufacturer's design strategies, the drastic remedy of summary judgment is improper, and the issue of whether the design of the car involved in the accident unreasonably increased the risks of injury by collision should be presented to the jury. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

Where a plaintiff in a medical malpractice action presents an expert who raises a factual question about the probability of a heart attack, the issue should be presented to the jury. Sharp v. Kaiser Found. Health Plan, 710 P.2d 1153 (Colo. App. 1985), aff'd, 741 P.2d 714 (Colo. 1987).

A litigant is entitled to have disputed facts determined by trial, and it is only in the clearest of cases, where no doubt exists concerning the facts, that a summary judgment is warranted. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

It was error for trial court to grant summary judgment when a material question of fact existed with respect to whether petitioner was denied the opportunity to call a witness with information relevant to his defense. People v. Diaz, 862 P.2d 1031 (Colo. App. 1993).

Potential existence of conspiracy to defraud bankrupt company's judgment creditor should have precluded issuance of summary judgment. Magin v. DVCO Fuel Sys. Inc., 981 P.2d 673 (Colo. App. 1999).

If any doubt resides in the mind of the court after a consideration of the motion, its resolution must be against the motion. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

If reasonable persons might reach different conclusions or might draw different inferences from uncontroverted facts, summary judgment should be denied. Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Because reasonable persons could disagree as to whether any reasonable use exists for property rezoned from light industrial to agricultural use, summary judgment is not appropriate. Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892 (Colo. 1993).

Summary judgment should not be granted in case of doubt. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

Even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

The question of foreseeability in the context of the legal issue of duty remains a disputed factual issue, if differing factual inferences may be drawn from the evidence, making the entry of summary judgment improper. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Where there exists a genuine issue as to a very material fact which must be determined, a motion for summary judgment should be denied. Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948).

Where there is an issue as to whether a doctor, who admittedly knew of the high risk of scarring to a particular patient, knowingly concealed that information from the patient, a material issue of fact remains such that summary judgment is inappropriate. Brodie v. Mastro, 638 P.2d 800 (Colo. App. 1981).

Summary judgment may not be entered if genuine issues of material fact remain for resolution. Smith v. Hoffman, 656 P.2d 1327 (Colo. App. 1982).

It is elementary that summary judgment may not be granted where unresolved genuine issues of material facts remain for determination. Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

A trial court acts precipitously in granting a motion for summary judgment where there are genuine issues as to several material facts. Pritchard v. Temple, 168 Colo. 555, 452 P.2d 381 (1969).

Where issues remain to be adjudicated, it is error to enter a summary judgment. Harvey v. Morris, 148 Colo. 489, 367 P.2d 352 (1961).

Where it is perfectly clear from the pleadings and interrogatories and the answers thereto that there is a genuine issue, it is error to enter summary judgment. McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (1971).

Where evidence showed that management fired whistle blower in retaliation for whistle blowing, grant of summary judgment dismissing wrongful discharge claim reversed and remanded despite employer's conflicting evidence. Webster v. Konczak Corp., 976 P.2d 317 (Colo. App. 1998).

Where an issue of fact is raised which is not determinable on affidavits and answers to interrogatories propounded, a motion for summary judgment should be denied. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946).

Summary judgment is usually inappropriate in cases dealing with potentially unconstitutional motivations. Because evidence concerning motive is almost always subject to a variety of conflicting interpretations, a full trial on the merits is normally the only way to separate permissible motivations from those that merely mask unconstitutional actions. Ridgeway v. Kiowa Sch. Dist. C-2, 794 P. 2d 1020 (Colo. App. 1989).

In light of the various defenses in defendants' answer which raise genuine issues of material fact, a trial court is correct in denying the plaintiff's motion for summary judgment against the defendants. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Defenses based on business judgment rule and denial of harm to corporation precluded summary judgment in case involving unlawful distribution of corporate assets. Such assertions only emphasize that there are disputed issues of material fact. Polk v. Hergert Land & Cattle Co., 5 P.3d 402 (Colo. App. 2000).

When defendants' motion for summary judgment is overruled, their admission of facts under their legal theory terminates, and it is error for a trial court to give any consideration thereto in connection with its determination of plaintiff's motion. This leaves plaintiff's motion for summary judgment completely unsupported by anything except such as it had itself placed in the record, and which definitely discloses uncertainty of fact and disputable issues for trial. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact, for, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

The fact that each side in moving for summary judgment in his or its favor, respectively, asserts that there is no genuine issue as to any material fact does not necessarily make it so, and does not bar the court from determining otherwise. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

An arbitration clause providing arbitration of certain issues only does not mean that the parties cannot agree to submit to arbitration other matters in dispute between them, even though the contract does not require it, and so, where it is impossible to tell whether the defenses were actually submitted for arbitration, a trial court is in error in summarily striking these defenses from the answer filed in the arbitration proceeding and on such basis improvidently granting summary judgment. Int'l Serv. Ins. Co. v. Ross, 169 Colo. 451, 457 P.2d 917 (1969).

Summary judgment improper if record inadequate. Where the record has not been adequately developed on a material factual issue, summary judgment is not proper. Moore v. 1600 Downing St., Ltd., 668 P.2d 16 (Colo. App. 1983); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984).

Where it could not be said as a matter of law that plaintiffs' remedy at law would be adequate to compensate them for the loss suffered, the granting of summary judgment was improper. Benson v. Nelson, 725 P.2d 71 (Colo. App. 1986).

Where the moving party filed only a general denial to plaintiff's complaint, summary judgment was improper. Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986).

Summary judgment in an action for principal and interest due on promissory notes was improper where the determination as to the appropriate primary interest rate could not be made on the face of promissory notes, the motion lacked supporting documentation regarding such rate, and the moving party's supporting brief stating the amount claimed as interest was not verified. Fed. Deposit Ins. Corp. v. Cassidy, 779 P.2d 1382 (Colo. App. 1989).

Summary judgment was improperly granted when ambiguity in preemptive clause

in contract could be resolved by extrinsic evidence showing the intent of the parties and that parties understood their rights and obligations under said clause. Polemi v. Wells, 759 P.2d 796 (Colo. App. 1988).

Reinsurers were not entitled to summary judgment based only on interinsurance exchange's inability to produce actual reinsurance certificates, where affidavit and computer printout indicating serial number of each reinsurance certificate, name of subscriber, period of insurance, and premium charged were based on admissible facts. Benham v. Pryke, 703 P.2d 644 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 67 (Colo. 1987).

A question of fact remained on claim to quiet title where § 38-41-116 allowed purchaser to bring an action to enforce any right or title he may have under a contract within ten years from the date of delivery of general warranty deed and parties intent concerning when delivery of the deed was to take place required determination. Bent v. Ferguson, 791 P.2d 1241 (Colo. App. 1990).

A question of fact remained on claim concerning entitlement to royalty payments from the production and sale of natural gas. Westerman v. Rogers, 1 P.3d 228 (Colo. App. 1999).

F. Responsibility of Court.

In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

Any issue of fact must be determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment. Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981).

The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of their own motion for summary judgment. The concession does not continue over into the supreme court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

It was an abuse of discretion for trial court to fail to rule on the defendants' motion for extension of time until the date summary judgment motion in favor of plaintiff was granted, at which time, the court denied defendants' motion for extension of time. Pursell v. Hull, 708 P.2d 490 (Colo. App. 1985).

Trial court did not abuse discretion by ruling on summary judgment motion when motion to compel was pending. Card v. Blakeslee, 937 P.2d 846 (Colo. App. 1996).

G. Review.

On appeal of a grant of summary judgment, where there was no testimony taken in the case, the reviewing court must determine the posture of the case as it went before the trial judge on the basis of the pleadings, the affidavits, interrogatories, and answers thereto, and the depositions which are in the record. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

Following denial of motion for summary judgment, failure to renew motion at the close of the evidence operates as a waiver of the summary judgment motion and precludes appellate review. Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

A stipulation that, if review is sought by any party, the procedure of considering and determining the legal issue upon a motion for summary judgment will not be assigned as a ground of error does not preclude plaintiffs in error from urging that the contents of a deposition could not be used on review as a basis for determining legality of a trust agreement. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

Review of judgment granting a motion for summary judgment is de novo. Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005); Meyerstein v. City of Aspen, 282 P.3d 456 (Colo. App. 2011).

An order denying motion for summary judgment is interlocutory and not subject to review. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972); Manuel v. Ft. Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981); Banyai v. Arruda, 799 P.2d 441, (Colo. App. 1990); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

No review of summary judgment denial after trial on merits. A trial court's denial of a motion for summary judgment may not be considered on appeal from a final judgment entered after a trial on the merits. Manuel v. Fort Col-

lins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981).

In order to preserve an issue raised by summary judgment for appeal, the party asserting the argument must make a motion for directed verdict or for judgment notwithstanding the verdict. Failure to do so operates as an abandonment, and therefore a waiver, and the issue cannot then be reviewed on appeal. Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996); Karg v. Mitchek, 983 P.2d 21 (Colo. App. 1998); Davis v. GuideOne Mut. Ins. Co., 2012 COA 70M, 297 P.3d 950.

In reviewing the propriety of a summary judgment, an appellate court must apply the principle that the moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Peterson v. Halsted, 829 P.2d 373 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

Section (c) is the applicable standard of review to be applied by an administrative law judge when ruling upon a motion for summary judgment in a workers' compensation claim. Fera v. Indus. Claim Appeals Office, 169 P.3d 231 (Colo. App. 2007).

Standard of review is de novo for motion for a determination of law. A determination is proper if there is no genuine issue of material fact necessary to determine the question. Patterson v. BP Am. Prod. Co., 2015 COA 28, 360 P.3d 211.

H. Illustrations.

If differing factual inferences may be drawn from the evidence, the question of foreseeability remains a disputed factual issue, and the entry of summary judgment in such circumstances is improper. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Section (c) authorizes a trial court to enter a decree for specific performance of a contract upon motion for a summary judgment over the objection that a summary judgment can only be granted in an action at law, as technically distinguished from an equitable proceeding. Linch v. Game & Fish Comm'n, 124 Colo. 79, 234 P.2d 611 (1951).

Court erred in granting summary judgment in negligence case where evidence presented material issue of fact as to whether a defendant water district assumed a duty to have water available for the plaintiff's lumberyard located outside of said district's boundaries; the water district placed a fire hydrant at the said lumberyard upon the fire district's request specifically for the protection of the lumber company. Wheatridge Lumber Co. v. Valley Water Dist., 790 P.2d 874 (Colo. App. 1989).

Generally, the issue of a party's intent is a question of fact, and is not an appropriate issue for summary disposition. Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. App. 1986).

Whether an actor owes a duty of due care to another is a question of law for resolution by the court. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment; hence, if the record evidence is insufficient to allow the court to determine the question of foreseeability as a matter of law, such motion must be denied. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Material question of fact whether employee hired for indefinite term could be terminated at will precluded entry of summary judgment for employee in wrongful discharge action, where employee manual outlined termination procedures that employer proposed to follow, and employee allegedly received copy of manual either at start or during course of employment. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

Summary judgment was properly denied where plaintiff's evidence failed to show the existence of a right of employment or protected contractual rights that were violated by the defendant's action and the evidence was insufficient to overcome the defendants' claim of qualified immunity. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

Defendant entitled to summary judgment on claim of negligent hiring since evidence was insufficient to satisfy the test set forth in Connes v. Molalla Transport Sys., Inc. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

A living trust is valid and binding as against a motion for summary judgment where such does not disclose within its four corners that it is sham or an abortive attempt on the part of a settlor to evade the statute of wills. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

Where trial court found that failure to pay entire bonus as specified in top lease of mineral estate defeated the entire agreement, there was no genuine issue of material fact and the trial court properly quieted title to mineral interest in plaintiffs. Sohio Petroleum Co. v. Grynberg, 757 P.2d 1125 (Colo. App. 1988).

Issue of whether contract is adhesion contract does not preclude entry of summary judgment in the absence of any genuine issue of material fact. Jones v. Dressel, 623 P.2d 370 (Colo. App. 1981).

Summary judgment was appropriate in case involving dismissal, for academic reasons, of student from university clinical program

where the evidence submitted detailed the grounds for discharge and no evidence was submitted that the procedure applied departed from accepted academic norms. Dillingham v. Univ. of Colo., Bd. of Regents, 790 P.2d 851 (Colo. App. 1989).

Summary judgment was appropriate in case involving failing grade of student in pediatrics course necessary to complete junior year where student failed to demonstrate that failing grade was given for any reason other than his unsatisfactory academic performance. Davis v. Regis Coll., Inc., 830 P.2d 1098 (Colo. App. 1991).

Civil service commission was entitled to judgment as a matter of law restricting access to examination results where person requesting access presented no evidence disputing the factual issue of whether substantial injury to the public interest would result if the information were not restricted under § 24-72-204 (6). Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance policy exclusions, summary judgment is appropriate. Nikolai v. Farmers Alliance Mut. Ins., 830 P.2d 1070 (Colo. App. 1991).

Summary judgment is appropriate where insurance company met its burden by submitting affidavits establishing that it did not engage in intentional conduct probative of waiver and insured failed to raise a genuine issue of disputed fact by refuting the showing. Nikolai v. Farmers Alliance Mut. Ins. Co., 830 P.2d 1070 (Colo. App. 1991).

Summary judgment improperly granted when there existed a material question of fact as to whether petitioner's use of or presence in vehicle was causally related to injuries incurred and therefore covered under automobile insurance policy. Cung La v. State Farm Auto. Ins. Co., 830 P.2d 1007 (Colo. 1992).

Summary judgment improperly granted when the doctrine of collateral estoppel improperly applied. Bebo Constr. Co. v. Mattox & O'Brien, 990 P.2d 78 (Colo. 1999).

Record established defendant's entitlement to summary judgment on claims of trespass and breach of deed of trust and plaintiff not entitled to compensation for items allegedly stolen by defendant's agent since agent was not acting within the scope of his employment at the time of the theft. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

Defendant entitled to summary judgment on claim for outrageous conduct where plaintiff failed to establish a sufficient basis for such claim. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

Summary judgment based on qualified immunity was properly denied where plaintiff children pled facts necessary to establish a violation of a clearly established constitutional right in support of a 42 U.S.C. § 1983 claim against county department of social services employees regarding the employees' placement and adoption decisions. Shirk v. Forsmark, 2012 COA 3, 272 P.3d 1118.

I. Continuance for Discovery.

Under section (f), an abuse of discretion may result when the court refuses to grant a party a reasonable continuance to permit use of discovery procedures as provided by the rules of civil procedure and when it is premature to grant a motion for summary judgment. Miller v. First Nat. Bank, 156 Colo. 358, 399 P.2d 99 (1965); Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Where plaintiff had a reasonable period within which to conduct discovery and was given reasonable notice that no further extensions of time would be granted, summary judgment was proper. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

It is not an abuse of discretion to deny a section (f) request where movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. Henisse v. First Transit, Inc., 220 P.3d 980 (Colo. App. 2009), rev'd on other grounds, 247 P.3d 577 (Colo. 2011).

V. CASE NOT FULLY ADJUDICATED.

Under section (d) of this rule, a court may grant a partial summary judgment as to material facts existing without substantial controversy and reserve disputed facts for subsequent proceedings. City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

By its terms, section (d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to this rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under C.R.C.P. 54(b). Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

Where summary judgment order reserved until trial on all issues other than the amount of admitted liability, and one of these issues would be the amount of interest to be awarded, plaintiff properly raised the question of interest in its motion to amend the judgment. Kwal Paints, Inc. v. Travelers Indem. Co., 34 Colo. App. 74, 525 P.2d 471 (1974), aff'd, 189 Colo. 66, 536 P.2d 1136 (1975).

Partial summary judgment affirmed. Certified Indem. Co. v. Thompson, 180 Colo. 341, 505 P.2d 962 (1973); Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042 (Colo. App. 1983).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. Halter v. Waco Scaffolding & Equip. Co., 797 P.2d 790 (Colo. App. 1990).

VI. FORM OF AFFIDAVITS.

This rule permits a motion for a summary judgment with or without supporting affidavits. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

Although the party moving for a summary judgment has the burden of showing that he is entitled to judgment, still, it has always been perilous for an opposing party neither to proffer any evidentiary explanatory material nor file a section (f) affidavit. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Although it may be risky for a party not to respond to a motion for summary judgment, the absence of a response does not relieve the moving party of its burden to establish that summary judgment is appropriate. USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001).

Where an affidavit is filed by plaintiff's attorney rather than a witness and does not affirmatively show that the attorney has personal knowledge of the relevant facts, the requirements of section (e) are not met. USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001).

An affidavit that sets forth only a conclusory assertion without factual allegations to support it does not meet the requirements of section (e). USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001); Burton v. Colo. Access, 2015 COA 111, __ P.3d __, aff'd on other grounds, 2018 CO 11, 428 P.3d 208, cert. denied sub nom. Olivar v. Pub. Serv. Emple. Credit Union, __ U.S. __, 139 S. Ct. 87, 202 L. Ed. 2d 26 (2018).

A litigant by merely asserting a fact, without any evidence to support it, cannot avoid a summary disposition of his case. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

Particularly on such issues as good faith, intent, and purpose, the bald declaration of a party by affidavit is not sufficient to resolve the issue in the face of a pleaded denial, and a motion for summary judgment should be denied. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

A "genuine issue" cannot be raised by counsel simply by means of argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Argument of counsel alone cannot create a factual issue. Ginter v. Palmer & Co., 39 Colo. App. 221, 566 P.2d 1358 (1977), rev'd on other grounds, 196 Colo. 203, 585 P.2d 583 (1978).

The purpose of a motion for summary judgment would be defeated if at a hearing on such motion oral argument and the taking of testimony were allowed as a matter of right. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

In a breach of contract proceeding, a party seeking damages for future lost profits must establish with reasonable, but not necessarily mathematical, certainty both the fact of the injury and the amount of the loss. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

In summary judgment proceeding in a breach of contract action, a party seeking damages for future lost profits must present sufficient evidence to compute a fair approximation of future loss. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

A court may enter summary judgment precluding recovery for lost profits if a plaintiff offers only speculation or conjecture to establish damages. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

When a movant makes out a convincing showing that genuine issues of fact are lacking, it is required that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Once a movant makes a convincing showing that genuine issues are lacking, section (e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. Hadley v. Moffat County Sch. Dist. Re-1, 641 P.2d 284 (Colo. App. 1981); McLaughlin v. Allen, 689 P.2d 1169 (Colo. App. 1984).

Where plaintiffs' affidavits failed to reveal that any discovery relating to plaintiffs' alle-

gations would have resulted in any facts that would preclude summary judgment, trial court did not abuse its discretion in suspending discovery under section (f). Sundheim v. Bd. of County Comm'rs of Douglas County, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996).

Where a plaintiff offers no evidence to contradict an affirmative showing of nonliability made by defendants in support of their motion for summary judgment, nor did the plaintiff show that any other evidence he might have produced at trial would contradict the evidence, a trial court has no alternative but to conclude that there is no genuine issue of fact upon which the defendants could be found liable, and it properly grants their motions for summary judgment. Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Where a defendant asserts a counterclaim and plaintiff denies the allegation in a reply, but does not file an affidavit denying such, the plaintiff is not entitled to summary judgment. McKinley Constr. Co. v. Dozier, 175 Colo. 395, 487 P.2d 1335 (1971).

A party is not compelled to try his case on affidavits with no opportunity to cross-examine affiants. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1946); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969).

Where affidavits show conflict, there is a genuine issue of material fact which should be determined by a fact-finding body after both parties have presented evidence in support of their respective positions. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

This rule provides for sworn or certified copies of all pertinent papers which are referred to in the affidavits to accompany the motion. Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

While technically it is an error not to have certified the papers attached to such motion, one waives any objection to the lack of certification by their reliance upon some of these exhibits as bases for their position and for their appeal. Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

An affidavit of counsel which only recites that the attached documents are certified copies of a court judgment does comply with the provisions of C.R.C.P. 59(e) (now 59(a)(4)). Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Single purpose affidavit does not violate rule of "personal knowledge". An affidavit of counsel which serves the single purpose of placing before the court certified copies of relevant documents does not violate the requirements of the rule that affidavits be made on "personal knowledge". Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Certified court records in and of themselves constitute a sufficient affidavit in support of a motion for summary judgment. Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Court cannot consider files, records, and other documents in prior case involving another party in the same manner. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947).

Mere allegations of fraudulent concealment insufficient to establish genuine issue of fact. Where the plaintiff had neither pleaded nor proved that the defendant was connected with or responsible for the non-availability to her of her hospital records, in the context of the defendant's motion for summary judgment, therefore, the plaintiff's "mere allegations" of fraudulent concealment by the defendant were insufficient to set up a genuine issue of fact as to the defendant's asserted fraudulent acts and, accordingly, as to the equitable estoppel urged by the plaintiff. Mishek v. Stanton, 200 Colo. 514, 616 P.2d 135 (1980).

Affidavit containing hearsay meets requirements of this rule since hearsay would be admissible in court under exception to hearsay rule. K.H.R. by and through D.S.J. v. R.L.S., 807 P.2d 1201 (Colo. App. 1990).

Amendment of complaint by argument and affidavit. When there are allegations in a complaint and facts appearing in an affidavit which may be construed as supporting the theories of estoppel and waiver, and these theories are argued to the trial court, although the theories were not specifically alleged in the complaint, the trial court must treat the complaint as amended for purposes of considering a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

Failure to state admissible facts in affidavit may justify summary judgment. A failure to state admissible facts in the affidavit, based on the affiant's personal knowledge, may justify the court in entering summary judgment for the opposing party. In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977).

Thus, summary judgment was proper where discrepancies were inadmissible to create a disputed issue of fact. Affidavits based on inadmissible hearsay are insufficient for purposes of summary judgment determination. Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003).

Depositions held insufficient basis for summary judgment. Where none of the depositions offered in support of a motion for summary judgment show that any of the persons deposed had personal knowledge of actions being sued on or of the amount or details of the claimed losses, the testimony in the depositions is not admissible and the depositions cannot stand as the basis for the summary judgment. Nat'l Sur.

Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982).

Court's ruling without oral argument not denial of due process. Defendant was not denied due process of law by the fact that the court ruled on the motion for summary judgment without oral argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Due process does not include the right to oral argument on a motion for summary judgment, especially where the party against whom the motion is directed had ample opportunity to file any affidavits or legal arguments he might have had during the time between the filing of the motion and the date for hearing. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Neither the law of the case doctrine nor collateral estoppel precluded plaintiffs from contesting an issue addressed in first motion for summary judgment from submitting affidavits in opposition to same issue in a subsequent motion for summary judgment. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

Applied in Commercial Indus. Const., Inc. v. Anderson, 683 P.2d 378 (Colo. App. 1984); Wasalco, Inc. v. El Paso County, 689 P.2d 730 (Colo. App. 1984); Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986); People v. Hernandez and Assocs., Inc., 736 P.2d 1238 (Colo. App. 1986); McDaniels v. Laub, 186 P.3d 86 (Colo. App. 2008); McDonald v. Zions First Nat'l Bank, N.A., 2015 COA 29, 348 P.3d 957.

VII. WHEN AFFIDAVITS UNAVAILABLE.

A trial court abuses its discretion in refusing to grant one a reasonable continuance to permit utilization of the discovery procedures provided by the rules of civil procedure, and it is precipitous and premature in granting a motion for summary judgment. Miller v. First Nat'l Bank, 156 Colo. 358, 399 P.2d 99 (1965).

Where responses to discovery, although not timely filed, demonstrate a disputed issue concerning material fact, a motion for summary judgment is improper. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973).

By not answering requests for admissions in a summary judgment motion, the relevant subject matters of the requests for admissions are deemed admitted under C.R.C.P. 36. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Trial court does not err when it rules on motion ex parte unless a party requests oral argument or a continuance. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

Whether to grant a request for discovery pursuant to section (f) lies within the discretion of the trial court. It is not an abuse of discretion to deny a section (f) discovery request if the movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. A-1 Auto Repair & Detail v. Bilunas-Hardy, 93 P.3d 598 (Colo. App. 2004).

VIII. FORM OF JUDGMENT.

Findings of fact and conclusions of law are not required when ruling on a motion under this rule or under C.R.C.P. 12. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

Absent circumstances not present in the case, the denial of a motion for summary judgment may not be considered on appeal from a final judgment after trial on the merits. Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981); Grogan v. Taylor, 877 P.2d 1374 (Colo. App. 1993); Fire Ins. Exch. v. Rael by Rael, 895 P.2d 1139 (Colo. App. 1995).

Rule 57. Declaratory Judgments

(a) Power to Declare Rights, etc.; Force of Declaration. District and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) Who May Obtain Declaration of Rights. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(c) Contract Construed Before Breach. A contract may be construed either before or after there has been a breach thereof.

(d) For What Purposes Interested Person May Have Rights Declared. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(e) Not a Limitation. The enumeration in sections (b), (c), and (d) of this Rule does not limit or restrict the exercise of the general powers conferred in section (a) of this Rule, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(f) When Court May Refuse to Declare Right. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(g) Review. All orders, judgments, and decrees under this Rule may be reviewed as other orders, judgments, and decrees.

(h) Further Relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(i) Issues of Fact. When a proceeding under this Rule involves the determination of an issue of fact, such issues may be tried and determined in the same manner as issues of facts are tried and determined in other actions in the court in which the proceeding is pending.

(j) Parties; Notice to State or Municipality. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves a challenge to the validity of a municipal ordinance or franchise, the party challenging the ordinance or franchise shall serve the municipality with a copy of the relevant motion or pleading and such municipality shall be made a party, and is entitled to be heard. If a party files a motion or other pleading asserting that a state statute, ordinance, or franchise is unconstitutional, that party shall serve the state attorney general with a copy of the motion or pleading, and the state is entitled to be heard. Notice to the state or municipality required by this subsection (j) shall be made pursuant to Rule 5(b) within 21 days of the date when the motion or pleading challenging validity or constitutionality was filed.

(k) Rule is Remedial; Purpose. This Rule is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

(l) Interpretation and Construction. This Rule shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgment and decrees.

(m) Trial by Jury; Remedies; Speedy Hearing. Trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Source: (j) amended and effective January 10, 2019.

Cross references: For declaratory judgments, see article 51 of title 13, C.R.S.; for jury trials of right, see C.R.C.P. 38; for trial by jury or by the court, see C.R.C.P. 39.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Declaratory Judgments in Colorado'', see 6 Dicta 20 (Feb. 1929). For article, ''A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity'', see 23 Rocky Mt. L. Rev. 247 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''One Year Review of Cases on Contracts'', see 33 Dicta 57 (1956). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Criminal Law and Procedure'', see 39 Dicta 81 (1962). For comment on Meier v. Schooley appearing below, see 34 Rocky Mt. L. Rev. 414 (1962). For comment, ''Pre-Enforcement Judicial Review: CF & I Steel Corp. v. Colorado Air Pollution Control Commission'', see 58 Den. L.J. 693 (1981). For article, ''Declaratory Judgment Actions to Resolve Insurance Coverage Questions'', see 18 Colo. Law. 2299 (1989).

Annotator's note. Since this rule is similar to CSA, C. 93, §§ 78 to 92, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this rule.

The declaratory judgment act is constitutional. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

The Colorado declaratory judgment act is incorporated in this rule. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956); State Bd. of Control for State Homes for Aged v. Hays, 149 Colo. 400, 369 P.2d 431 (1962).

Review pursuant to this rule is appropriate where C.R.C.P. 106(a)(4) relief is unavailable because the challenged action is legislative or because review of the record is an insufficient remedy. Grant v. District Court, 635 P.2d 201 (Colo. 1981).

Declaratory relief under this rule is an appropriate means of challenging administrative governmental actions that are not subject to review under C.R.C.P. 106(a)(4). Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992).

Review pursuant to this rule is appropriate even in the context of a quasi-judicial proceeding where a declaratory judgment is requested and C.R.C.P. 106(a)(4) does not provide an adequate remedy. Constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under this rule. Native Am. Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004).

Review under this rule is not available where sufficient review has already been provided under C.R.C.P. 106(a)(4). Denver Ctr. for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Plaintiffs' claim for declaratory relief asserting that planning commission did not provide sufficient notice to them of a permit review meeting was properly dismissed under C.R.C.P. 106(b). Because C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively seek such review (whether framed as claims under section (a)(4) of this rule or not) are subject to the 30-day deadline under C.R.C.P. 106(b). Thus, claims for declaratory relief under this rule that seek review of quasi-judicial decisions must be filed within 30 days. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

The granting of declaratory relief is a matter resting in the sound discretion of the trial court and is not precluded even when there is another adequate remedy. Troelstrup v. District Court, 712 P.2d 1010 (Colo. 1986).

Ordinances legislative in nature are reviewable under this rule. Ordinances establishing general policies, such as a zoning ordinance, even though accompanied by procedures for notice and public hearing, are, when determining the proper procedure for review, legislative in nature and reviewable under this rule when the constitutional application of the ordinance is involved. Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

A zoning ordinance amendment is subject to review pursuant to this rule and is not reviewable pursuant to C.R.C.P. 106(a)(4) where it is an amendment of general application, may be enacted by initiative, and is subject to referendum. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

Although a master plan is ordinarily not reviewable under this rule, the plan is reviewable when it is no longer advisory. Since the plan at issue was adopted as a zoning resolution by the board of county commissioners acting in a legislative capacity, it is no longer

advisory. Condiotti v. Bd. of County Comm'rs, 983 P.2d 184 (Colo. App. 1999).

It is permissible to join § 24-4-106 action and action under this rule for purposes of review. Utah Int'l, Inc. v. Bd. of Land Comm'rs, 41 Colo. App. 72, 579 P.2d 96 (1978).

Action under rule attacking constitutionality of administrative regulation not barred as untimely. While agency rules and regulations are indeed reviewable under § 24-4-106 (4), expiration of that section's filing period does not invariably bar as untimely an action under this rule attacking the constitutionality of an administrative regulation promulgated by § 24-4-103 rule-making. Collopy v. Wildlife Comm'n, 625 P.2d 994 (Colo. 1981).

Court lacks subject matter jurisdiction in action for declaratory judgment when plaintiff has not exhausted administrative remedies. Leete v. Bd. of Med. Exam'rs, 807 P.2d 1249 (Colo. App. 1991).

Declaratory judgment is proper procedure for preenforcement challenge to regulation. Declaratory judgment is a proper procedure by which to make a preenforcement challenge to a regulation promulgated by a state agency. CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 270, 610 P.2d 85 (1980).

Action for declaratory judgment is appropriate method for challenging governmental action that is not quasi-judicial and therefore not subject to C.R.C.P. 106(a)(4) review. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

The supreme court will not render an advisory opinion in declaratory judgment actions. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

There can be no coercive judgment in a proceeding under the declaratory judgment rule. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Declaratory judgment is not the proper remedy to determine status of a person confined in the state penitentiary, the proper remedy being habeas corpus where if warranted a coercive order could be entered. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Court may treat improper petition for a habeas corpus as a petition for declaratory relief to serve the interests of finality and judicial economy. Collins v. Gunter, 834 P.2d 1283 (Colo. 1992).

The only new remedy afforded by the declaratory judgment law is to provide an adequate remedy in cases where no cause of action has arisen authorizing an executory judgment and where no relief is or could be claimed, and, while relief under this statute cannot be had where another established remedy is available, it is not intended to abolish the well-known causes of action, nor does it afford an additional remedy where an adequate one existed before, and it should not be resorted to where there is no necessity for a declaratory judgment. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

This act is not intended to repeal the statute prohibiting judges from giving legal advice nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Where, under the pleadings in an action for a declaratory judgment, no question is presented which is properly cognizable under the uniform declaratory judgments act, the suit should be dismissed. Fairall v. Frisbee, 104 Colo. 553, 92 P.2d 748 (1939).

In a declaratory judgment action in which the court rules against the position of the plaintiff, it should enter a declaratory judgment and not sustain a motion to dismiss. Karsh v. City & County of Denver, 176 Colo. 406, 490 P.2d 936 (1971).

The uniform declaratory judgments act was never intended to be a substitute for, or a short cut to, proper pleading and specifically provides that all issues of fact shall be tried and determined as in other cases. Home Owners' Loan Corp. v. Meyer, 110 Colo. 501, 136 P.2d 282 (1943).

Actions for declaratory judgment were not intended as a substitute for statutory procedure. Shotkin v. Perkins, 118 Colo. 584, 199 P.2d 295, cert. denied, 335 U.S. 888, 69 S. Ct. 230, 93 L. Ed. 426 (1948), reh'g denied, 335 U.S. 909, 69 S. Ct. 409, 93 L. Ed. 442, cert. denied, 338 U.S. 907, 70 S. Ct. 303, 94 L. Ed. 558 (1949), reh'g denied, 338 U.S. 952, 70 S. Ct. 479, 94 L. Ed. 588 (1950); Hays v. City & County of Denver, 127 Colo. 154, 254 P.2d 860 (1953).

Termination of a dissolution proceeding as a result of the death of one of the parties did not render the controversy over the antenuptial agreement moot. Even though the death of one spouse mooted the dissolution proceeding, because the antenuptial agreement had a practical legal effect on an ongoing probate proceeding, the trial court was in error when it ruled the agreement invalid. Schwartz v. Schwartz, 183 P.3d 552 (Colo. 2008).

Claim seeking a declaration that, as a matter of law, the word "firearm" in § 30-15-301 includes bows and arrows does not present a nonjusticiable political question. District court erred, therefore, in dismissing plaintiff's declaratory judgment claim based on the political question doctrine. Moss v. Bd. of County Comm'rs for Boulder County, 2015 COA 35, 411 P.3d 918.

This case is a classic case appropriate for resolution by entry of a declaratory judgment. A declaratory judgment would resolve the controversy between the parties regarding whether bow-and-arrow discharges are prohibited under the existing county resolution in the area where plaintiffs reside. At a minimum, there is controversy about whether bow-and-arrow discharges are prohibited under the applicable county resolution. A declaratory judgment would resolve the dispute about what conduct is prohibited under the current legal framework. Thus, a declaratory judgment will terminate the controversy or uncertainty regarding the scope of the resolution. As such, plaintiffs' claim is appropriate for resolution by entry of a declaratory judgment. Moss v. Bd. of County Comm'rs for Boulder County, 2015 COA 35, 411 P.3d 918.

Applied in State Bd. of Cosmetology v. District Court, 187 Colo. 175, 530 P.2d 1278 (1974); Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); City of Arvada v. City & County of Denver, 36 Colo. App. 146, 539 P.2d 1294 (1975); City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); Newton v. Nationwide Mut. Fire Ins. Co., 197 Colo. 462, 594 P.2d 1042 (1979); Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm'rs, 198 Colo. 175, 597 P.2d 564 (1979); Jeffrey v. Colo. State Dept. of Soc. Servs., 198 Colo. 265, 599 P.2d 874 (1979); Bd. of County Comm'rs v. Fifty-First Gen. Ass'y, 198 Colo. 302, 599 P.2d 887 (1979); DuHamel v. People ex rel. City of Arvada, 42 Colo. App. 491, 601 P.2d 639 (1979); Spiker v. City of Lakewood, 198 Colo. 528, 603 P.2d 130 (1979); CF & I Steel Corp. v. Colo. Air Pollution Control Comm'n, 44 Colo. App. 111, 606 P.2d 1306 (1978); Estate of Daigle, 634 P.2d 71 (Colo. 1981); Stone Envtl. Eng'r Servs., Inc. v. Colo. Dept. of Health, 631 P.2d 1185 (Colo. App. 1981); Empire Sav., Bldg. & Loan Ass'n v. Otero Sav. & Loan Ass'n, 640 P.2d 1151 (Colo. 1982); Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982); Citizens for Free Inter. v. Dept. of Rev., 649 P.2d 1054 (Colo. 1982); Two G's, Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983); DuPuis v. Charnes, 668 P.2d 1 (Colo. 1983); Denver & R.G.W.R.R. v. City & County of Denver, 673 P.2d 354 (Colo. 1983); Martynes & Assocs. v. Devonshire Square Apts., 680 P.2d 246 (Colo. App. 1984); Lakewood Fire Protect. v. City of Lakewood, 710 P.2d 1124 (Colo. App. 1985).

II. POWER TO DECLARE RIGHTS; FORCE OF DECLARATION.

Since the adoption of the uniform declaratory judgments act, the supreme court is permitted to declare and adjudge rights and liabilities under a given state of facts irrespective of whether it directly supplies remedies to enforce them. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

A declaratory judgment can only be taken to be a determination as to the rights of the parties before the court. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971).

For a declaratory judgment to be binding, the necessary parties must be before the court. Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983).

A declaratory judgment is conclusive as to questions raised by parties and passed upon by court. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973); City & County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (1973).

The equitable jurisdiction of a court may be invoked to meet the ends of justice in order that a multiplicity of suits may be prevented. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

The plaintiff in requesting a declaratory judgment should not be required to risk violation of the statute in order to obtain a declaration of its validity. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

A case was clearly within the contemplation of this provision where certain beneficiaries of a life insurance policy brought an action against an insurance company to establish the applicability of a double indemnity clause to the death of the insured whose death was caused by an overdose of luminal: A contract was involved, persons were interested, and there was a controversy concerning the construction of the policy. Equitable Life Assur. Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937).

Trial court abused its discretion in dismissing due process claim based on ripeness where professors already worked under an employment contract, they entered into the contract in reliance on the terms stated in the contract, and they faced uncertainty as to the terms of the contract because it was later modified with the intent to apply it retroactively. Saxe v. Bd. of Trs. of Metro. State Coll., 179 P.3d 67 (Colo. App. 2007).

III. WHO MAY OBTAIN DECLARATION OF RIGHTS.

The general assembly is without power to require courts to exercise nonjudicial functions; but it is not without the power to impose upon courts jurisdiction over certain enumerated actions seeking declaratory judgments on matters that lend themselves to and receive

judicial determination in otherwise litigated cases, as it at once appears, such would not be nonjudicial in their nature. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Declaratory judgment act neither expands nor contracts the jurisdiction of Colorado's courts. In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995).

One whose rights are affected by statute may have its construction or validity determined by a declaratory judgment. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

One whose rights are favorably affected by a statute is entitled to seek a judicial determination thereof so long as the court is provided with a properly adverse context. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976).

One whose rights or status may be affected by statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the issuance of a declaratory judgment exists. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976).

Proper forum for challenge to constitutionality of statute or ordinance under which an administrative agency acts is district court where declaratory judgment can be sought. Arapahoe Roofing & Sheet Metal v. Denver, 831 P.2d 451 (Colo. 1992).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

This rule establishes the procedural mechanism for implementation of the declaratory judgment act. Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995).

A proceeding for declaratory judgment must be based upon an actual controversy. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971); Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983).

When the questions presented are not uncertain or hypothetical, and they are presented in an action seeking a declaratory judgment, they are no less justiciable than if presented by injunction or otherwise. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Although a declaratory judgment action must be based on an actual controversy, a party need not violate the challenged statute or regulation in order to obtain a declaration of its invalidity. It is sufficient that a party will be adversely affected by the challenged regulation. Bowen/Edwards v. Bd. of County Comm'rs, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The right to a declaratory judgment extends to a party who claims to be adversely affected by a regulation. Plaintiff contended that he was an interested party under a written agreement between the social security administration and the department of human services. Thus, even if the authorization signed by the plaintiff allowing the social security administration to send his federal benefits check directly to the department of human services itself were not deemed a contract, plaintiff stated a claim for declaratory relief and was entitled to have a determination on the merits rather than dismissal. Martinez v. Dept. of Human Servs., 97 P.3d 152 (Colo. App. 2003).

A justiciable controversy existed, and so the dismissal of a declaratory judgment claim was an abuse of discretion, where a town's ordinance limited a developer's rights under an existing contract with the town, notwithstanding the fact that the developer had not applied for a permit from the town. Lot Thirty-Four Venture, L.L.C. v. Town of Telluride, 976 P.2d 303 (Colo. App. 1998), aff'd on other grounds, 3 P.3d 30 (Colo. 2000).

Court is not required to reply to mere speculative inquiries. Gabriel v. Bd. of Regents, 83 Colo. 582, 267 P. 407 (1928).

Specific threat of enforcement of a rent control statute created a sufficient actual controversy for purposes of this rule. Meyerstein v. City of Aspen, 282 P.3d 456 (Colo. App. 2011).

A declaratory judgment may not issue under the provisions of section (b) of this rule on the validity of a city ordinance to create a storm sewer district, where the proposed ordinance is in contemplation only and has not been passed by the city council. City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929).

As desirable as it might be to have an announcement of the court upon a question, it would be improper for it to decide in the absence of the necessary parties. City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929); Continental Mut. Ins. Co. v. Cochrane, 89 Colo. 462, 4 P.2d 308 (1931).

No proceeding lies under our declaratory judgment act to obtain merely an advisory opinion. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971).

The declaratory judgment leaves the parties to pursue the remedies which the law provides, after performing its office of declaring the existence of a certain liability. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Preventative relief in some instances is just as properly a matter of judicial function as remedial relief and if given by a declaratory order in the construction of a statute, it is res judicata as to the questions of construction raised between the parties and passed upon. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Plaintiff had standing to pursue declaratory judgment action where the complaint demonstrated that the regulations threatened to cause it injury by alleging it would be adversely affected by compliance with the regulations, that if it complied with the regulations, it would suffer economic injury because the Board's permit fees and bond requirements are greater than those of the state, and that if it proceeded with oil and gas development without a county permit it would be subject to criminal sanctions. Bowen/Edwards v. Bd. of County Comm'rs, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The fact that a party confesses judgment in part or in whole does not automatically lead to a declaratory judgment as prayed for by the plaintiffs. Bennett v. City of Fort Collins, 190 Colo. 198, 544 P.2d 982 (1975).

The declaratory judgment is applicable to a dispute over the right to the use of spring waters not tributary to any natural stream. Colo. & Utah Coal Co. v. Walter, 75 Colo. 489, 226 P. 864 (1924).

For determination of rights under the teachers' salary law, see Washington County High Sch. Dist. v. Bd. of Comm'rs, 85 Colo. 72, 273 P. 879 (1928).

In an action under the declaratory judgments act to determine whether or not a municipality has the power to issue bonds and levy taxes for the payment thereof, the city auditor, being a person whose legal relations are affected by the proposal, is the proper person to initiate the proceedings. McNichols v. City & County of Denver, 101 Colo. 316, 74 P.2d 99 (1937).

Where results to occur from the enforcement of a statutory provision can be predicted with certainty or where the basic right of the state to enter legislative fields said to be the domain of the federal government is questioned, a court properly may declare with respect to the validity of a statute. Am. Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

A court should not enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions, the effect of which, in concrete situations not yet developed, could not be definitely perceived. Am. Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

The validity of zoning ordinances has been challenged by certiorari review under C.R.C.P. 106(a)(4) and declaratory relief under this rule, and on occasion, these forms of relief have been pursued simultaneously. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Judicial review remedy for rezoning challenge. As a general rule, judicial review by way of C.R.C.P. 106(a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property. However, where persons have not had prior notice of a rezoning hearing and have not participated in it, certiorari review is not always an effective remedy, and a hearing de novo under a declaratory judgment is a proper and effective remedy. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Income tax statute and regulations may be determined by declaratory judgment. Where a taxpayer's liability for income taxes turns on the construction of a statute and the validity, or invalidity, of regulations purporting to interpret that statute, the case is well within the purpose of a declaratory judgment. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

Relief may be afforded to persons uncertain about rights under penal statute. Relief in the nature of a declaratory judgment will be afforded in appropriate circumstances to those persons who claim uncertainty and insecurity with respect to their rights under a penal statute or law. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

An action for declaratory judgment may be properly maintained by an insurance company to determine if it will be liable to its insured for a defense and for payment of a possible judgment arising from a specified occurrence. Beeson v. State Auto. & Cas. Underwriters, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Insurance coverage may be declared. When a reasonable likelihood is established that alleged tortious conduct of an insured is excluded from coverage under his homeowner's policy, a trial judge may appropriately exercise discretion in affording insurer opportunity to obtain declaration of its obligations under the policy prior to the personal injury trial. Troelstrup v. District Court, 712 P.2d 1010 (Colo. 1986).

Physicians who were denied staff privileges at private hospital were not entitled to relief in form of declaratory judgment that hospital's board violated state law by not following hospital's bylaws. Green v. Lutheran Med. Ctr. Bd. of Dirs., 739 P.2d 872 (Colo. App. 1987).

Declaratory judgment actions may be filed to determine the existence of, or rights under, an oral contract. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

A licensee of the owner of real estate is entitled to declaratory judgment regarding a proposed modification to an easement on the owner's property, particularly where both the owner and its licensee are parties to the proceeding. City of Boulder v. Farmer's Reservoir & Irrig. Co., 214 P.3d 563 (Colo. App. 2009).

Although section (b) of this rule details situations in which declaratory judgment actions may be brought, it does not restrict the court's ability to grant declaratory relief in other situations when appropriate. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

IV. CONTRACT CONSTRUED BEFORE BREACH.

The purpose of this rule is for a judicial declaration of rights under a contract. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

A proposed contract affords plaintiff no right to have it construed. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

One who is not a party to a contract is without standing to obtain a declaratory judgment determining the validity of such contract. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

In an action under the declaratory judgments act to determine the validity of a contract, the complaint failing to allege that the validity of the contract had been questioned, or that a question had arisen under it, no cause of action was stated. Gabriel v. Bd. of Regents, 83 Colo. 582, 267 P. 407 (1928).

Section (c) inapplicable where undetermined, extrinsic facts. Although § 13-51-107 and section (c) of this rule provide that a contract may be interpreted prior to breach, these provisions are inapplicable where the dispute requires an interpretation in light of extrinsic facts which are not yet determinable. McDonald's Corp. v. Rocky Mt. McDonald's, Inc., 42 Colo. App. 143, 590 P.2d 519 (1979).

V. FOR WHAT PURPOSES INTERESTED PERSONS MAY HAVE RIGHTS DECLARED.

Section (d) of this rule confers no new authority concerning wills and trusts, because district courts had full and complete jurisdiction before the passage of the declaratory judgments act to construe wills and trusts and to control executors and trustees in the administration of estates. Mulcahy v. Johnson, 80 Colo. 499, 252 P. 816 (1927).

A declaratory judgment is a proper proceeding when the amounts involved are substantial and there is a threat of multiplicity of suits, particularly when the plaintiffs are public employees. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

VI. WHEN COURT MAY REFUSE TO DECLARE RIGHT.

Declaratory judgment actions should be considered only in cases where "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, and it follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed". People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

A declaratory judgment is appropriate when it will terminate a controversy. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

The district court properly dismissed a declaratory judgment complaint for lack of a justiciable controversy concerning the plaintiff's alleged right to select the location of the defendant's proposed oil and gas wells where the defendant had not yet submitted an application for a permit to drill wells at specific locations. Burkett v. Amoco Prod. Co., 85 P.3d 576 (Colo. App. 2003).

Where parties whose interests would be affected by the action were not made parties thereto, and declaratory judgment would not terminate litigation, a holding that necessary and indispensable parties were not before the trial court was not error. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

It is not the function of the courts, even by way of declaration, to adjudicate with respect to administrative orders in the absence of a showing that a judgment, if entered, would afford a plaintiff present relief. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

A judicial tribunal is not required to render a judicial opinion on a matter which has become moot. Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

A case is moot when a judgment, if rendered, will have no practical legal effect upon an existing controversy. Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

An action is considered moot when it no longer presents a justiciable controversy be-

cause the issues involved have become academic or dead, and in a declaratory judgment action there is a tendency to construe the mootness doctrine more narrowly. Sigma Chi Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515 (D. Colo. 1966).

Declaratory judgment proceedings may not be invoked to resolve a question which is nonexistent, even though it can be assumed that at some future time such question may arise. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958); Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

The jurisdiction of the court to enter declaratory judgments does not properly extend to entering advisory judgments as to hypothetical issues which may never arise. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

In action for declaratory judgment under this rule, the complaint must state a question which is existent and not one which is academic or nonexistent; there must be a justiciable issue or legal controversy extant, and not a mere possibility that at some future time such question may arise. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

In a suit to procure a declaratory judgment fixing the applicability of the sales tax to certain merchandising transactions, where it appears from the record that matters other than those shown by the pleadings must be presented to disclose the real controversy, the actual dispute can only be resolved by a consideration of proven or stipulated facts, and in such a situation the trial court, although properly holding that a demurrer to the complaint should have been overruled, should have, notwithstanding defendant elected to stand upon his demurrer, refused to render judgment granting the relief asked until evidence was produced affording a basis for conclusions with respect to proper declarations to be made and the relief to be granted. Armstrong v. Carman Distrib. Co., 108 Colo. 223, 115 P.2d 386 (1941).

Applied in City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929).

VII. REVIEW.

When an administrative remedy has not been sought in a timely manner, this rule does not provide jurisdiction for judicial review. Jefferson Sch. D. R-1 v. Div. of Labor, 791 P.2d 1217 (Colo. App. 1990).

Since judicial review would not be significantly aided by an additional administrative decision, petitioner's failure to appeal should not bar his only defense to a criminal prosecution. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

Applied in McNichols v. City & County of Denver, 101 Colo. 316, 74 P.2d 99 (1937); Young v. Bd. of County Comm'rs, 102 Colo. 342, 79 P.2d 654 (1938).

VIII. FURTHER RELIEF.

This rule provides for further relief based on a declaratory judgment, but unless such relief is asked in the same action wherein the declaratory judgment is sought, and in connection therewith, it can be obtained only as to damages accruing subsequent to the date of the declaratory judgment. Lane v. Page, 126 Colo. 560, 251 P.2d 1078 (1952).

Because a declaratory judgment should not be sought in order to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, where the damages were antecedent and might with propriety have been determined in the same proceeding in which declaratory judgment alone was sought, such judgment should operate as a bar to any subsequent claim therefor. This is in accord with the general rule. Lane v. Page, 126 Colo. 560, 251 P.2d 1078 (1952).

A declaratory judgment does not constitute absolute bar to subsequent proceedings where parties are seeking other remedies, even though based upon claims which could have been asserted in original action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973); City & County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (1973); Eason v. Bd. of County Comm'rs of County of Boulder, 961 P.2d 537 (Colo. App. 1997).

Subsequent relief sought by party to prior declaratory judgment action need not be sought by amendment of complaint in original action, but may be sought by separate action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

Relief is not limited by language of statute or rule to prevailing party in declaratory judgment action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

Reversal of an underlying declaratory judgment is not the "further relief" contemplated by § 13-51-112 and section (h) of this rule but is, instead, ordinary postjudgment relief. While "further relief" is not limited to the original prevailing party, nevertheless, such relief must seek remedies different from those granted in the declaratory judgment. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

Where plaintiff received no personal direct benefit from prosecuting declaratory judgment action, but the subject matter of the judgment was enhanced or preserved by the litigation, plaintiff's attorney is permitted a reasonable fee which should be awarded by the trial court. Agee v. Trustees of Pension Bd., 33 Colo. App. 268, 518 P.2d 301 (1974).

IX. ISSUES OF FACT.

The majority rule is that whether a party is entitled to have disputed issues of fact decided by a jury is not determined by the fact that a declaratory judgment is sought, but whether the right to a jury trial existed prior to the passage of the declaratory judgment act in the type of action involved, if so, there is a right to trial by jury in such action. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

The right to jury trial must be determined by the real, meritorious controversy between parties, as shown by the whole case, and in determining the essential character of a suit or remedy within this rule, the entire pleadings and all issues raised are to be examined and not merely the plaintiff's declaration, complaint, petition, or evidence, but a plaintiff may not defeat a defendant's right to a jury trial by framing his complaint so that his action would be cognizable only in equity under the old procedure, by the blending of a claim cognizable at law with a demand for equitable relief, by an allegation of an equitable cause of action which does not exist, or by joining a legal with an equitable cause of action; and at least, a joinder of legal and equitable causes of actions in a complaint does not deprive the defendant of a right to trial by jury of the purely legal issues. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

That pleadings, depositions, admissions or affidavits contain undisputed matter and can be taken as true is not decisive of the question of whether there is a genuine issue of any material fact, because an issue of fact may arise from countervailing inferences which are permissible from evidence accepted as true. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

In an action for declaratory judgment, where the evidence was in conflict as to whether a tenant was entitled to remain in possession under the farm lease for the succeeding crop year, and trial to a jury resulted in a verdict favorable to the tenant, it was error to set the verdict aside and give judgment for plaintiff, defendant being entitled to a jury trial. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

Factual determinations may be necessary in order to declare rights, status, or legal relations, and an action for declaratory judgment may be properly maintained by an insurance company to fix liability vel non, notwithstanding that factual determinations are necessary to make a declaration on the controlling issue. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Am. Family Mut. Ins. Co. v. Bowser, 779 P.2d 1376 (Colo. App. 1989).

X. PARTIES — MUNICIPAL ORDINANCES.

A case for a declaratory judgment, under a statute providing for declaratory judgments in cases of actual controversies only, which shall have the effect of final judgments, must be formally presented with proper parties. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

A plaintiff, seeking a determination of any cause by means of a judgment declaring rights, liabilities, and jural relations, must comply with the provisions of the declaratory judgment statute by naming all of the persons as parties who have a right to defend the action, or who are interested therein, or who will be affected by the making of a declaration of rights. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

The indispensable and necessary parties in any declaratory judgment action are those who have conflicting legal interests in the controversy to be adjudicated and whose rights will be affected thereby, and the trial court should insist that jurisdiction be obtained of all such parties either personally or in an appropriate class action under the provisions of C.R.C.P. 23; otherwise the court should dismiss the action, for a declaratory judgment action is intended to completely terminate the controversy, and if the court does not have jurisdiction of such interested parties, its judgment would not settle the questions presented and thus lead to multifarious litigation. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

All "parties who have or claim any interest which would be affected by the declaration" must be made parties to the proceeding, for neither in the declaratory judgment action nor in any other judicial proceeding may the rights of persons not parties to a judicial proceeding be bound by the action of a court in that proceeding. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

Only persons who have a legally cognizable interest must be made parties to an action, and no real controversy is presented until a judgment is entered. Connecticut Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc., 911 P.2d 684 (Colo. App. 1995), aff'd on other grounds sub nom. Constitution Assoc. v. N.H. Ins. Co., 930 P.2d 556 (Colo. 1996).

The interest which a party must have in the subject matter in order to make him a necessary party defendant must be a present substantial interest, as distinguished from a mere expectancy or future contingent interest. Game & Fish Comm'n v. Feast, 157 Colo. 303, 402 P.2d 169 (1965).

It is not necessary to make the state of Colorado a party defendant when two agencies of the state government are parties defendant and are represented by the state attorney general, because when suit is brought against an agency or department of the state government, it is in effect against the state itself. Game & Fish Comm'n v. Feast, 157 Colo. 303, 402 P.2d 169 (1965).

Attorney general must be served with a copy of the declaratory judgment proceeding and afforded the opportunity to be heard, but it is within his discretion whether he elects to be heard. Lakewood Pawnbrokers, Inc. v. City of Lakewood, 182 Colo. 315, 512 P.2d 1241 (1973).

Notice to attorney general not necessary where constitutional question arises during trial. Section 13-51-115 and this rule, mandating notice to the attorney general when allegations of unconstitutionality are made, do not address the situation where the question of constitutionality arises for the first time during the course of trial. Howell v. Woodlin Sch. Dist. R-104, 198 Colo. 40, 596 P.2d 56 (1979).

It is error to deny petitions of intervention of junior colleges whose rights would be directly affected by a declaration of unconstitutionality depriving them of funds. Mesa County Junior College Dist. v. Donner, 150 Colo. 156, 371 P.2d 442 (1962).

Where by stipulation all persons having any interest regarding the interpretation of liability insurance policies place themselves before the court, all the possible tort-feasors, in essence, challenge the respective insurance companies to defend the various named insureds pursuant to the terms of their contracts, and the insurance companies deny any liability, a controversy of sufficient immediacy and reality to warrant the issue of a declaratory judgment is raised. Beeson v. State Auto. & Cas. Underwriters, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Where the city was not made a party, and the attorney general of the state of Colorado has not been served with a copy of the proceeding and has had no opportunity to be heard, the essential conditions required by the rule are not present, and under such circumstances a determination of the questions argued by counsel cannot be had in this proceeding. Meier v. Schooley, 147 Colo. 244, 363 P.2d 653 (1961).

For discussion of member municipalities in sewage disposal district being found to be indispensable parties, see Bancroft-Clover Water & San. Dist. v. Metro. Denver Sewage Disposal Dist. No. 1, 670 P.2d 428 (Colo. App. 1983).

Membership policyholders of a mutual insurance company had a substantial interest in the declaratory judgment sought by the company and should have been made parties thereto, because in their absence the declaratory judgment would not have terminated the uncertainty or controversy. Continental Mut. Ins. Co. v. Cochrane, 89 Colo. 462, 4 P.2d 308 (1931).

Where plaintiffs seek a judicial declaration not as to their own rights and status but attempt to have others not named or served declared to be in some ''unlawful'' status, no error was committed by the trial court in holding that declaratory judgment was not a proper remedy. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

A litigant may properly bring a declaratory judgment action challenging a municipal ordinance for violating a city's charter. A city's charter is like its constitution, and all ordinances that a city passes must comply with the terms of its charter. City of Boulder v. Public Serv. Co. of Colo., 2018 CO 59, 420 P.3d 289.

XI. RULE IS REMEDIAL — PURPOSE.

The general or primary purpose of a declaratory judgments statute and rule is to provide a ready and speedy remedy, in cases of actual controversy, for determining issues and adjudicating the legal rights, duties, or status of the respective parties, before controversies with regard thereto lead to the repudiation of obligations, the invasion of rights, and the commission of wrongs. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956); Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Primary purpose of declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument of law. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

The purpose of the statute and the rule is to be remedial and to afford relief from uncertainty and insecurity, and the statute and rule expressly provide that they be liberally construed and administered. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking

relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

XII. TRIAL BY JURY.

It is clear that in a proper case a jury trial may be had in an action brought under a declaratory judgments rule. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

The fact that an action is for a declaratory judgment is not, in and of itself, determinative of the type of action brought for purposes of determining whether there is a right to trial by jury. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

The historical test to be applied to determine whether a right to a jury trial exists in a declaratory judgments action is that if any of the parties would have a constitutional right to a jury trial on any issue involved prior to the adoption of the declaratory judgments rule, such right remains. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without the intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected, and this has the salutary effect of permitting the defendant a trial by jury whether the action is brought under the common law or under the declaratory judgments rule. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

Rule 58. Entry of Judgment

(a) Entry. Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term ''judgment'' includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.

(b) Satisfaction. Satisfaction in whole or in part of a money judgment may be entered in the judgment record (Rule 79(d)) upon an execution returned satisfied in whole or in part, or upon the filing of a satisfaction with the clerk, signed by the judgment creditor's attorney of record unless a revocation of authority is previously filed, or by the signing of such satisfaction by the judgment creditor, attested by the clerk, or notary public, or by the signing of the judgment record (Rule 79(d)) by one herein authorized to execute satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the judgment creditor or the judgment creditor's attorney to give such satisfaction, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it.

Source: (a) amended February 7, 1991, effective June 1, 1991; (a) amended March 17, 1994, effective July 1, 1994; (b) amended and adopted February 27, 1997, effective July 1, 1997; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For judgment upon multiple claims or involving multiple parties, see C.R.C.P. 54(b); for judgment record, see C.R.C.P. 79(d); for attachments, see C.R.C.P. 102; for garnishment, see C.R.C.P. 103; for replevin, see C.R.C.P. 104.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951).

Applied in Dill v. County Court, 37 Colo. App. 45, 541 P.2d 1272 (1975); Ayala v. Colo. Dept. of Rev., 43 Colo. App. 357, 603 P.2d 979 (1979); Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982); Davis Mfg. & Supply Co. v. Coonskin Props., Inc., 646 P.2d 940 (Colo. App. 1982); Pasbrig v. Walton, 651 P.2d 459 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); Bassett v. Eagle Telecommunications, 750 P.2d 73 (Colo. App. 1987); In re Hoffner, 778 P.2d 702 (Colo. App. 1989).

II. ENTRY.

The entry of judgment is a purely ministerial act. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Relief sought, and therefore time limitations, for judgment entered pursuant to this rule is pursuant to C.R.C.P. 59(a)(4) even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

Section (a) indicates a sequence of events in which the entry of judgment follows, in point of time, the preparation of the written form of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

This rule provides that upon a special verdict the court shall direct the appropriate judgment, and other provisions indicate that the court shall direct the entry of a judgment. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

This rule requires that a court's preparation of the written form of the judgment precede the clerk's entry of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

The clerk's entries are administrative, not judicial. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

Court's ''findings, conclusions, and order'' is sufficient to function as the written form of the judgment required by section (a). Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Where the record does not contain any document executed before the clerk's notation of judgment in the register of actions, the notation cannot function as an entry of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Lack of a proper order determining a C.R.C.P. 59 motion was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the rule 59 motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Section (a) of this rule applies in dissolution of marriage cases with multiple issues. Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976).

Until the written form of a dissolution decree, together with the written permanent orders were prepared, signed by the judge, and then entered on the register of actions, there was no entry of judgment. Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976).

Likewise, a magistrate's order shall be signed and in writing in accordance with section (a). A magistrate's order modifying child support decree becomes effective, for the purposes of appeal, when the magistrate's order is signed. A nunc pro tunc order shall not affect a party's right to review. In re Spector, 867 P.2d 181 (Colo. App. 1993).

Written decree terminating a parental relationship constitutes ''a written form of the judgment'' within the intent of section (a). People in Interest of A.M.D., 648 P.2d 625 (Colo. 1982).

In dissolution proceeding, where trial court incorporated partial separation agreement as well as oral supplemental agreement into the degree of dissolution, there was a final, appealable order notwithstanding the fact that wife's counsel failed to prepare and file a written form of the supplemental agreement. The decree was dated and signed by the trial court and, by expressly incorporating both the partial separation agreement and the supplemental agreement, it left nothing further for the court to do in order to completely determine the rights

of the parties. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Judgment is not entered until there is a signed written order. Sayat Nova, Inc. v. District Court, 619 P.2d 764 (Colo. 1980); Neoplan USA Corp. v. Indus. Comm'n, 721 P.2d 157 (Colo. App. 1986); Church v. Amer. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987); In re Estate of Royal, 813 P.2d 790 (Colo. App. 1991); Hall v. Am. Standard Ins. Co. of Wis., 2012 COA 201, 292 P.3d 1196.

Where court entered its ''Findings of Fact, Conclusions of Law and Judgment'' and ordered separate decree quieting title to be prepared, there was no final judgment until the quiet title decree was signed. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

Judgment may be entered without the court's signature when that judgment is not prepared by counsel. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

For purposes of timely filing of a motion for new trial under C.R.C.P. 59(a)(1), a judgment is "entered" only upon notation in the judgment docket pursuant to section (a) of this rule and C.R.C.P. 79(d). City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeals as of right), not section (a) of this rule. Section (a) of this rule, however, does control the date of entry of judgment for the purposes of a C.R.C.P. 59, new trial motion. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984).

Final entry of judgment for purposes of timely notice of appeal under C.A.R. 4(a) based on denial of new trial motion is date on which court filed written judgment in fixed amount on special verdict since this written ruling adjudicated all claims, rights, and liabilities of parties. Vallejo v. Eldridge, 764 P.2d 417 (Colo. App. 1988).

Order entered on minutes is effective as "written order" under section (a) of this rule. Wesson v. Bowling, 199 Colo. 30, 604 P.2d 23 (1979).

A minute order was sufficiently clear and precise and may be entered on the register pursuant to section (a) of this rule where the order detailed the amount of the judgment and setoffs and assessed costs, gave the plaintiff the right to possession, provided that the plaintiff apply the defendant's security deposit to the judgment, allowed the plaintiff interest to the date of the judgment on the amount due on a note, and, finally, gave both parties 20 days to file motions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Entry of judgment effective upon notation in register. Both section (a) of this rule and C.R.C.P. 79(a) clearly state that entry of a judgment is effective upon notation in the register of actions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Written order denying motion for reconsideration of dismissal without prejudice complied with section (a) of this rule. The prior order dismissing the case without prejudice was not reduced to writing and did not comply with the requirements of this rule. SMLL, L.L.C. v. Daly, 128 P.3d 266 (Colo. App. 2005).

Judgment becomes final upon notation, though not recorded in judgment record. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the finality of that judgment. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

The court has the authority to supplement and modify the opinions it expresses in its oral remarks until the judgment has been reduced to writing, dated, and signed. In re West, 94 P.3d 1248 (Colo. App. 2004).

Conclusion of juvenile hearing does not occur until filing in clerk's office. For purposes of § 19-1-110 (now § 19-1-108) (5), the ''conclusion of the [juvenile] hearing'' does not occur until the juvenile commissioner signs the written findings and recommendations and transmits them to the juvenile judge by filing in the office of the clerk. The five-day period within which to file a request for review does not commence running until the filing date. People in Interest of M.C.L., 671 P.2d 1339 (Colo. App. 1983).

C.R.C.P. 6(e) does apply to extend time under this rule. Bonanza Corp. v. Durbin, 696 P.2d 818 (Colo. 1985).

No reviewable judgment presented. An appellate court must see that the actual judgment has been pronounced by the court and then entered by the clerk and that it appears in the record; otherwise no reviewable judgment is presented. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Relation back of judgment so as to extinguish appeal right unconstitutional. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determination made on May 28. Under these circumstances, the 10-day period of C.R.C.P. 59(b), expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Read together, the rules provide that a motion for a new trial must be filed not later

than 10 days following the notation of judgment in the trial court's register of actions (or judgment docket). In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Time for motion after entry of order not issuance. Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975) (decided prior to amendments made in 1977, 1984, and 1987).

Even though a nunc pro tunc order generally is fully operative on the litigants' rights as of the prescribed effective date, a nunc pro tunc order cannot be used to reduce the time nor to defeat the right to take an appeal. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

The filing on September 26 of an order nunc pro tunc as of September 25 cannot give effect to a clerk's September 25 entry of judgment, especially where the record does not indicate that the September 26 order was subsequently entered in the register of actions. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Where notice of entry of judgment is mailed to only one party in contravention of section (a) of this rule, the time provided by C.R.C.P. 59(a) for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. Padilla v. D.E. Frey & Co., Inc., 939 P.2d 475 (Colo. App. 1997).

Trial judge's failure to sign minute order does not prevent the court of appeals from considering the appeal. Furlong v. Gardner, 956 P.2d 545 (Colo. 1998).

Applied in Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

III. SATISFACTION.

Court has authority to order satisfaction apart from acknowledgment. A court has the authority to order a satisfaction of judgment even though there had not been an acknowledgment by the judgment creditor and without the filing of a motion by the debtor to compel such an acknowledgment. Osborn Hdwe. Co. v. Colo. Corp., 32 Colo. App. 254, 510 P.2d 461 (1973).

Execution sale constitutes satisfaction to extent of proceeds. In the absence of a defect justifying setting an execution sale aside, a levy and sale under an execution constitutes a satisfaction only to the extent of the proceeds of the sale. Gale v. Rice, 636 P.2d 1280 (Colo. App. 1981).

Rule authorizes a court to enter satisfaction of judgment on behalf of a judgment debtor, even though a judgment creditor refuses to acknowledge payment, so long as the judgment debtor has paid the judgment amount into the court registry. Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

Applied in Chateau Chaumont Condo. v. Aspen Title Co., 676 P.2d 1246 (Colo. App. 1983).

Rule 59. Motions for Post-Trial Relief

(a) Post-Trial Motions. Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow pursuant to a request for an extension of time made within that 14-day period, a party may move for post-trial relief including:

(1) A new trial of all or part of the issues;
(2) Judgment notwithstanding the verdict;
(3) Amendment of findings; or
(4) Amendment of judgment.

Motions for post-trial relief may be combined or asserted in the alternative. The motion shall state the ground asserted and the relief sought.

(b) No Post-Trial Motion Required. Filing of a motion for post-trial relief shall not be a condition precedent to appeal or cross-appeal, nor shall filing of such motion limit the issues that may be raised on appeal.

(c) On Initiative of Court. Within the time allowed the parties and upon any ground available to a party, the court on its own initiative, may:

(1) Order a new trial of all or part of the issues;
(2) Order judgment notwithstanding the verdict;
(3) Order an amendment of its findings; or
(4) Order an amendment of its judgment.

The court's order shall specify the grounds for such action.

(d) Grounds for New Trial. Subject to provisions of Rule 61, a new trial may be granted for any of the following causes:

(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial;

(2) Misconduct of the jury;

(3) Accident or surprise, which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at the trial;

(5) Excessive or inadequate damages; or

(6) Error in law.

When application is made under grounds (1), (2), (3), or (4), it shall be supported by affidavit filed with the motion. The opposing party shall have 21 days after service of an affidavit within which to file opposing affidavits, which period may be extended by the court or by written stipulation between the parties. The court may permit reply affidavits.

(e) Grounds for Judgment Notwithstanding Verdict. A judgment notwithstanding verdict may be granted for either of the following grounds:

(1) Insufficiency of evidence as a matter of law; or

(2) No genuine issue as to any material fact and the moving party being entitled to judgment as a matter of law.

A motion for directed verdict shall not be a prerequisite to any form of post-trial relief, including judgment notwithstanding verdict.

(f) Scope of Relief in Trials to Court. On motion for post-trial relief in an action tried without a jury, the court may, if a ground exists, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

(g) Scope of Relief in Trials to a Jury. On motion for post-trial relief in a jury trial, the court may, if a ground exists, order a new trial or direct entry of judgment. If no verdict was returned, the court may, if a ground exists, direct entry of judgment or order a new trial.

(h) Effect of Granting New Trial. The granting of a new trial shall not be an appealable order, but a party by participating in the new trial shall not be deemed to have waived any objection to the granting of the new trial, and the validity of the order granting new trial may be raised by appeal after final judgment has been entered in the case.

(i) Effect of Granting Judgment Notwithstanding Verdict, Amendment of Findings or Amendment of Judgment. Subject to C.R.C.P. 54(b), granting of judgment notwithstanding the verdict, amendment of findings or amendment of judgment shall be an appealable order.

(j) Time for Determination of Post-Trial Motions. The court shall determine any post-trial motion within 63 days (9 weeks) of the date of the filing of the motion. Where there are multiple motions for post-trial relief, the time for determination shall commence on the date of filing of the last of such motions. Any post-trial motion that has not been decided within the 63-day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date.

(k) When Judgment Becomes Final. For purposes of this Rule 59, judgment shall be final and time for filing of notice of appeal shall commence as set forth in Rule 4(a) of the Colorado Appellate Rules.

Source: (a) amended March 17, 1994, effective July 1, 1994; entire rule amended and effective October 11, 2001; IP(a), (a) last paragraph, (d) last paragraph, and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (a) amended and effective January 10, 2019.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Misconduct of Jury — Ground for New Trial'', see 16 Dicta 317 (1939). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''Civil Remedies and Civil Procedure'', see 30 Dicta 465 (1953). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964). For note, ''New Trial Motion in Colorado — Some Significant Changes'', see 37 U. Colo. L. Rev. 379 (1965). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, ''The One Percent Solution'', see 11 Colo. Law. 86 (1982). For article, ''Federal Practice and Procedure'', which discusses a Tenth Circuit decision dealing with post-trial motions, see 62 Den. U. L. Rev. 232 (1985). For article, ''Post-Trial Motions in the Civil Case: An Appellate Perspective'', see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule, as it existed prior to January 1, 1985, was similar to §§ 237 and 238 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, and, since present provisions of sections (e) and (i) of this rule are similar to C.R.C.P. 50(b) and (c), as they existed prior to January 1, 1985, relevant cases construing §§ 237 and 238 of the former code and former C.R.C.P. 50(b) and (c) have been included in the annotations to this rule.

Purpose of a motion for a new trial is to give the trial court an opportunity to correct alleged errors. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have made. In re Jones, 668 P.2d 980 (Colo. App. 1983); Harriman v. Cabela's Inc., 2016 COA 43, 371 P.3d 758.

Relief sought, and therefore time limitations, for judgment entered pursuant to C.R.C.P. 58 is pursuant to section (a)(4) of this rule even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

This rule authorizes the filing of a motion for new trial and empowers the court under certain conditions to grant a new trial on all or part of the issues. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

A motion for reconsideration of an order granting a new trial is not governed by this section because such order is not a final judgment. Bowman v. Songer, 820 P.2d 1110 (Colo. 1991).

A motion to reconsider is not specifically delineated in this rule, and no other rule or statute establishes a party's right to file such a motion, except under the State Administrative Procedure Act and the Colorado appellate rules. Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

A motion to reconsider in light of new circumstances or newly discovered evidence is not subject to the limitations in section (d) of this rule. UIH-SFCC Holdings, L.P. v. Brigato, 51 P.3d 1076 (Colo. App. 2002).

New trial is the only means for trial court to change judgment. Once a valid judgment is entered the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either this rule or C.R.C.P. 60. Cortvriendt v. Cortvriendt,

146 Colo. 387, 361 P.2d 767 (1961); In re Warner, 719 P.2d 363 (Colo. App. 1986).

Plaintiff's motion to reconsider the summary judgment determination must be characterized as a motion for new trial under section (d)(4). The primary purpose of a motion for a new trial is to give the trial court an opportunity to correct any errors it may have made. Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994); Zolman v. Pinnacol Assurance, 261 P.3d 490 (Colo. App. 2011).

Retired judge may not entertain a motion for a new trial. After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the ''former'' judge had himself entered the final judgment at a time when he was actually serving as a judge. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

Court of appeals had subject matter jurisdiction to rule on issue to setoff two judgments and to enter single judgment despite fact that second notice of appeal to amended judgment was untimely where plaintiff raised issue of lack of setoff in trial court. Husband v. Colo. Mountain Cellars, 867 P.2d 57 (Colo. App. 1993).

Motion for new trial is analogous to motion for reconsideration, reargument, or rehearing in a proceeding before the public utilities commission. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

An order denying a motion for a new trial does not deprive the court of jurisdiction to reconsider. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977).

Lack of a proper order, entered in accordance with C.R.C.P. 58, determining a motion under this rule was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

After reconsideration of the motion to set aside, the court can adhere to its order which has the effect of striking the motion for a new trial. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977).

Court has duties upon timely filing of motion. Where a timely motion for a new trial is filed, it is then incumbent upon the district court to either set the motion for hearing or to dispense with oral argument and decide the motion on the basis of the written briefs alone. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

A trial court has great discretion in granting of motions for new trials. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

In determining whether a new trial should be granted, the trial court has broad discretionary powers. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Whether or not a new trial is granted is usually a matter for the sound discretion of the trial judge whose presence and observation at the trial better equip him for making this decision. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

The trial court properly exercised discretion when granting a motion for reconsideration in order to correct a previous erroneous ruling on a motion to reconsider if done within 60 days of the prior ruling. In re Nixon, 785 P.2d 151 (Colo. App. 1989).

Where the record indicated that no further issues of material fact remained to be addressed, summary judgment was a final judgment despite trial court order indicating that genuine issues of material fact remained to be addressed, and district court lacked jurisdiction for further orders. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

Order reversed where court substitutes opinion on disputed facts. Orders granting new trials are subject to reversal where it appears from the record that the trial court has merely substituted its opinion on disputed questions of fact for that of the jury. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971); Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

Where the court failed to rule on a motion for reconsideration within 60 days, the court effectively denied the motion, the judgment became final, and the court lost jurisdiction for any further action. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

Automatic denial after the 60-day determination period described in section (j) of this rule is mandatory. Actions taken by the court under this rule after the 60-day period are outside the court's jurisdiction and void. De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

But divestiture of jurisdiction under this rule does not preclude the court from considering proper motions made under C.R.C.P. 60. De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

A trial judge may not change the substance of a jury's verdict upon his own motion. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

The granting of a new trial by the trial court should be reversed if the reasons for

granting a new trial do not constitute legal grounds, or do not in fact exist. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

In trial by court, judge retains jurisdiction after motion filed. Upon the filing of the motion for new trial within the time provided by rule, the trial court retained full power to correct any and all errors theretofore committed in the trial to the court. Goodwin v. Eller, 127 Colo. 529, 258 P.2d 493 (1953).

Filing of motion operates to continue jurisdiction of court. Where a trial was to the court, and its findings were announced, and counsel gave notice of a motion for a new trial, and subsequently at the same term filed his motion, but the motion was not disposed of until the subsequent term, held that the proceedings at the first term, subsequent to the findings, operated to reserve the case and to continue the jurisdiction beyond that term, for the purpose of disposing of the motion and the settling of the bill of exceptions. Gomer v. Chaffe, 5 Colo. 383 (1880).

The trial court may reverse judgment. Where an action has been tried to the court without a jury, and a motion for new trial has been filed after entry of findings and judgment, the trial court has the power, upon consideration of such motion, to vacate the original findings and judgment, reverse itself, and enter a judgment in favor of the opposite party. Goodwin v. Eller, 127 Colo. 529, 258 P.2d 493 (1953); Smith v. Whitlow, 129 Colo. 239, 268 P.2d 1031 (1954).

Trial court properly refused to consider the issues raised in affidavits and did not abuse its discretion in denying plaintiff's motion to reconsider since affidavits filed after the granting of a motion for summary judgment cannot be considered on a motion to reconsider and a court need not entertain new theories on a motion to reconsider following the grant of summary judgment. Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

The court will not address issues raised for the first time in a reply brief on a post-trial motion for the same reason that issues will not be considered when raised for the first time in reply briefs on appeal. Flagstaff Enters. Constr. Inc. v. Snow, 908 P.2d 1183 (Colo. App. 1995).

Court may limit issues to be retried. When error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distant and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters. Murrow v. Whitely, 125 Colo. 392, 244 P.2d 657 (1952).

Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice to either party. Murrow v. Whiteley, 125 Colo. 392, 244 P.2d 657 (1952).

Where the issues of damages and of liability in the action are closely intertwined, it would be error to confine the new trial solely to the liability issue. Where the issues at trial are interrelated and depend upon one another for determination, then error which requires a new trial on one issue will, of necessity, require a new trial as to all issues. Bassett v. O'Dell, 30 Colo. App. 215, 491 P.2d 604 (1971), aff'd, 178 Colo. 425, 498 P.2d 1134 (1972).

Under this rule, the court may, on review, subject dependency proceedings to a complete review, in furtherance of which he is empowered, inter alia, to reconsider the petition, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new order. People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 418 (1976).

The motion for a new trial set forth numerous alleged errors of the trial court relating to the admission of evidence, exhibits, the giving and refusal of instructions, and other matters bearing directly upon the issue of liability and which, if overruled, defendants would be entitled to have reviewed upon writ of error. To limit the retrial to the issue of damages alone would deprive them of the full review covering all elements of the case to which they are unquestionably entitled. The trial court acted within its discretion and authority in declining to limit the issues upon retrial. Piper v. District Court, 147 Colo. 87, 364 P.2d 213 (1961).

Original judgment retains force until modified. Irregular and erroneous judgments necessarily retain their force and have effect until modified by a trial court in consequence of its authority in certain circumstances, or until vacated pursuant to new trial procedures under this rule, or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault. Davidson Chevrolet, Inc. v. City & County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Interest runs from original judgment when motion for new trial is denied. Where a motion for a new trial is overruled and thereafter a trial court computes interest on the verdict and orders judgment in the amount of the verdict and interest, this concludes the trial court's action relative to the judgment and becomes the final judgment. Green v. Jones, 134 Colo. 208, 304 P.2d 901 (1956).

A memorandum in support of a motion for new trial is not mandatory but it is within the discretion of the trial judge to consider a motion for new trial without a memorandum. West-Fir Studs, Inc. v. Anlauf Lumber Co., 190 Colo. 298, 546 P.2d 487 (1976).

Memorandum brief is for benefit of trial court. Although section (a) (now section (d)) formerly required a memorandum brief and it was within the discretion of the trial court to strike a motion for new trial unaccompanied by such a brief, this requirement was for the benefit of the trial court in its own review and evaluation of its determination of the case, and where the trial court ruled on a motion for new trial without requiring a brief, the brief requirement was waived. L.C. Fulenwider, Inc. v. Ginsberg, 36 Colo. App. 246, 539 P.2d 1320 (1975) (decided prior to 1985 amendment).

The requirement of a memorandum brief in support of a motion for new trial is for the benefit of the trial court in its review of its determination of the case. Where the trial court considers the brief to be sufficient and considers the brief in its ruling on the motion, the brief has fulfilled its purpose as intended by the rules of procedure. In re Flohr, 672 P.2d 1024 (Colo. App. 1983).

Counsel is not entitled to free transcript to aid in preparation of motion. In absence of statute authorizing furnishing of free transcript of proceedings to aid in preparation of motion for new trial, counsel is not entitled to copy for preparation of such motion. People in Interest of A.R.S., 31 Colo. App. 268, 502 P.2d 92 (1972).

A motion for new trial filed in apt time suspends the judgment so that it becomes final only when the motion is overruled. Bates v. Woodward, 66 Colo. 555, 185 P. 351 (1919); Kinney v. Yoelin Bros. Mercantile Co., 74 Colo. 295, 220 P. 998 (1923).

This rule does not apply to appeals in a district court from judgments of a county court. Such appeals are pure creatures of statute, and no motion for a new trial is provided for in such cases. Erbaugh v. Jacobson, 140 Colo. 182, 342 P.2d 1026 (1959).

After an appeal of a final judgment has been perfected, the trial court is without jurisdiction to entertain any motion or any order affecting the judgment. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

Requirement of supporting affidavit serves to demonstrate that one, who moves for a new trial alleging irregularities in prior proceedings that denied him a fair trial, is acting upon a basis of knowledge, not upon a suspicion or mere hope. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Affidavit of losing counsel allowed to support motion for new trial where the affidavit contains factual allegations and a basis of knowledge upon which the motion for a new trial rests. Aldrich v. District Court, 714 P.2d 1321 (Colo. 1986).

Successor judge has discretion to rule on a motion for a new trial which challenges the sufficiency of the evidence. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

There is nothing in the rules prohibiting early filing of a motion for new trial; they only proscribe motions filed too late. Haynes v. Troxel, 670 P.2d 812 (Colo. App. 1983).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the finality of that judgment. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

The provisions of C.R.C.P. 6(e) authorize the addition of three days to the prescribed period for taking certain actions following service by mail. However, the time for filing a rule 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered. As a result, C.R.C.P. 6(e) is not applicable to the filing of rule 59 motions. Wilson v. Fireman's Fund Ins. Co., 931 P.2d 523 (Colo. App. 1996).

Attorney fee issues. Trial court retains jurisdiction to determine motions on attorney fee issues even though the merits of the judgment are pending appeal. Koontz v. Rosener, 787 P.2d 192 (Colo. App. 1989).

Where each party prevails in part an award of costs is committed to sole discretion of trial court and court's discretion remains unaffected by fact that judgment awarded to one party is larger than judgment awarded to the other. Husband v. Colo. Mountain Cellars, 867 P.2d 57 (Colo. App. 1993).

A request for costs is outside the purview of this section because a decision concerning a request for costs does not amend or otherwise affect the finality of the judgment on the merits. Because a request for costs is not subject to the 60-day limitation, the trial court had jurisdiction to consider the defendant's bill of costs following the expiration of that period. Hierath-Prout v. Bradley, 982 P.2d 329 (Colo. App. 1999).

Rule not applicable. Motions filed following a jury trial that pertained to unresolved, substantive claims raised in the complaint are not directed at post-judgment relief and, therefore, this rule is not applicable. Church v. Amer. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987).

No error by trial court in denying appellant's motion for leave to file a motion for reconsideration of motion to dismiss and in rejecting arguments to clarify trial court's original order. Failure to file motion within time allowed by section (a), absent extension, deprives court of jurisdiction to act under rule.

Here, time to file motion for post-trial relief ended before appellant filed motion for leave to file motion for reconsideration of motion to dismiss. As such, motion for leave was untimely, and trial court did not err in denying it. Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am., 181 P.3d 303 (Colo. App. 2007).

Applied in Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); City of Englewood v. Reffel, 34 Colo. App. 103, 522 P.2d 1241 (1974); Bd. of County Comm'rs v. Evergreen, Inc., 35 Colo. App. 171, 532 P.2d 777 (1974); Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); Lehman v. Williamson, 35 Colo. App. 372, 533 P.2d 63 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975), 541 P.2d 118 (Colo. App. 1975); Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); In re Franks, 189 Colo. 499, 542 P.2d 845 (1975); Lewis v. People in Interest of C.K.L., 189 Colo. 552, 543 P.2d 722 (1975); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (1977); Allred v. City of Lakewood, 40 Colo. App. 238, 576 P.2d 186 (1977); Catron v. Catron, 40 Colo. App. 476, 577 P.2d 322 (1978); Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978); Taylor v. Barnes, 41 Colo. App. 246, 586 P.2d 238 (1978); State Dept. Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); First Nat'l Bank v. Campbell, 41 Colo. App. 406, 589 P.2d 501 (1978); Matthews v. Tri-County Water Conservancy Dist., 42 Colo. App. 80, 594 P.2d 586 (1979); O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); City of Colo. Springs v. Gladin, 198 Colo. 333, 599 P.2d 907 (1979); Hitti v. Montezuma Valley Irrigation Co., 42 Colo. App. 194, 599 P.2d 918 (1979); Ayala v. Colo. Dept. of Rev., 43 Colo. App. 357, 603 P.2d 979 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); People in Interest of J.B.P., 44 Colo. App. 95, 608 P.2d 847 (1980); Matthews v. Tri-County Water Conservancy Dist., 200 Colo. 202, 613 P.2d 889 (1980); Prof'l Group, Ltd. v. Great Falls Props., Inc., 44 Colo. App. 370, 622 P.2d 76 (1980); D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981); Fitzgerald v. Edelen, 623 P.2d 418 (Colo. App. 1981); Fort Lupton State Bank v. Murata, 626 P.2d 757 (Colo. App. 1981); Craig v. Rider, 628 P.2d 623 (Colo. App. 1980); In re Stroud, 631 P.2d 168 (Colo. 1981); Maltby v. J.F. Images, Inc., 632 P.2d 646 (Colo. App. 1981); In re Stedman, 632 P.2d 1048 (Colo. App. 1981); Young v. Golden State Bank, 632 P.2d 1053 (Colo. App. 1981); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); People in Interest of E.A., 638 P.2d 278 (Colo. 1981); In re Smith, 641 P.2d 301 (Colo. App. 1981); Duran v. Lamm, 644 P.2d 66 (Colo. App. 1981); Cavanaugh v. State Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982); Davis Mfg. & Supply Co. v. Coonskin Props., Inc., 646 P.2d 940 (Colo. App. 1982); Jameson v. Foster, 646 P.2d 955 (Colo. App. 1982); Kennedy v. Leo Payne Broadcasting, 648 P.2d 673 (Colo. App. 1982); State Dept. of Highways v. Pigg, 656 P.2d 46 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); Parry v. Walker, 657 P.2d 1000 (Colo. App. 1982); Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982); Moore v. Wilson, 662 P.2d 160 (Colo. 1983); Acme Delivery Serv., Inc., v. Samsonite Corp., 663 P.2d 621 (Colo. 1983); Blecker v. Kofoed, 714 P.2d 909 (Colo. 1986); Blue Cross of W. New York v. Bukulmez, 736 P.2d 834 (Colo. 1987); Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, 327 P.3d 321.

II. POST-TRIAL MOTIONS.

A. New Trial.

The purpose of filing a post-trial motion is to give a trial court an opportunity to correct any errors. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957); Minshall v. Pettit, 151 Colo. 501, 379 P.2d 394 (1963); Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

A motion for a new trial is not to be regarded as a routine or perfunctory matter. Its obvious purpose is to direct the attention of the trial court with at least some degree of specificity to that which the losing litigant asserts to be error, all to the end that the trial court will be afforded a last look, and an intelligent last look, at the controversy still before it. General allegations of error do not comply. Martin v. Opdyke Agency, Inc., 156 Colo. 316, 398 P.2d 971 (1965); Hamilton v. Gravinsky, 28 Colo. App. 408, 474 P.2d 185 (1970).

Order granting new trial is an interlocutory order, and the trial court retains jurisdiction to modify or rescind the order prior to the entry of any final judgment thereafter. A motion for reconsideration of such an order does not challenge the entry of the judgment and is not subject to the limitations of this rule. Songer v. Bowman, 804 P.2d 261 (Colo. App. 1990).

Section (f) of this rule, through the language "if a ground exists", incorporates the six specific grounds upon which post-trial relief may be granted, which are found in section (d) of the rule. Kincaid v. Western Oper. Co., 890 P.2d 249 (Colo. App. 1994).

Section (b) (now (a)) permits a motion for new trial to be filed within 10 (now 15) days after entry of judgment, which means after entry of an adverse judgment. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959).

Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 (now 15) days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975).

When 10-day rule not applicable. Where the court was granting plaintiff's motion for a new trial and not acting on its own motion, the 10-day rule set forth in section (b) (now (a)) of this rule was not applicable. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976) (decided prior to 1977 and 1985 amendments).

Provision of section (b) (now (a)) is mandatory. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

Section (b) (now (a)) is mandatory, and failure to comply with it requires a dismissal of the appeal. SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975); Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982).

Timely filing is jurisdictional. Timely filing of a motion for a new trial is jurisdictional. SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975).

The failure to file a motion for a new trial within the time prescribed by section (b) (now (a)), as extended by any orders of court pursuant to motions timely made, deprives the court of jurisdiction and requires dismissal of the appeal. Nat'l Account Sys. v. District Court, 634 P.2d 48 (Colo. 1981); Schuster v. Zwicker, 659 P.2d 687 (Colo. 1983); Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984); In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

A timely motion for a new trial, or to alter or amend the judgment, is a jurisdictional prerequisite to appellate review of such judgment. Watered Down Farms v. Rowe, 39 Colo. App. 169, 566 P.2d 710 (1977), rev'd on other grounds, 195 Colo. 152, 576 P.2d 172 (1978).

Period for filing a motion for a new trial begins when notice of entry of judgment is mailed to the parties, but C.R.C.P. 6(e) extends that period when a judgment is mailed. Because C.R.C.P. 6(e) does not specifically exclude C.R.C.P. 59 motions from its provisions, C.R.C.P. 6(e) extends the time for filing a C.R.C.P. 59 motion when the parties were not present when the judgment was signed and the notice of entry of judgment was mailed to the parties. Littlefield v. Bamberger, 10 P.3d 710 (Colo. App. 2000).

Extension of time is discretionary. Trial judge's extension of the time for filing the motion for new trial, from 10 (now 15) to 20 days, is within his discretion. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Extension of time for filing post-trial motions. Where the trial court, following judgment, grants a ''stay'' in order for counsel to have an ''opportunity to pursue the matter further'', it intends to extend the permissible time for filing post-trial motions. Blecker v. Kofoed, 672 P.2d 526 (Colo. 1983).

Court of review will assume extension was properly made. Where the time for filing a motion for new trial was extended to 15 (now regular time limit) days after the entry of judgment, the court of review will assume that the extension was properly made, in the absence of proper objections to the order of the county court. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Failure to file motion in time is fatal. The failure to file a motion for a new trial within the time provided by this rule, or within the extended period fixed by the court for so doing, is fatal to the right of review. Therefore, the county court was without jurisdiction to entertain a motion for a new trial after the time allowed by the court; and such motion should have been stricken from the files. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949); City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Trial court proceeded in excess of its jurisdiction when it vacated the jury verdict and ordered a new trial outside of the time limits provided by this rule. The trial court had jurisdiction to order a new trial within the time limit only. Beavers v. Archstone Comtys. Ltd., 64 P.3d 855 (Colo. 2003).

For permissibility of filing motion with judge or clerk, see Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

Defendant must file for new trial after his case is dismissed, not after conclusion of entire case. Where a complaint is dismissed as to certain defendants and judgment of dismissal entered under C.R.C.P. 41(b)(1), a court has no power after the time to file a motion for a new trial has expired as to such defendants, to grant a motion for a new trial as to all defendants, such dismissal constituting a judgment on the merits under C.R.C.P. 41. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

A judgment is entered only when noted in judgment docket. For purposes of timely filing of a motion for new trial under section (b) (now (a)) of this rule, a judgment is ''entered'' only upon notation in the judgment docket pursuant to C.R.C.P. 58(a)(3) (now (a)) and C.R.C.P.

79(d). City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

If this section is not complied with, supreme court cannot review. Where a record on error fails to show compliance with this section requiring the filing of a motion for a new trial, or that a trial court otherwise ordered under section (f), the supreme court will not consider the merits on review. Sullivan v. Modern Music Co., 137 Colo. 292, 324 P.2d 374 (1958) (decided prior to 1985 amendment).

C.R.C.P. 6(a) does apply to extend time under this rule. Bonanza Corp. v. Durbin, 696 P.2d 818 (Colo. 1985).

Court did not forestall 60-day deadline by taking inconclusive action within said period, i.e. scheduling hearing on motion. Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Motion may be filed prior to entry of judgment. A motion for new trial may properly be filed prior to the execution of the written order entering the judgment. In re Jones, 668 P.2d 980 (Colo. App. 1983).

Date of entry of judgment on jury verdict is effective date. The date that judgment on a jury verdict is entered in open court is the effective date of entry of judgment which governs the filing of a motion for new trial under section (b) (now (a)). Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982).

C.R.C.P. 58(a) controls date of entry of judgment. The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeal as of right), not C.R.C.P. 58(a); C.R.C.P. 58(a), however, does control the date of entry of judgment for the purposes of this rule. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

When post-trial motion is filed prior to entry of judgment, it is deemed to have been filed on the date of entry of judgment, and the 60-day period within which to rule on motion commences to run from said date. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988).

Post-trial motions for attorney fees are subject to the provisions of this rule, and the effect of such motions upon the time limitations of C.A.R. 4(a) are as specified in this rule. Torrez v. Day, 725 P.2d 1184 (Colo. App. 1986).

Evidence was not "newly discovered" when the party seeking a new trial had the evidence in its possession two months prior to the trial court's judgment, but did not file the evidence with the trial court. Mortgage Invs. Corp. v. Battle Mountain Corp., 70 P.3d 1176 (Colo. App. 2003).

Where there has never been a trial, this section cannot be violated. In a proceeding under the Colorado Children's Code, title 19, where it was argued that the petition for new trial and demand for jury trial were filed too late, and thus were not in accordance with section (b) (now (a)) of this rule, this argument was rejected since according to the record there had never been any trial held or evidence presented in support of the dependency petition and, hence, no violation of said section could have occurred. C. B. v. People in Interest of J. T. B., 30 Colo. App. 269, 493 P.2d 691 (1971).

The running of the time for filing a notice of appeal is terminated upon the timely filing of a motion for new trial, and the time begins to run anew when that motion is denied. A subsequent motion for new trial that raises issues that either were or could have been raised in the movant's prior motion does not affect the running of the time for filing the notice of appeal. Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983).

Trial court erred in failing to consider a motion for new trial and motion to amend judgment which were filed after court entered judgment from bench but before judgment was signed as written order and filed. Haynes v. Troxel, 670 P.2d 812 (Colo. App. 1983).

For distinction between considerations governing determination of effect of time limitations in criminal cases and in civil cases, see People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of this rule or C.R.C.P. 60 were available to him to reopen the divorce proceeding. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Extinguishing right of appeal by relating action back to date of judgment. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determinations made on May 28. Under these circumstances, the 10-day period of section (b) (now (a)) of this rule expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to the 1977 and 1985 amendments).

Motion for judgment non abstante is wholly separate and distinct from motion for new trial and does not take the place of one. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment non abstante or a new trial may be prayed in the alternative. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment notwithstanding verdict (n.o.v.) does not effect an automatic denial of an alternative motion for a

new trial. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Trial court may grant a motion for a new trial on all or part of the issues. Trione v. Mike Wallen Standard, Inc., 902 P.2d 454 (Colo. App. 1995).

Before granting a partial new trial, it should clearly appear that the issue to be retried is entirely distinct and separable from the other issues involved in the case and that a partial retrial can be had without injustice to any party. Bassett v. O'Dell, 178 Colo. 425, 498 P.2d 1134 (1972); Trione v. Mike Wallen Standard, Inc., 902 P.2d 454 (Colo. App. 1995).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

Applied in Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984); Acierno by & through Acierno v. Garyfallou, 2016 COA 91, 409 P.3d 464.

B. Judgment Notwithstanding the Verdict.

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

This rule provides the method for securing a judgment "non obstante veredicto" when a motion for a directed verdict has been properly requested. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

This rule adds nothing of substance to the rights of litigants previously available through a more cumbersome procedure. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

The reason underlying this rule is that an opportunity should be given a trial court to reexamine, as a matter of law, the facts which have been considered and resolved by a jury. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Motion for directed verdict must be made at conclusion of evidence. In actions where the issues are submitted to a jury for determination, it is an essential prerequisite to the right of either party to file a motion for judgment notwithstanding the verdict that a motion for directed verdict shall have been made at the conclusion of all the evidence. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

This rule does not compel a party against whom a verdict is directed to make a motion for a directed verdict in his favor as a condition to the right to file a motion for judgment notwithstanding the verdict, since a verdict having been directed by the court, the reason for the requirement no longer exists. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Where a motion to dismiss is interposed at the conclusion of all the evidence and after verdict and judgment a motion for a new trial is filed, one of the grounds thereof being that a court erred in denying the motion to dismiss made at the conclusion of all the evidence, such motion is sufficient to authorize a trial court to enter judgment for a defendant notwithstanding the verdict. Mountain States Mixed Feed Co. v. Ford, 140 Colo. 224, 343 P.2d 828 (1959).

For a court to set aside a verdict as against the weight of evidence, the evidence may be merely insufficient in fact and it may be either

insufficient in law or it may have more weight and not enough to justify the court in exercising the control which the law gives it to prevent unjust verdicts to allow a verdict to stand. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

This rule does not allow for a belated disturbance of a jury's finding on the facts when a reservation has been made to determine law questions only. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

Filing a motion for judgment notwithstanding the verdict within 10 days after receipt of the verdict is mandatory. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Unless such motion is filed within that time, a court has no power to pass on it. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957); Arrow Mfg. Co. v. Ross, 141 Colo. 1, 346 P.2d 305 (1959).

Appellate court forbidden to enter judgment. In the absence of a motion for judgment notwithstanding the verdict made in the trial court within 10 days after reception of a verdict, the rule forbids the trial judge or an appellate court to enter such a judgment. Mero v. Holly Hudson Motor Co., 129 Colo. 282, 269 P.2d 698 (1954).

Standard for granting judgment n.o.v. A jury's verdict can be set aside and judgment notwithstanding the verdict entered only if the evidence is such that reasonable men could not reach the same conclusion as the jury. Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978), aff'd, 200 Colo. 268, 614 P.2d 880 (1980); Wesley v. United Servs. Auto Ass'n, 694 P.2d 855 (Colo. App. 1984); Smith v. Denver, 726 P.2d 1125 (Colo. 1986); Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544 (Colo. 1988); Nelson v. Hammond, 802 P.2d 452 (Colo. 1990); McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990).

When order enlarging time to file motion for judgment n.o.v. permissible. Although C.R.C.P. 6(b) expressly limits a trial court's ability to extend a time for acting under section (b) of this rule, there is an exception to that limitation where a party reasonably relies and acts upon an erroneous or misleading statement of ruling by a trial court regarding the time for filing post-trial motions. Converse v. Zinke, 635 P.2d 882 (Colo. 1981).

Motion for judgment non abstante is wholly separate and distinct from motion for new trial and does not take the place of one. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment non abstante or a new trial may be prayed in the alternative. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment n.o.v. does not effect an automatic denial of an alternative motion for a new trial. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

The standard for granting a motion for judgment notwithstanding the verdict is complicated when statutory presumptions exist. Such presumptions may be rebutted only by clear and convincing evidence that persuades the finder of fact that the truth of the contention is highly probable and free from serious and substantial doubt. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

In ruling on motion for judgment notwithstanding the verdict, the court must determine whether a reasonable person could not have reached the same conclusion as did the jury and, in making such determination, the court cannot consider the weight of the evidence or

the credibility of the witnesses and must consider the evidence in the light most favorable to the verdict. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988); Tuttle v. ANR Freight Sys., Inc., 797 P.2d 825 (Colo. App. 1990); Durdin v. Cheyenne Mountain Bank, 98 P.3d 899 (Colo. App. 2004).

A judgment notwithstanding the verdict may be entered only if a reasonable person could not reach the same conclusion as the jury, when viewing the evidence in the light most favorable to the party against whom the motion is directed. Every reasonable inference that may be drawn from the evidence must be drawn in favor of the non-moving party. Boulder Valley Sch. Dist. R-2 v. Price, 805 P.2d 1085 (Colo. 1991).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

The trial court did not view the evidence presented in appellant's favor and thereby misapplied the standard for granting a judgment notwithstanding the verdict. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

Applied in Alden Sign Co. v. Roblee, 121 Colo. 432, 217 P.2d 867 (1950); Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490, 36 A.L.R.3d 232 (1967); DeCaire v. Pub. Serv. Co., 173 Colo. 402, 479 P.2d 964 (1971); Wheller & Lewis v. Slifer, 195 Colo. 291, 577 P.2d 1092 (1978); Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978); Rogers v. Forest City Stapleton, Inc., 2015 COA 167M, 441 P.3d 969.

C. Amendment of Judgment.

Former section (e) required that a motion to alter or amend must be filed within 10 days after entry of judgment. Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957).

Former section (e) of this rule provided for the filing of a motion to alter or amend a judgment, which is the motion that is referred to in former section (f) of this rule, and it is not to be confused with a motion under former C.R.C.P. 52(b) to amend the findings. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

When trial court amends pursuant to a motion, original judgment is not final. Former section (e) of this rule specified that a party may move to alter or amend a judgment by a motion filed not later than 10 days after entry of judgment. Appellee filed such a motion within the allotted time, and the trial court subsequently did amend its judgment pursuant to such motion and the supplemental motion. Under these circumstances, the original trial court's judgment never became final. It was not enforceable by either divorced party with respect to his or her property rights. It did not create an enforceable right either in the husband or in his estate to take a divided share of the joint tenancy property. Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

A judgment amended to comply with a motion therefor is the only judgment to which a writ of error will lie. Green v. Jones, 134 Colo. 208, 304 P.2d 901 (1956).

C.R.C.P. 6(b) divests the court of jurisdiction to extend the time for taking action under former section (e) of this rule. Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957).

C.R.C.P. 6(b) gives trial court wide latitude in extending 10-day period of former section (e). Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

Memorandum brief must be filed with motion. The rule requiring a short memorandum brief to be filed with a motion for new trial applies equally to a motion to alter or amend the judgment. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977) (decided before 1985 amendment).

Court loses jurisdiction to hear plaintiff's application for attorney's fees if the plaintiff fails to file a motion to amend the judgment within 15 days. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Omission of order for costs indicates no allowance of costs. As determined by the court entering judgment, the omission of an order relating to costs constitutes a direction by it that no costs, including attorney fees, are allowed. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Appellants barred on appeal from asserting error by trial court. Where, after two cases were tried and the parties' rights and obligations were determined by partial summary judgments which were not made final judgments under C.R.C.P. 54(b), appellants could have, and indeed should have, moved for a new trial or an altered or amended judgment under this rule and where they did not timely file such motions and allow the trial court an opportunity to review its possible errors, appellants were barred on appeal from asserting error by the trial court. Manka v. Martin, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

Issue of amendment of judgment due to nonjoinder of indispensable parties was preserved for appellate review, despite appellee's assertion to the contrary, due to the court's ability to act after judgment to protect absent indispensable parties. Francis v. Aspen Mtn. Condo. Ass'n, 2017 COA 19, 401 P.3d 125.

Beneficiaries of a trust are not indispensable parties where the trust is a party to the action and is represented by the trustee. In such a case the beneficiaries' absence does not "impair or impede" a complete adjudication of the parties' rights. Francis v. Aspen Mtn. Condo. Ass'n, 2017 COA 19, 401 P.3d 125.

Repeated assurances by the court clerk that the defendant's motion to alter and amend the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under C.R.C.P. 60(b)(5). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Court properly denied motion to amend judgment in malpractice claim against attorney as defendant is not entitled to set-off fees which would otherwise have been collected from original action. McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990).

Where notice of entry of judgment is mailed to only one party in contravention of C.R.C.P. 58(a), the time provided by section (a) of this rule for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. Padilla v. D.E. Frey & Co., Inc., 939 P.2d 475 (Colo. App. 1997).

Trial court's property division in dissolution of marriage action reflects no abuse of discretion based on husband's economic circumstances, the characterization of property as marital or separate, or wife's depletion of marital property, where trial court did its best in dividing marital property based only on wife's evidence since husband elected not to participate in the action. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Applied in Hughes v. Worth, 162 Colo. 429, 427 P.2d 327 (1967); Bittle v. CAM-Colo., LLC, 2012 COA 93, 318 P.3d 65.

III. ON INITIATIVE OF COURT.

The trial court has an immemorial right to grant a new trial whenever, in its opinion, the justice of the particular case so requires. Brncic v. Metz, 28 Colo. App. 204, 471 P.2d 618 (1970).

New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

Judge may grant new trial even if party's motion is insufficient. Where plaintiffs filed a motion for new trial in apt time on the ground of an erroneous instruction to the jury, the fact that the court granted a new trial on a portion of motion which correctly stated the law and hence was insufficient to justify granting the new trial did not support claim that the court erroneously acted upon its own initiative under this rule where the instruction was patently erroneous in other respects. Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963).

C.R.C.P. 51, does not apply to trial court when it sua sponte grants new trial. The purposes of the contemporaneous objection requirement of C.R.C.P. 51 are not violated when the trial court acts on its own initiative to order a new trial under this rule. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

Where status of minor children at stake, court remanded for findings. While a motion may fail to comply strictly with the requirements of this rule when the status of minor children is at stake, a court of appeals will notice error in the trial court proceedings and remand for findings. In re Brown, 626 P.2d 755 (Colo. App. 1981).

An order enlarging the time within which to file a motion for judgment n.o.v. is without effect in view of the provisions of C.R.C.P. 6(b). Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

C.R.C.P. 6(b) provides that a court may not extend the time for taking any action under this rule. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

District court exceeded its jurisdiction by ordering, sua sponte, a new trial on all the issues of marriage dissolution proceeding because the district court acted outside its time limits mandated by section (c) of this rule to initiate such post-trial relief and failed to state adequate grounds for a new trial as required by said rule. Koch v. District Court, Jefferson County, 948 P.2d 4 (Colo. 1997).

IV. GROUNDS FOR NEW TRIAL.

A. In General.

Annotator's note. Since former section (a)(1) (now (d)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A trial court may not grant a new trial for reasons other than those enumerated in section (d). This rule limits the grounds to those specified in the rule, and there is no catch-all or discretionary ground available. Rains v. Barber, 2018 CO 61, 420 P.3d 969.

A miscarriage of justice is not one of the grounds specified in section (d). Trial court abused its discretion in granting a new trial on that ground. Rains v. Barber, 2018 CO 61, 420 P.3d 969.

Use of "shall" in section (a). Prior to 1985, former section (a) of this rule specified that the memorandum brief "shall be filed with the motion". There is a presumption that the word "shall" when used in a statute or rule is mandatory. Anlauf Lumber Co. v. West-Fir Studs, Inc., 35 Colo. App. 119, 531 P.2d 980 (1974), aff'd, 190 Colo. 298, 546 P.2d 487 (1976) (decided prior to the 1985 amendment).

This rule specifies that an application for new trial, under certain circumstances, "shall be supported by affidavit", and there is a presumption that the word "shall" when used in a statute or rule is mandatory. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976); In re Fleet, 701 P.2d 1245 (Colo. App. 1985).

Notwithstanding the affidavit requirement in section (d) of this rule, C.R.E. 606(b) acts to preclude juror affidavits as a basis for seeking post-trial relief, unless the exceptions in that rule apply. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Issues must be preserved for consideration on appeal. Where a party fails to preserve issues for review in his motion for a new trial or in his motion to amend judgment, the court will not consider them on appeal. Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981).

Court not required to act in absence of affidavit. Upon receipt of a motion for a new trial on those grounds which, according to the rules, must be supported by affidavit, the court is not required to act in the absence of such affidavit. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

A motion to alter or amend judgment, or for new trial, does not in itself amount to a memorandum brief. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977) (decided prior to the 1985 amendment).

Where events forming the basis for the granting of a new trial occurred in the presence of the court and during the trial, the trial judge obviously had sufficient first hand knowledge to determine whether there was adequate ground for a new trial under this rule, and, under such circumstances, the absence of an affidavit does not deprive the court of the power to grant relief. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Where a motion for a new trial is based on misconduct of counsel which occurred in the presence of the court, the court may act upon and grant such motion even if no affidavit is submitted. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

New trial may be granted upon misconduct of counsel. The granting of a new trial may be founded upon counsel's misstatements of fact, or on his statements of fact which have not been introduced in or established by evidence, or on a finding that counsel has made a statement or argument appealing to the emotions and prejudices of the jury. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

A new trial is not granted for misconduct of counsel as a disciplinary measure, but to prevent a miscarriage of justice. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Fact that the court found defendant's counsel to be guilty of misconduct during the course of the trial for more reasons than those alleged by plaintiff does not put the court in the position of acting on its own initiative in granting motion for new trial. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Filing of motion tolls time for filing notice of appeal. The filing of a motion to alter or amend a judgment tolls the running of the time for filing notice of appeal. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Affidavit filed after time allowed is not to be considered. An affidavit filed in support of a motion for a new trial without leave of the court, and after the time limited by a previous order, is not to be considered. Denver & R. G. R. R. v. Heckman, 45 Colo. 470, 101 P. 976 (1909).

Sufficiency of affidavit required. An affidavit merely stating what the opposing counsel had directed his client to do, but not showing that in fact anything was done pursuant to the direction, is insufficient to convict the party of misconduct. Denver & R. G. R. R. v. Heckman, 45 Colo. 470, 101 P. 976 (1909).

The requirement of an affidavit presupposes that the affiant has firsthand information rather than possessing only hearsay. Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

The reception of oral testimony at the time the motion for new trial is under consideration is a matter within the discretion of the trial court. The record in the instant case does not suggest an abuse of this discretion. Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913).

Hearsay and conclusory allegations are insufficient under rule. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

B. Irregularity in Proceedings.

Ruling on motion for new trial on ground of misconduct of witness is within discretion

of trial court. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929); Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951).

Ruling will not be disturbed in absence of showing that the court's discretion was abused. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

For when discretion is allowed, see Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951).

An irregularity warranting a new trial is an improper occurrence during the trial that affected or likely affected the outcome. Rains v. Barber, 2018 CO 61, 420 P.3d 969.

The finding of the court cannot be disturbed unless it was manifestly against the weight of the testimony. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Objection on ground of misconduct of witness must be made before verdict. A party to a trial who, although knowing of apparent misconduct on the part of a witness, remains silent until after the verdict has gone against him, may not then assign such misconduct as a ground for a new trial. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

Conduct of witness held insufficient to warrant reversal. The fact that a witness was seen in conversation with a juror during a recess of the court, is insufficient to warrant a reversal of the judgment, where there was nothing to indicate any attempt to influence the juror. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

Giving cigars to jurors after verdict is not grounds for new trial. The fact that the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, held no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks by employees of a party to jury may be grounds for new trial. If persons employed by a suitor hang about the purlieus of the court, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, a verdict shown to have been influenced by such practices should be unhesitatingly vacated. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks to jurors which manifestly had no effect upon their deliberations are not ground for a new trial. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Seeing of excluded exhibit by jury may be grounds for new trial. A mistake or inadvertence whereby the jury was permitted to have access to an exhibit which had been excluded from consideration was an irregularity in the proceedings, and under the provisions of this rule, the proper method of presenting it in a motion for a new trial is to support and file an affidavit with the motion. Maloy v. Griffith, 125 Colo. 85, 240 P.2d 923 (1952).

If trial court instructs jury on improper closing remarks, there are no grounds for new trial. Where remarks in closing argument are improper but the trial court immediately and subsequently properly instructs, the reviewing court must presume that the jury followed the trial court's instructions, such not constituting grounds for new trial. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

Denial of a motion for a continuance because of the unavoidable absence of a party during litigation is grounds for the granting of a new trial because the attendance of a litigant is necessary for a fair presentation of his case. Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

For deficiency in trial record which requires reversal of judgment but not new trial, see Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1973).

No relief under this rule for malpractice of party's own attorney. In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

Sustained objection to expert testimony not an irregularity warranting a new trial. There was no evidence in the record of juror confusion and the jury had ample knowledge of its role, and therefore did not need to hear expert's apportionment of fault to perform its role. Rains v. Barber, 2018 CO 61, 420 P.3d 969.

An improper jury verdict may stem from an irregularity in the proceedings, but the verdict itself cannot be an irregularity justifying a new trial. Rains v. Barber, 2018 CO 61, 420 P.3d 969.

Untimely filing of motion contending irregularity in proceedings fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

C. Misconduct of Jury.

Annotator's note. Since section (a)(2) (now (d)(2)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section

have been included in the annotations to this rule.

Disposition of motion is within discretion of trial court. Disposition of a motion for a new trial based on the ground of misconduct of jurors is within the sound discretion of the trial court. Denver Alfalfa Milling & Prods. Co. v. Erickson, 77 Colo. 583, 239 P. 17 (1925).

Verdict set aside where misconduct revealed. Jury verdict will be set aside when juror's affidavit revealed certain misconduct on the part of one or more of the jurors. Santilli v. Pueblo, 184 Colo. 432, 521 P.2d 170 (1974).

Ruling on motion will not be disturbed on review, unless the discretion has been abused or the ruling is manifestly against the weight of the evidence. Denver Alfalfa Milling & Prods. Co. v. Erickson, 77 Colo. 583, 239 P. 17 (1925).

Test of misconduct is capacity of influencing result. The test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961); T.S. v. G.G., 679 P.2d 118 (Colo. App. 1984); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

Sympathy for a plaintiff's injured condition is not tantamount to the passion or prejudice necessary to overturn a jury verdict. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Test is determined as a matter of law. It is not the province of the court to speculate, conjecture or determine what or how much effect upon a verdict the gross misconduct of a juror or jurors may in fact have in a particular case. While a correct determination might be possible in some cases, the inquiry would be impractical and fruitless in many cases and in all cases contain an element of speculation. The proper function of the court is to hear the facts of the alleged misconduct and to determine as a matter of law the effect reasonably calculated to be produced upon the minds of the jury by such misconduct. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

A new trial on all issues, not the granting of remittitur of the verdict, must be ordered when a trial court makes a finding that an excessive jury verdict resulted from bias, prejudice, or passion. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Movant seeking to set aside verdict based upon jury misconduct must establish fact of improper communication and as a result thereof the movant was prejudiced. Ravin v. Gambrell by and through Eddy, 788 P.2d 817 (Colo. 1990).

A party seeking a new trial on the basis of a jury's improper exposure to extraneous information must establish that the information was revealed to the jury and that it had the capacity to influence the verdict. Destination Travel, Inc. v. McElhanon, 799 P.2d 454 (Colo. App. 1992); Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

Misconduct of a juror, if known to counsel, should be made the ground of objection at the time, and before the cause is submitted. If first suggested in the motion for a new trial it is within the discretion of the court to disregard it. Denver City Tramway Co. v. Armstrong, 21 Colo. App. 640, 123 P. 136 (1912).

The reason for a supporting affidavit where there is an accusation of juror misconduct is to require the movant to prove his good faith and, by particularizing, demonstrate that his serious allegation of juror misconduct is based on knowledge, not suspicion or mere hope. Cawthra v. City of Greeley, 154 Colo. 483, 391 P.2d 876 (1964).

Motion unsupported by affidavit denied summarily. A motion for new trial based on alleged juror misconduct unsupported by affidavit, and lacking any indication that the movant had a legal excuse for its failure to do so, should be summarily denied. Cawthra v. City of Greeley, 154 Colo. 485, 391 P.2d 876 (1964); Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

Juror affidavit revealing that some jury members had stated that they had learned of codefendant's plea of guilty was insufficient to impeach jury verdict when it was determined from questioning jurors that they learned of plea only after completion of their deliberations. People v. Thornton, 712 P.2d 1095 (Colo. App. 1985).

Only the affidavit of losing counsel, and itself largely hearsay and conclusionary, is insufficient. Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

A quotient verdict as such is invalid. A quotient verdict, as such, is invalid, but where there is no antecedent agreement, or if after the quotient is ascertained, the jury proceeds to discuss and consider the propriety of the rendition of a verdict for an amount equal to the quotient, the verdict is good. City of Colo. Springs v. Duff, 15 Colo. App. 437, 62 P. 959 (1900); City & County of Denver v. Talarico, 99 Colo. 178, 61 P.2d 1 (1936).

Quotient verdict will be permitted to stand if it is an expression of deliberation. Quotient

verdict, shown to have been afterwards voted upon and accepted by the jury as a legitimate expression of their deliberations, will be permitted to stand upon a showing of very little proof in this direction. Pawnee Ditch & Imp. Co. v. Adams, 1 Colo. App. 250, 28 P. 662 (1891); Greeley Irrigation Co. v. Von Trotha, 48 Colo. 12, 108 P. 985 (1910).

Impeachment of a verdict on grounds which delve into the mental processes of the jury deliberation is not permitted. Santilli v. Pueblo, 184 Colo. 432, 521 P.2d 170 (1974); Rome v. Gaffrey, 654 P.2d 333 (Colo. App. 1982).

Extrajudicial investigation on inadmissible matters was manifestly improper. The question of the deceased's contributory negligence and his intoxication at the time of the accident was material. The extrajudicial investigation made during the course of the trial by the juror of the deceased's drinking habits, intoxication on other occasions, and the revocation of his driver's license, matters which had been specifically declared incompetent and inadmissible by the court, is misconduct as a matter of law the tendency of which is to influence the mind of the juror and for which a new trial should have been granted. In such cases the court should not consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

A new trial is not automatically required whenever a jury is exposed to extraneous information during trial or deliberations. Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

Extraneous information concerning the symptoms of a disease listed on a grocery bag obtained by a juror did not require a new trial. Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

D. Accident or Surprise.

Annotator's note. Since section (a)(3) (now (d)(3)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Surprise must be called to attention of court at trial. A party cannot avail himself of a motion for a new trial on the ground of surprise unless he calls the attention of the court to the matter at the time when it occurs and asks for proper relief. It is too late for him to manifest his surprise for the first time after the cause has been submitted to the jury and a verdict rendered against him. Outcalt v. Johnston, 9 Colo. App. 519, 49 P. 1058 (1897); Agnew v. Mathieson, 26 Colo. App. 59, 140 P. 484 (1914).

Untimely filing of motion contending "accident or surprise" fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

E. Newly Discovered Evidence.

Annotator's note. Since section (a)(4) (now (d)(4)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Motions for new trial on ground of newly discovered evidence are viewed with suspicion. Sebold v. Rieger, 26 Colo. App. 209, 142 P. 201 (1914); Eachus v. People, 77 Colo. 445, 236 P. 1009 (1925); Gasper v. People, 83 Colo. 341, 265 P. 97 (1928).

Granting of new trial is a matter of trial court's discretion. Whether to grant a new trial because of newly discovered evidence is a matter that lies within the sound discretion of the trial court. Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981).

In the absence of abuse of discretion the judge's decision on the merits of a motion for new trial will not be disturbed. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959); Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

New trial is to be granted only if the newly discovered evidence, if received, would probably change the result. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

The following requirements are essential to sustain a motion for new trial on the grounds of newly discovered evidence: (1) The evidence could not have been discovered in the exercise of reasonable diligence and produced at the trial; (2) the evidence is material to some issue before the court under the pleadings; (3) if received, the evidence would probably change the result. Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970); C.K.A. v. M.S., 695 P.2d 785 (Colo. App. 1984), cert. denied, 705 P.2d 1391 (Colo. 1985); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986); People v. Distel, 759 P.2d 654 (Colo. 1988).

Three factors affecting decision under section (d)(4), as adopted in cases interpreting this rule,

are not discrete items that lend themselves to mechanistic application, but rather are closely interrelated and require the exercise of a prudential judgment informed by considerations of fundamental fairness. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

For necessity of evidence being sufficient to change result, see Colo. Springs & Interurban Ry. v. Fogelsong, 42 Colo. 341, 94 P. 356 (1908); Specie Payment Gold Mining Co. v. Kirk, 56 Colo. 275, 139 P. 21 (1914); Lanham v. Copeland, 66 Colo. 27, 178 P. 562 (1919); Wiley v. People, 71 Colo. 449, 207 P. 478 (1922); Eachus v. People, 77 Colo. 445, 236 P. 1009 (1925); Heishman v. Hope, 79 Colo. 1, 242 P. 782 (1925); Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 81 Colo. 463, 256 P. 21 (1927); Trinidad Creamery Co. v. McDonald, 82 Colo. 328, 259 P. 1028 (1927); City of Ft. Collins v. Smith, 84 Colo. 511, 272 P. 6 (1928); Schlessman v. Brainard, 104 Colo. 514, 92 P.2d 749 (1939).

Party cannot reframe issues where facts were known at time of trial. No issue of mental competency was raised in the probate court during the trial of this action, despite the fact that counsel for plaintiffs were aware of the fact that an issue of competency had been raised in the federal court and could have been made in the probate court. In legal effect, the motions for new trial were insufficient and made no showing of the discovery of any new evidence which was pertinent to any issue tried in the probate court. Actually, the plaintiffs attempt to reframe the issues and inject into the proceedings a complete new theory upon which they elected not to rely at the time of the trial. Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969).

A motion for a new trial on the ground of newly discovered evidence will not be granted where counsel seeks to advance at a second trial a new theory based on different evidence which was available during the first trial. People in Interest of P.N., 663 P.2d 253 (Colo. 1983).

A new trial is not to be awarded for the discovery of evidence merely cumulative. Griffin v. Carrig, 23 Colo. App. 313, 128 P. 1126 (1913); Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

It is error to grant a new trial on the ground of newly discovered evidence, when such evidence would be immaterial. Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 81 Colo. 463, 256 P. 21 (1927).

Newly discovered evidence to justify the granting of a new trial must be relevant and material. Barton v. Laws, 4 Colo. App. 212, 35 P. 284 (1894).

New trial will not be granted for new evidence which is merely impeaching or discrediting. The general rule is that a new trial will not be granted for new evidence which is merely impeaching or discrediting. Hence, impeaching evidence which is merely cumulative of what might have been produced at the trial is not a sufficient ground for a new trial. Trinidad Creamery Co. v. McDonald, 82 Colo. 328, 259 P. 1028 (1927).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial could have been obtained through reasonable diligence more than two years prior to trial. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial was proper where defendant was not denied access to her bank balance and account activity and could, therefore, have discovered the canceled checks showing payment of the disputed insurance premiums. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

Application for new trial should be supported by affidavit. In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. Wiley v. People, 71 Colo. 449, 207 P. 478 (1922).

Affidavit must show that by exercise of reasonable diligence such evidence could not have been produced. If it does not appear from the affidavits in support of a motion for new trial, on the ground of newly discovered evidence, that by the exercise of reasonable diligence such evidence could not have been produced at the trial, the showing is insufficient. Outcalt v. Johnston, 9 Colo. App. 519, 49 P. 1058 (1897).

The affidavits for a new trial on the ground of newly discovered evidence must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant. Evidence as to matters not controverted on the trial will not suffice. Sebold v. Rieger, 26 Colo. App. 209, 142 P. 201 (1914).

For denial of new trial because party made no effort to present evidence, see Sall v. Sall, 173 Colo. 464, 480 P.2d 576 (1971).

Where application is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear. Colo. & S. Ry. v. Breniman, 22 Colo. App. 1, 125 P. 855 (1912).

The affidavit of counsel, based upon information and belief, of what a witness will testify is insufficient to secure a new trial on the ground of newly discovered evidence. Cole

v. Thornburg, 4 Colo. App. 95, 34 P. 1013 (1893).

After reversal, initially successful party may move for new trial. After reversal by the supreme court the party originally successful in the trial court can file a motion for new trial on the ground of newly discovered evidence, and only on that ground. To hold otherwise would deprive a party of an absolute right he would have had if the trial judge had made no error. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959).

Where the contention is that perjury has been committed, the motion for a new trial must be grounded upon newly discovered evidence. Buchanan v. Burgess, 99 Colo. 307, 62 P.2d 465 (1936); Schlessman v. Brainard, 104 Colo. 514, 92 P.2d 749 (1939).

Motion for new trial held properly overruled. In an action for damages resulting from an automobile accident, the contention of defendant that a new trial should have been granted on the ground of newly discovered evidence was considered and overruled. Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

Newly discovered evidence must be credible. In order for newly discovered evidence to serve as a basis for granting a new trial, it must be credible. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Although determining the credibility of a witness is normally the function of the trier of fact, when dealing with a motion for new trial based on newly discovered evidence, the trial court necessarily must include a determination of credibility in its evaluation of whether the new evidence would, if received, change the result already reached. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Denial of motion for new trial upheld. Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. App. 1983); Gilmore v. Rubeck, 708 P.2d 486 (Colo. App. 1985).

Standards set forth in section (a)(4) (now (d)(4)) are not unduly rigorous when applied to evidence discovered after an order for summary judgment has been entered. DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984).

F. Excessive or Inadequate Damages.

Annotator's note. Since section (a)(5) (now (d)(5)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Excessive damages are legitimate grounds for granting a motion for new trial. Leo Payne Pontiac, Inc. v. Ratliff, 29 Colo. App. 386, 486 P.2d 477 (1971), modified, 178 Colo. 361, 497 P.2d 997 (1972).

Award of inadequate damages is a proper ground for the granting of a new trial. Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

New trial may be had as to single issue of damages. Where damages assessed by verdict were grossly inadequate and there was no need of another trial on other issues raised in a negligence action, new trial would be granted as to damages only. Whiteside v. Harvey, 124 Colo. 561, 239 P.2d 989 (1951).

When an award of damages is excessive but liability is clear, it may be permissible to order a new trial limited to the issue of damages only. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Excessive verdict based on bias requires new trial. Where the trial judge makes a finding that the excessive jury verdict resulted from bias, prejudice, and passion, firmly established precedent requires that a new trial on all issues be granted. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Where the issue of liability is properly determined, but the jury has failed in its function adequately to assess the compensation required, it is mandatory that the court order a new trial on the issue of damages alone. Brncic v. Metz, 28 Colo. App. 204, 471 P.2d 618 (1970).

Court may order new trial on all issues where motion limited to damages. A party by moving for a new trial on the question of damages only cannot restrict the judge so as to prevent the exercise of sound judicial discretion. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

Where jury refuses to award compensatory damages, new trial on damages alone is warranted. Where the jury failed in its function in rendering a verdict by refusing to recognize the undisputed facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled, a new trial on the issue of damages only is warranted. Kistler v. Halsey, 173 Colo. 540, 481 P.2d 722 (1971).

New trial on the issue of damages only is warranted when there are undisputed facts as to injuries. In an action by a bicyclist seeking damages for injuries suffered as a result of an intersection pickup truck-bicycle collision, where the verdict, considering the undisputed evidence of severe multiple physical injuries sustained by plaintiff, was manifestly inadequate, indicating that the jury disregarded the trial court's instructions on damages, held a new trial on issue of damages only is warranted since the jury failed in its function to render a true verdict by refusing to recognize the undis-

puted facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled. Kistler v. Halsey, 173 Colo. 540, 481 P.2d 722 (1971).

Plaintiff's participation in new trial on damages alone waives other objections. Where plaintiffs, dissatisfied with verdict on first trial, file a motion for additur or a new trial on the question of damages only and the trial court grants a new trial on all issues, the plaintiffs by voluntarily participating in the second trial as ordered by the trial court waive any other error occurring in first trial. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

Verdict must be manifestly inadequate to be set aside. It is an abuse of discretion on the part of the court to set aside the verdict of the jury and grant a new trial solely on the ground of inadequacy of the verdict unless, under the evidence, it can be definitely said that the verdict is grossly and manifestly inadequate, or unless the amount thereof is so small as to clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations. Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); King v. Avila, 127 Colo. 538, 259 P.2d 268 (1953); DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

Where plaintiff's evidence showed damages considerably in excess of the original jury award and the trial court could properly determine that the jury disregarded the instructions or ignored the evidence, there is no error in granting a new trial on the issue of damages. Thorpe v. City & County of Denver, 30 Colo. App. 284, 494 P.2d 129 (1971).

Jury damage award set aside on basis of inadequacy when evidence was undisputed with respect to the existence and nature of the injuries sustained, and the jury failed to award any damages for noneconomic losses. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

Retrial on damages only was ordered because of the inconsistency in the damage award of the jury. The award of $3,000 for economic losses for the treatment and alleviation of pain is inconsistent with the award of zero dollars for noneconomic damages. Kepley v. Kim, 843 P.2d 133 (Colo. App. 1992).

When a new trial will be granted for excessive or inadequate damages rests in the discretion of the trial court, in cases where there is no legal measure of damages, or where the correctness of the result is not determinable by any definite and precise rule. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

The court of review will not interfere where there is evidence to support the verdict. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

Neither the Colorado supreme court nor any other appellate tribunal stands in as good a position as the trial court to review the relationship between an award of exemplary damages and the purposes these damages are to serve and, absent a clear abuse of discretion, the trial court's determination in this regard will not be disturbed on review. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

Trial court may give prevailing party option to remit excessive damages. Following a motion for a new trial based on excessive damage, the trial judge may grant the motion for a new trial, but at the same time give the prevailing party the option of remitting that portion of the jury's award which is deemed to be excessive, or facing a new trial on damages. If the prevailing party thereafter remits this portion of the award, the trial court would thereupon deny the motion for a new trial and enter a final judgment. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972); McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989).

A trial court has the power to grant a new trial under this rule or, in the alternative, to deny the new trial on the condition that the plaintiff will agree to a remittitur of the amount of the damages found by the court to be excessive. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Option of remittitur or new trial permissible where damages manifestly excessive. The option of remittitur or new trial is permissible in cases where the trial court considers the damages manifestly excessive, section (a)(5) (now (d)(5)), but cannot conclude that the damages were a product of bias, prejudice, or passion. Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983); E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd, 49 P.3d 1151 (Colo. 2002).

Remittitur appropriate where evidence did not show that damages for fraud and those for breach of contract were separate and distinct, nor that damages for business interference were greater than or different from lost profits resulting from the breach. McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989).

Remittitur is not sustainable where the amount of damages awarded is supported by the court's instruction and the evidence presented or, alternatively, where the plaintiff is not offered an opportunity to refuse the modified amount and request a new trial. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Trial court must enter findings to support order of remittitur. Belfor USA Group v.

Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

New trial granted where trial court erred in damages instruction. Walton v. Kolb, 31 Colo. App. 95, 500 P.2d 149 (1972).

G. Error in Law.

A judicial admission can be made in closing argument. Counsel's statements that plaintiff had incurred some physical injury in the accident must be considered a binding judicial admission and a new trial ordered on the issue of damages. Larson v. A.T.S.I., 859 P.2d 273 (Colo. App. 1993).

V. GROUNDS FOR JUDGMENT NOTWITHSTANDING VERDICT.

Annotator's note. Since section (a)(6) (now (e)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The weight of evidence does not depend upon its volume or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligation by the jurors. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight preponderance against the verdict. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

The trial court's action will not be reviewed unless a manifest abuse of discretion appears. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

Where the verdict of a jury is manifestly against the weight of the evidence, it will be set aside by the appellate court. Denver & R. G. R. R. v. Peterson, 30 Colo. 77, 69 P. 578 (1902); McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870 (1912).

Where the record fails to disclose any satisfactory evidence as to the real merits of the controversy, the judgment will be reversed and the cause remanded for a new trial. Scott v. Conrad, 24 Colo. App. 452, 135 P. 135 (1913).

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions ex contractu. A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence or misconstrued its effect, or were influenced by improper motives. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

VI. EFFECT OF GRANTING NEW TRIAL.

To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

A litigant may elect not to participate in trial and still seek review. In Colorado a litigant against whom a new trial has been ordered may elect to stand on such order, obtain a dismissal of the action, and thereupon seek review by appeal. Chartier v. Winslow Crane Serv. Co., 142 Colo. 294, 350 P.2d 1044 (1960).

New trial participation does not waive other objections. Prior to the amendment in 1964, a party against whom an order granting a new trial had been entered waived any error in the order by participating in the new trial. The amendment merely removed this waiver. It did not change the rule of Chartier in Chartier v. Winslow (142 Colo. 294, 350 P.2d 1044 (1960)) that a party may decline to participate in a new trial, permit judgment to be entered against him and sue out appeal for a determination of the correctness of the order granting the new trial. Rice v. Groat, 167 Colo. 554, 449 P.2d 355 (1969).

Proceeding to terminate parental rights. The granting of a new trial in a proceeding to terminate parental rights placed the parties in the positions they occupied prior to the vacated hearing. People in Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975).

VII. EFFECT OF GRANTING JUDGMENT NOTWITHSTANDING VERDICT, AMENDMENT OF FINDINGS, OR AMENDMENT OF JUDGMENT.

The effect of this rule is merely to render unnecessary a request for a formal reservation of the question of law raised by the motion for a directed verdict and, in addition, to regulate the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

VIII. TIME FOR DETERMINATION OF POST-TRIAL MOTIONS.

Section (j) is applicable only to motions filed on or after January 1, 1985, and does not

apply to motions which were pending upon that date. Stientjes v. Olde-Cumberlin Auctioneers, Inc. 754 P.2d 1384 (Colo. App. 1988).

Motion for costs is not a motion for post-trial relief governed by this section and, therefore, need not be determined within 60 days under section (j). Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

Construction of "determine" within context of section (j) for purposes of resolving timeliness of notices of appeal. Trial court made a ''determination'' on post-trial motions upon oral ruling from bench within 60 days from date of filing of last of such motions even though written order was not signed and entered until after expiration of 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

Motion for amendment of findings and judgment was ''determined'' when trial court came to a decision on the merits of such motion and directed movant's counsel to prepare order reflecting such decision, which order was not signed and entered until after 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

A motion made pursuant to C.R.C.P. 60 cannot be used to circumvent the operation of section (j) unless the facts of the case constitute an ''extreme situation'' justifying relief from a judgment pursuant to C.R.C.P. 60(b)(5). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

The "unique circumstances" doctrine is not available to a party seeking to modify the time for determination of a post-trial motion pursuant to section (j). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Time limits for filing notice of appeal under C.A.R. 4 must be met for appeals of judgments for attorney fees. The award of attorney fees in a case is sufficiently separate from an underlying judgment on the merits to require that a notice of appeal of the judgment awarding attorney fees be filed within the time limits of C.A.R. 4 independently of the judgment entered on the merits of the underlying case. If this is not done, the court of appeals is not vested with subject matter jurisdiction to determine issues related to the award of attorney fees. Dawes Agency v. Am. Prop. Mortg., 804 P.2d 255 (Colo. App. 1990).

Timely filing of motion for reconsideration of a completed post-trial ruling on an attorney fees issue tolls the time for filing a notice of appeal until the court determines the motion or the motion is deemed denied after 60 days pursuant to section (j). Jensen v. Runta, 80 P.3d 906 (Colo. App. 2003).

Time limits for filing notice of appeal under C.A.R. 4 are terminated as to all parties by timely filing of a motion under this rule. Thereafter, time begins to run upon determination of the motion or the date the motion is deemed denied, whichever is earlier. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992); Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

Section (j) is designed to encourage expeditious determination of post-trial motions and to provide certainty in the calculation of the time within which a party must file a notice of appeal. Campbell v. McGill, 810 P.2d 199 (Colo. 1991).

Section (j) does not apply to issues concerning recovery of attorney fees not sought as damages. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Section (j) satisfied where the court acted on motion within 60 days following the filing of the last multiple motions and where the court orally ruled upon the motions within 60 days, even though the written order was signed and entered after the period. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Section (j) satisfied where plaintiff's motion for reconsideration was entered within 60 days of the date trial court granted plaintiff's motion to represent himself. Campbell v. McGill, 810 P.2d 199 (Colo. 1991).

The provisions of C.R.C.P. 54(b) regarding a trial court's jurisdiction to revise its initial judgment are expressly incorporated in C.R.C.P. 58 and, therefore, are applicable to motions filed pursuant to this rule. The 60-day limit specified in section (j) did not bar trial court's determination of a motion for new trial in case involving multiple claims and multiple parties when trial court did not make an express direction for entry of final judgment under C.R.C.P. 54(b) and there could be no entry of final judgment under C.R.C.P. 58(a). Smeal v. Oldenettel, 814 P.2d 904 (Colo. 1991).

Reading section (a) of this rule, C.R.C.P. 58, and C.R.C.P. 54(a) together, a motion under this rule may be filed only to challenge a final order or judgment, not a non-final or interlocutory order or judgment. Przekurat v. Torres, 2016 COA 177, __ P.3d __, aff'd on other grounds, 2018 CO 69, 428 P.3d 512.

Ruling on post-trial motion must be entered within 60-day time limit specified in section (j) and any order entered after such 60-day limitation is null and void. In re Micaletti, 796 P.2d 54 (Colo. App. 1990); Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

A court loses jurisdiction when it fails to rule on a post-judgment motion within 60 days. The language of section (j) is mandatory and provides that the district court shall rule within 60 days or the motion shall be automatically denied. Arguelles v. Ridgeway, 827 P.2d 553 (Colo. App. 1991).

A motion under section (j) is automatically deemed denied after 60 days, however the court had authority under C.R.C.P. 60(a) to va-

cate such denial and rule on the motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. Farmers Ins. Exchange v. Am. Mfrs. Mut. Ins. Co., 897 P.2d 880 (Colo. App. 1995).

The time period for responding to motions is not extended when a court grants a party additional time to respond to the opposing party's briefs. Arguelles v. Ridgeway, 827 P.2d 553 (Colo. App. 1991).

Failure to obtain an extension of time within which to file motion under this rule deprived the district court of jurisdiction to hear any motion filed after the 15-day period had expired and the untimely filing of that motion did not toll the running of the 45 days for the filing of a notice of appeal under C.A.R. 4. Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

While section (a) provides that motions for amendment of judgment shall be filed within 15 days or such greater time as the court may allow, a court may only allow greater time during the 15 days following the entry of judgment. Once that period expires, the court loses jurisdiction to grant additional time. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

Plaintiff abandons timeliness issue if he or she does not argue that the trial court erred in rejecting her motion under this rule as untimely. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than 182 days after the judgment, order, or proceeding was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within 182 days after the rendition of any judgment in such action, to answer to the merits of the original action. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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

Cross references: For stay of proceedings to enforce judgments, see C.R.C.P. 62(b); for setting aside default, see C.R.C.P. 55(c).

ANNOTATION

A. In General.
B. Default Judgments.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. 67 (1964). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, ''Post-Trial Motions in the Civil Case: An Appellate Perspective'', see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that sections have been included in the annotations to this rule.

Once a valid judgment is entered, the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either C.R.C.P. 59 or this rule. Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961).

This rule prescribes the conditions upon which the court may relieve a party from a final judgment. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

Court may relieve only a party or a party's legal representative from a final judgment; therefore, garnishor of judgment debtor could not seek to modify or set aside an order in the principal case since it was not a party to that case. Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

A motion under this rule may not be used to circumvent the operation of C.R.C.P. 59(j), absent extraordinary circumstances involving extreme situations. Anderson v. Molitor, 770 P.2d 1305 (Colo. App. 1988).

A motion for relief from judgment under section (b) of this rule may not be construed to avoid C.R.C.P. 59(j) and its 60-day requirement. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

This rule is not a substitute for appeal, but instead is meant to provide relief in the interest of justice in extraordinary circumstances. Thus, a motion under this rule generally cannot be used to circumvent the operation of C.R.C.P. 59(j). De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003); Harriman v. Cabela's Inc., 2016 COA 43, 371 P.3d 758.

Section (b)(5) of this rule cannot be used to raise issues that should normally be raised in C.R.C.P. 59 motions or that should be appealed in due course after a court enters judgment. Harriman v. Cabela's Inc., 2016 COA 43, 371 P.3d 758.

After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the ''former'' judge had himself entered the final judgment at a time when he was actually serving as a judge. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

A court's error in interpreting a statutory grant of jurisdiction is not equivalent to acting with a total lack of jurisdiction. King v. Everett, 775 P.2d 65 (Colo. App. 1989), cert. denied, Everett v. King, 786 P.2d 411 (Colo. 1989).

Trial court could not amend judgment to include prejudgment interest when omission was intentional. Jennings v. Ibarra, 921 P.2d 62 (Colo. App. 1996).

A judgment creditor is not required to get an amended judgment showing trial court intended to award post-judgment interest where court inadvertently failed to do so. Bainbridge, Inc., v. Douglas County Sch. Dist., 973 P.2d 684 (Colo. App. 1998) (declining to follow Jennings v. Ibarra, 921 P.2d 62 (Colo. App. 1996)).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule, since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

Default judgment entered after a hearing on damages was a final judgment because it left the court with nothing to do but execute upon the judgment. Therefore, motion to set aside the default judgment filed within six months was timely filed. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

There were no grounds for vacating the default judgment where plaintiff failed to show a reason for not amending the original complaint during the three months before default judgment was entered. Since the judgment was not vacated, it was within the court's discretion to deny the motion to amend the original complaint after entry of the default judgment. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

Where none of the grounds prescribed by this rule, upon which a party may be relieved from a final judgment or order is urged in a motion to vacate, no abuse of discretion in denying such motion can be shown. Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961).

There were no grounds for vacating the default judgement where the federal district court entered an order denying defendant's attempt to remove the case to federal court and remanded the case to state court prior to the trial date. Plaintiff's request for reconsideration of the federal court's order did not cut off the state court's jurisdiction since, under federal law, remand orders are not reviewable on appeal or otherwise. Blazer Elec. Supply Co. v. Bertrand, 952 P.2d 857 (Colo. App. 1998).

Meritorious defense not grounds for vacation of judgment. A party may not have a judgment vacated solely upon an allegation of the existence of a meritorious defense. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

The mere existence of a meritorious defense is not sufficient alone to justify vacating the judgment. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

Appellate review limited to whether trial court abused its discretion. Appellate review of the grant or denial of a motion under section (b) is normally limited to determining whether the district court abused its discretion. In re Stroud, 631 P.2d 168 (Colo. 1981).

It is within the discretion of the trial court to determine whether a party's conduct justifies relief from a judgment, and such determination will be upheld unless the court abused its discretion. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

Appellate review of the denial of a motion under section (b) of this rule is limited to whether the trial court abused its discretion. A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

A motion pursuant to section (b) must meet the requirements of the rule in order to be subject to exercise of the court's discretion. Especially with respect to the residuary provision of section (b)(5), which has been narrowed to include only extreme situations and extraordinary circumstances, a trial court's ruling must be reviewed in light of the purposes of the rule and the importance to be accorded the principle of finality. Davidson v. McClellan, 16 P.3d 233 (Colo. 2001).

Where defendant failed to object to plaintiff's motion for substitution of parties and also failed to object to trial court's order permitting the substitution, the right to appeal on those issues is waived. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Where there has been a hearing on a motion pursuant to this rule involving controverted issues of fact, a motion for new trial is a jurisdictional prerequisite for appellate review. Canady v. Dept. of Admin., 678 P.2d 1056 (Colo. App. 1983).

Order granting relief on insufficient grounds not void. Failure to allege sufficient grounds for relief from a prior judgment does not make the subsequent order granting that motion void; rather, the court's action is legal error, vulnerable to reversal upon appeal. In re Stroud, 631 P.2d 168 (Colo. 1981).

Trial court has jurisdiction to consider a request for relief from an award of attorney fees and costs under section (b)(4) if the award was based on an underlying judgment that was reversed or vacated on appeal. Party did not waive her right to challenge the award by failing to separately appeal the award. Oster v. Baack, 2015 COA 39, 351 P.3d 546.

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Time limit inapplicable where judgment exceeded jurisdiction. Where a claim is made that the district court's judgment exceeded its jurisdiction, the time limit of section (b) does not apply. Mathews v. Urban, 645 P.2d 290 (Colo. App. 1982); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Even though a motion under C.R.C.P. 59(j) is automatically denied after 60 days, the court had authority under section (a) to vacate the judgment on its own motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. Farmers Ins. Exch. v. Am. Mfrs. Mut. Ins. Co., 897 P.2d 880 (Colo. App. 1995).

Successor judge may consider challenges to rulings of law presented in a motion for a new trial. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

Appeal from denial of motion. Denial of a motion under this rule is appealable independently of an underlying judgment. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

An order denying a motion under section (b) of this rule is appealable independently of an underlying judgment and requires a separate notice of appeal. Sender v. Powell, 902 P.2d

947 (Colo. App. 1995); Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

District court has jurisdiction to review a section (b)(2) motion where a magistrate has authority under § 13-5-301 to hear the motion without the consent of the parties. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

A section (b)(2) motion filed within six months of the district court's order is timely filed under this rule. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

Court's order discharging a receiver appointed under predecessor to § 38-38-601 is a final judgment subject to appellate review, and any claim based on misfeasance or malfeasance of the receiver must be presented prior to discharge, if at all, unless grounds exist for relief from judgment under this rule. Four Strong Winds, Inc. v. Lyngholm, 826 P.2d 414 (Colo. App. 1992).

Relief from foreign judgments available under this rule is limited by full faith and credit clause of federal constitution to: (1) Judgments based upon fraud; (2) void judgments; and (3) judgments which have been satisfied, released, or discharged, or a prior judgment upon which it was based has been reversed or vacated, or it is no longer equitable that judgment should have prospective application. Marworth, Inc. v. McGuire, 810 P.2d 653 (Colo. 1991).

A trial court's ruling in resolving a motion for relief from judgment predicated on newly discovered evidence under section (b) will not be disturbed absent a clear showing of an abuse of discretion. Sender v. Powell, 902 P.2d 947 (Colo. App. 1995).

Failure to submit financial information to the trial court and the failure of the trial court to review the modified child support agreement between the parties rendered the resulting trial court order subject to being set aside under section (b)(5). In re Smith, 928 P.2d 828 (Colo. App. 1996).

The provisions for vacating, modifying, or correcting an arbitration award are set forth in §§ 13-22-223 and 13-22-224 and are the exclusive means for challenging an award. Therefore, this rule is not the appropriate vehicle to challenge the award. Superior Constr. Co. v. Bentley, 104 P.3d 331 (Colo. App. 2004).

Applied in Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974); Janicek v. Hinnen, 34 Colo. App. 68, 522 P.2d 113 (1974); Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975); In re Estate of Bonfils, 190 Colo. 70, 543 P.2d 701 (1975); Duran v. District Court, 190 Colo. 272, 545 P.2d 1365 (1976); Johnston v. District Court, 196 Colo. 261, 580 P.2d 798 (1978); In re Gallegos, 41 Colo. App. 116, 580 P.2d 838 (1978); O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); Sec. State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); Collection Agency, Inc. v. Golding, 44 Colo. App. 421, 616 P.2d 988 (1980); Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980); People in Interest of T.A.F. v. B.F., 624 P.2d 349 (Colo. App. 1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Soehner v. Soehner, 642 P.2d 27 (Colo. App. 1981); Cross v. District Court, 643 P.2d 39 (Colo. 1982); Best v. Jones, 644 P.2d 89 (Colo. App. 1982); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); Kendall v. Costa, 659 P.2d 715 (Colo. App. 1982); Falzon v. Home Ins. Co., 661 P.2d 696 (Colo. App. 1982); Ground Water Comm'n v. Shanks, 658 P.2d 847 (Colo. 1983); In re Hiner, 669 P.2d 135 (Colo. App. 1983); Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983); Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983); In re Ward, 670 P.2d 1260 (Colo. App. 1983); Turchick & Kempter v. Hurd & Titan Constr., 674 P.2d 969 (Colo. App. 1983); Realty World-Range Realty, Ltd. v. Prochaska, 691 P.2d 761 (Colo. App. 1984); E.B. Jones Constr. Co. v. Denver, 717 P.2d 1009 (Colo. App. 1986); In re Allen, 724 P.2d 651 (Colo. 1986); People v. Caro, 753 P.2d 196 (Colo. 1988); Blesch v. Denver Publ'g Co., 62 P.3d 1060 (Colo. App. 2002).

II. CLERICAL MISTAKES.

The failure to include interest is an oversight or omission and falls squarely within this rule. Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958); Reasoner v. District Court, 197 Colo. 516, 594 P.2d 1060 (1979).

Since the statute required an award of prejudgment interest and failure to include such interest was merely a ministerial oversight, passage of five years since entry of the award would not prevent the addition of prejudgment interest, even though the original amount of the award had been satisfied. Brooks v. Jackson, 813 P.2d 847 (Colo. App. 1991).

It is not error for a court to correct a judgment by including interest when the omission is called to its attention. Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958).

An error in the calculation of interest is merely clerical and does not require court intervention and stay of execution. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Where the written, final decree does not reflect the oral findings of fact and an earlier order of the court, the decree is not in accord with the expectations and understanding of the court and the parties and that is the type of error section (a) of this rule is designed to remedy. Reasoner v. District Court, 197 Colo. 516, 594 P.2d 1060 (1979).

This rule provides that a trial court may correct an oversight while the case is pending on appeal, provided leave of the appellate court is obtained. Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963).

Language of the order of remand was sufficiently broad to authorize the trial court's amendment of its order. Flatiron Paving Co. v. Wilkin, 725 P.2d 103 (Colo. App. 1986).

Under section (a), a district court may correct a misnamed party in a judgment. Reisbeck, LLC v. Levis, 2014 COA 167, 342 P.3d 603.

Where the failure is not that of a judge in entering an incorrect judgment or decree, or that of a clerk in incorrectly recording the proceedings had in a case, but rather, it is the attorney's failure to prosecute with due diligence the proceedings which he has commenced on behalf of a plaintiff, then, under these circumstances, relief is properly denied under section (a) of this rule. Hatcher v. Hatcher, 169 Colo. 174, 454 P.2d 812 (1969).

Attorney's failure to proceed diligently not clerical error. Unexcused attorney failure to diligently proceed on behalf of his client does not constitute clerical error justifying relief under section (a). Cavanaugh v. State Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982), appeal dismissed for want of substantial federal question, 459 U.S. 1011, 103 S. Ct. 367, 74 L. Ed. 2d 504 (1982), reh'g denied, 460 U.S. 1104, 103 S. Ct. 1806, 76 L. Ed. 2d 369 (1983).

Where the record reflects the court's intent to include amounts owing under a contract, the amount due under the contract was virtually undisputed, and the court made extensive findings that the contract was wrongfully terminated, it was judicial error and correctable under section (a) when the court omitted such amounts from its final order. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

Where plaintiff filed a motion under C.R.C.P. 59 for post-judgment relief for a clerical error made by the court for failure to include the amount unpaid in a wrongfully terminated contract, the court's failure to rule on the C.R.C.P. 59 motion did not bar the plaintiff from seeking relief under section (a) of this rule. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

A motion under section (a) is limited to making a judgment speak the truth as originally intended, and not intended to relitigate the matter before the court. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

A motion or order under section (a) does not extend the time for filing a notice of appeal of the underlying judgment. An order clarifying the original judgment relates back to the time of the filing of the initial judgment and does not extend the time for appeal of that judgment. In re Buck, 60 P.3d 788 (Colo. App. 2002).

Clerical error in a verdict form does not include an alleged error that either alters the legal effect of the jury's verdict or addresses the jury's misunderstanding or misapplication of the court's instructions. Clerical error corrections to a jury's verdict are disfavored. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Use of Larimer county as the venue defendant had erroneously identified on the caption of the proposed order authorizing foreclosure sale was a clerical error that did not affect its validity. Colorado law looks to the substance of a pleading and not to the form of its caption. Moreover, under section (a), courts have the power to correct a clerical error in an order. Upon defendant's motion brought under section (a), district court magistrate corrected the clerical error by issuing an amended order, nunc pro tunc. Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Equipment failure resulting in the lack of a complete transcript is not a clerical error. Correction of clerical errors under section (a) is a matter within the discretion of the trial court, and the court here did not abuse its discretion in ruling that plaintiff's motion for a new trial based on equipment failure was not a clerical error as contemplated by section (a). In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

III. MISTAKES; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; FRAUD; ETC.

A. In General.

Law reviews. For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''One Year Review of Appeals and Agency'', see 33 Dicta 13 (1956). For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For note, ''Res Judicata — Should It Apply to a Judgment Which is Being Appealed?'', see 33 Rocky Mt. L. Rev. 95 (1960). For note, ''Batton v. Massar: The Finality of Colorado Adoptions'', see 35 U. Colo. L. Rev. 314 (1963).

Authority for relief from a judgment order or proceeding is conferred in an appropriate proceeding by section (b) of this rule. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

It is incumbent upon one to prove mistake, inadvertence, surprise, excusable neglect, or fraud or that a judgment is void because no service was had upon him. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

In order to be entitled to relief under this rule, a defendant has to demonstrate to the trial court either mistake, inadvertence, surprise, ex-

cusable neglect, fraud, misrepresentation, or other misconduct on the part of plaintiff. Eisenson v. Eisenson, 158 Colo. 394, 407 P.2d 20 (1965).

Party seeking relief from judgment must demonstrate by clear, strong, and satisfactory proof that such relief is warranted. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

A motion to vacate a judgment must allege a defense which is "prima facie" meritorious. Henritze v. Borden Co., 163 Colo. 589, 432 P.2d 2 (1967).

A meritorious defense must be stated with such particularity that the court can see that it is a substantial and meritorious defense, and not merely a technical or frivolous one. Henritze v. Borden Co., 163 Colo. 589, 432 P.2d 2 (1967).

This rule prescribes the conditions upon which a court may relieve a party from a final judgment. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

Motions for relief from a final order are governed by this rule under which the time for filing such motions is expressly limited to six months. Love v. Rocky Mt. Kennel Club, 33 Colo. App. 4, 514 P.2d 336 (1973).

To be entitled to have a judgment vacated or set aside, a disadvantaged party must bring himself within the terms and conditions of this rule. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

Surety bond not required. Section (b) of this rule, providing that a court may set aside a judgment upon such terms as may be just, does not warrant an order of court requiring defendants to post a surety bond in the full amount of a plaintiffs' claim as a condition to having their defense heard. Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

This rule provides for the granting of relief from judgments entered by mistake, inadvertence, surprise, excusable neglect, fraud, etc. Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958).

Section (b) of this rule permits a court to relieve a party from a final judgment or order for ''mistake, inadvertence, surprise, or excusable neglect''. Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

A court may set aside a judgment in favor of a debtor if the judgement was entered into in violation of the automatic stay provision of the federal bankruptcy code. McGuire v. Champion Fence & Contstr., Inc., 104 P.3d 327 (Colo. App. 2004).

Relief under section (b) is limited to setting aside an order or judgment. It is beyond the authority of a court to grant additional affirmative relief, such as reformation of a settlement agreement, in instances of fraud, misrepresentation, or other misconduct. Affordable Country Homes, LLC v. Smith, 194 P.3d 511 (Colo. App. 2008).

Father's motion for relief not time-barred because judgment was void. Where notice through publication was inadequate because birth mother made fraudulent misrepresentations to the court, birth father was deprived of his constitutional right to due process, thus making the judgment terminating his parental rights void by default. The requirements of due process take precedence over statutory enactments. In re C.L.S., 252 P.3d 556 (Colo. App. 2011).

C.R.C.P. 11 imposes sanctions upon those who violate its provisions, it does not preclude relief under section (b)(1) of this rule. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Relief under section (b) is available for judgments entered pursuant to § 13-17-202. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Responsibility for reasons under clause (1) in the first sentence of section (b) shall be of party. The mistake, inadvertence, surprise, or excusable neglect subject to correction under this rule must be by a party to the action or his legal representative. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

Acceptance under judgment waives right to review. A party who accepts an award or legal advantage under a judgment normally waives his right to any review of the adjudication which may again put in issue his right to the benefit which he has accepted. Farmers Elevator Co. v. First Nat'l Bank, 181 Colo. 231, 508 P.2d 1261 (1973).

A motion to vacate upon any of the grounds must be made within a "reasonable time". Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

A motion to vacate judgment must be filed within a "reasonable time" under this rule. Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

For purposes of motion based on evidence of perjury, there is a critical difference between perjury and the mere presence of factual conflicts or deficiencies in the evidence; proponent must show that discrepancies or inaccuracies in testimony were not the result of the usual shortcomings inherent in human perception and memory but rather were the result of a willful fabrication of evidence bearing on a material issue. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991); In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

In dissolution of marriage case trial court did not abuse its discretion in denying husband's motion under section (b)(2) even though husband contended wife undervalued, omitted, or otherwise hid marital assets at dissolution of marriage hearings where husband did not show that such alleged discrepancies or inaccuracies in wife's testimony resulted from a willful fabrication of evidence. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial was equally consistent with theory that plaintiff's perceptions and recollections of accident honestly differed from those of certain other witnesses. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial upheld where intentional misconduct was ameliorated before and during trial. Court held that there was no reason to presume that defendant's misconduct substantially impaired plaintiff's ability to prepare for and proceed at trial. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Relief from the operation of a judgment alleged to have resulted from mistake must be pursued by motion, to be made within a ''reasonable time''. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

"Any other reason justifying relief" language of section (b)(5) encompasses newly discovered evidence. A motion for relief from a judgment pursuant to this rule on the ground of newly discovered evidence should be resolved by the same criteria applicable to a C.R.C.P. 59 (d)(4) motion: Applicant must establish that the evidence could not have been discovered by the exercise of reasonable diligence and produced at the first trial; the evidence was material to an issue in the first trial; and the evidence, if admitted, would probably change the result of the first trial. S.E. Colorado Water Conservancy Dist. v. O'Neill, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993).

Section (b)(5) is a residuary clause for application only in situations not covered by other sections in this rule. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Section (b)(5) does not apply where motion is based on "fraudulent acts and misrepresentations". Instead, such a motion is subject to section (b)(2) and the corresponding six-month time limit. In re Adoption of P.H.A., 899 P.2d 345 (Colo. App. 1995).

This rule may be used as a mechanism for obtaining relief from a final judgment due to a change in case law precedent. State Farm Mut. Auto. Ins. Co. v. McMillan, 925 P.2d 785 (Colo. 1996).

However, while C.R.C.P. 59 gives a trial court "full power to correct any and all errors committed," under section (b)(5) of this rule, the erroneous application of the law is simply not a sufficient basis for relief. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001); SR Condos., LLC v. K.C. Constr., Inc., 176 P. 3d 866 (Colo. App. 2007).

Section (b) of this rule requires any motion for relief of judgment on the grounds of mistake or fraud to be made within six months after judgment. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Less than five weeks is not unreasonable. A delay of less than five weeks, if the allegation of when they learned of the judgment be true, cannot be said to be unreasonable. Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Relief must be sought not more than six months after the judgment by section (b) of this rule. Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964).

Under section (b)(1) a motion to vacate must be filed within six months, or it is barred. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

Where a judgment resulted from a mistaken belief in the existence of a terminated order, this constitutes grounds for relief under section (b)(1), and the ''reasonable time'' limitation of this rule for avoiding the effects of the judgment upon such grounds cannot exceed six months. Sauls v. Sauls, 40 Colo. App. 275, 577 P.2d 771 (1977).

Where one seeks to be relieved from the judgment more than six months after its entry, such attempt is too late. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

A motion filed seven months after entry of judgment is filed too late. Fiant v. Town of Naturita, 127 Colo. 571, 259 P.2d 278 (1953); Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Since each of the installments for support becomes a judgment when it accrues, the only relief from judgment on the grounds of fraud or mistake would pertain to those installments which became due six months or less before the final judgment. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Section (b) of this rule cannot be applied to bar a motion brought under § 14-10-122 (1)(c) for retroactive modification of child support based on a mutually agreed upon change of physical custody. Section (b) of the rule imposes a time limit for the motion and is inconsistent with the procedure contemplated in the statute. In re Green, 93 P.3d 614 (Colo. App. 2004).

A court has no authority to grant relief. Where a motion is filed after the six-month deadline required by this rule, a court would have had no authority to grant relief. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Where plaintiff's motion for reinstatement of the case was not timely filed within the specified six-month period following entry of the order of dismissal, the trial court was without authority to reinstate the case or to provide further relief. Love v. Rocky Mt. Kennel Club, 33 Colo. App. 4, 514 P.2d 336 (1973).

When the limiting period has passed, an order vacating judgment is absolutely void for lack of jurisdiction. Elder v. Richmond Gold & Mining Co., 58 F. 536 (8th Cir. 1893); Empire Const. Co. v. Crawford, 57 Colo. 281, 141 P. 474 (1914); Bd. of Control v. Mulertz, 60 Colo. 468, 154 P. 742 (1916).

Claim preclusion (otherwise known as res judicata) bars independent damages actions for wrongs committed in dissolution proceedings. After the six-month period following entry of judgment provided by section (b)(2), independent damages action for wrongs allegedly committed in the dissolution proceeding are barred. Gavrilis v. Gavrilis, 116 P.3d 1272 (Colo. App. 2005).

There was no fraud upon the court in dissolution of marriage action where husband's fraudulent nondisclosure of assets and income was purely between the parties. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Void judgment may be vacated at any time regardless of time limits established by rules of civil procedure. Don J. Best Trust v. Cherry Creek Nat. Bank, 792 P.2d 302 (Colo. App. 1990).

Independent equitable action permitted. The propriety of an independent equitable action to afford relief from a prior judgment is expressly permitted under the provisions of section (b) of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Six-month limitation has no application to independent equitable action. An independent action to obtain equitable relief from a prior judgment is not brought under section (b) of this rule, and, hence, the six months' time limitation contained in this rule has no application. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982).

An independent equitable action to afford relief from a prior judgment is not restricted by the six-month time limitation upon motions made under clauses (1) to (5) in the first sentence of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Because an independent equitable action is not brought under this rule, the six-month time limit of clauses (1) and (2) in the first sentence of section (b) do not apply; rather, an independent equitable action must only be brought within a ''reasonable time''. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

An independent equitable action may provide additional remedies. An independent equitable action to afford relief from a prior judgment may provide remedies in addition to those afforded under section (b) of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Essential criteria upon which relief may be granted in an equitable action to afford relief from a prior judgment contemplated by section (b) are as follows: (1) That the judgment ought not, in equity and good conscience, be enforced; (2) that there can be asserted a meritorious defense to the cause of action on which the judgment is founded; (3) that fraud, accident, or mistake prevented the defendant in the action from obtaining the benefit of his defense; (4) that there is an absence of fault or negligence on the part of defendant; (5) and that there exists no adequate remedy at law. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974); In re Gance, 36 P.3d 114 (Colo. App. 2001).

Independent action to obtain equitable relief from prior judgment not brought under rule; rather, it is a new action, commenced in the same manner as any other civil action. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

Dismissal of judgment debtor's motion for relief under section (b)(4) on the basis of settlement agreement between judgment debtor and judgment creditor was proper where such motion was not timely filed and the court lacked jurisdiction since judgment debtor elected to litigate settlement agreement in a separate action. Tripp v. Parga, 764 P.2d 367 (Colo. App. 1988).

A party may not use an independent equitable action to accomplish what it could have accomplished by appeal. In case where plaintiff argued that second complaint was an independent equitable action seeking relief from order dismissing his first complaint, plaintiff's proper remedy was to seek timely appellate relief. Therefore, district court properly dismissed plaintiff's second complaint. Kelso v. Rickenbaugh Cadillac Co., 262 P.3d 1001 (Colo. App. 2011).

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Claimant seeking relief through an independent equitable action based on fraud must establish extrinsic fraud as opposed to mere intrinsic fraud. A mere showing of intrinsic fraud, such as perjury or nondisclosure be-

tween the litigants concerning the subject matter of the original action, is insufficient. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Husband's concealment of income and assets in dissolution of marriage action pertained to the substance and merits of the litigation and involved the parties themselves; it therefore did not rise to the level of fraud necessary to support an independent equitable action to vacate the underlying permanent orders. In re Gance, 36 P.3d 114 (Colo. App. 2001).

"Excusable neglect" sufficient to vacate an order results from circumstances which would cause a reasonably careful person to neglect a duty, and the issue of negligence is determined by the trier of fact. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's own negligence not excusable neglect. Where a party's own carelessness resulted in its failure to file a responsive pleading, this carelessness does not constitute excusable neglect. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

In general, excusable neglect involves unforeseen occurrences that would cause a reasonably prudent person to overlook a required act in the performance of some responsibility. Failure to act because of carelessness and negligence is not excusable neglect. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

Reliance on opposing party's pleadings held to be excusable neglect. A defendant's reliance upon the plaintiff's verified statement and pleadings appearing to drop the defendant from the action, coupled with the advice of an attorney that he need not be concerned about the proceedings, constitutes ''excusable neglect'' as a matter of law. People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982).

Reliance on district court's statements held to be excusable neglect. A defendant's failure to move for a new trial, based on the district court's assurance that such a motion was unnecessary in order for the defendant to appeal, constitutes excusable neglect under this rule. Tyler v. Adams County Dept. of Soc. Servs., 697 P.2d 29 (Colo. 1985).

Excusable neglect not found. Pro se plaintiff's failure to comply with notice provisions of § 24-10-109 does not constitute excusable neglect. Deason v. Lewis, 706 P.2d 1283 (Colo. App. 1985).

The rule that negligence on the part of an attorney may constitute excusable neglect on the part of the client has no application if the client itself is also negligent. Johnson v. Capitol Funding, LTD., 725 P.2d 1179 (Colo. App. 1986).

Common carelessness and negligence do not amount to excusable neglect and a party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. Guynn v. State Farm Mut. Auto Ins. Co., 725 P.2d 1162 (Colo. App. 1986).

Defendant's assertion that its agent was without authority to enter into a contract with plaintiff was not excusable neglect. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Conduct of a party's legal representative constitutes excusable neglect when surrounding circumstances would cause a reasonably prudent person to overlook a required act in the performance of some responsibility; however, common carelessness and negligence by the party's attorney does not amount to excusable neglect. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

Failure of settlement offer made by defendant's insurance attorney to specify whether offer addressed fewer than all of the claims between the parties, did not constitute excusable neglect. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

Excusable neglect does not constitute grounds for relief from the operation of C.R.C.P. 59(j). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Relief from a judgment may be granted on equitable grounds. Continental Nat'l Bank v. Dolan, 39 Colo. App. 16, 564 P.2d 955 (1977).

A motion under this rule cannot be overturned on appeal in the absence of an abuse of discretion by the district court. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Abuse of discretion will warrant reversal. While the grant or denial of relief from a judgment on equitable grounds is within the discretion of the trial court, an abuse of this discretion will warrant reversal. Continental Nat'l Bank v. Dolan, 39 Colo. App. 16, 564 P.2d 955 (1977); S.E. Colo. Water Conservancy Dist. v. O'Neill, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993); Blesch v. Denver Publ'g Co., 62 P.3d 1060 (Colo. App. 2002).

It is error to deny relief where dismissal erroneously ordered on court's own motion. Where court on own motion dismissed action for failure to prosecute without complying with notice requirements of C.R.C.P. 41(b) and C.R.C.P. 121 § 1-10(2), erroneous dismissal constituted sufficient reason to justify relief. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Abuse of discretion not found. Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984); Merrill

Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Existence of meritorious defense and lack of prejudice to the plaintiff are insufficient to show an abuse of discretion in denying a motion to set aside a default. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Even without tainted expert's testimony, trial court found that other evidence in the case supported the judgment. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

This rule is not applicable to a motion to reform a property settlement agreement incorporated into a divorce decree, since C.R.C.P. 81(b) provides that the Rules of Civil Procedure shall not govern procedure and practice in divorce actions if in conflict with applicable statutes. Ingels v. Ingels, 29 Colo. App. 585, 487 P.2d 812 (1971).

This rule is not applicable to a juvenile court's entry of an order terminating probation by mistake. The Colorado Rules of Civil Procedure apply only to juvenile matters that are not governed by the Colorado Children's Code. People in Interest of M.T., 950 P.2d 669 (Colo. App. 1997).

District court erred in denying husband relief from provision of dissolution of marriage decree requiring him to pay part of his future social security benefits to wife. State law equitable estoppel principles cannot be applied to bar a party from challenging a judgment rendered void by the supremacy clause of the U.S. constitution. In re Anderson, 252 P.3d 490 (Colo. App. 2010).

A decree determining property rights in a divorce matter is final and cannot be subsequently modified by reason of a change of circumstances. Ferguson v. Olmsted, 168 Colo. 374, 451 P.2d 746 (1969).

Where a court may provide for custody of children by orders made "before or after" the entry of a final decree, the trial court may provide for the custody of the child even though the subject was not mentioned in the original decree. Kelley v. Kelley, 161 Colo. 486, 423 P.2d 315 (1967).

Six-month limit applicable in child support action. Where defendant in a child support action alleged there was fraud, extrinsic to the record, perpetrated by plaintiff, unless the fraud alleged was such as to defeat the jurisdiction of the court, defendant was subject to the six-month limit of this rule. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of C.R.C.P. 59 or this rule were available to him to reopen the divorce proceeding. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Clause (5) of section (b) is residuary clause, covering extreme situations not covered by the preceding clauses in section (b). Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984); Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

A motion under this rule cannot be used to circumvent the operation of C.R.C.P. 59(j) unless the facts of the case constitute an "extreme situation" justifying relief from a judgment pursuant to clause (5) of section (b). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Total lack of judicial review of property division provisions of a separation agreement constitutes an omission falling within the ambit of clause (5) of section (b). In re Seely, 689 P.2d 1154 (Colo. App. 1984).

Reason alleged by a movant under clause (5) of section (b) must justify relief. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Grievous jury misconduct raising sensitive issues of religion presents grounds for relief under clause (5) ("other reason") of section (b). Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Where there is misconduct of jurors or the intrusion of irregular influences in the course of a trial, the test for determining whether a new trial will be granted is whether such matters had capacity of influencing result. Butters v. Dee Wann, 363 P.2d 494 (1961); Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

While trial court personally expressed belief that verdict would have been same with a "decent" jury, trial court made necessary finding, in setting aside judgment, that jurors' conduct had capacity of influencing verdict. Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Untimely assertion of federal statutory venue right is not an extreme situation justifying relief under clause (5) of section (b). Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Repeated assurances by the court clerk that the defendant's motion to alter and amend the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under clause (5) of section (b). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Defense not timely raised. The existence of a defense not timely raised does not constitute an extreme situation justifying relief from a default judgment under clause (5) of section (b). Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Changes in decisional law, even by the United States supreme court and even involving constitutionality, do not necessarily amount to the extraordinary circumstances required for relief pursuant to section (b)(5). Davidson v. McClellan, 16 P.3d 233 (Colo. 2001); SR Condos., LLC v. K.C. Constr., Inc., 176 P. 3d 866 (Colo. App. 2007).

Jurisdictional prerequisite for review of action on section (b) motion. A motion for a new trial is a jurisdictional prerequisite for appellate review of a grant or denial of a section (b) motion when there has been a hearing involving controverted issues of fact. Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

Erroneous in personam decision may be vacated. A trial court may properly vacate its order of dismissal against a defendant where the original decision of the trial court to dismiss under the theory that the action was in personam and not in rem was erroneous. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

When a defendant voluntarily pays a judgment, he is barred from questioning any technicalities, either of pleading or form, incident to the entry of the judgment. Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Misplaced reliance on the advice of counsel is not in itself sufficient grounds for granting of relief under section (b) of this rule. BB v. SS, 171 Colo. 534, 468 P.2d 859 (1970); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984).

Where a party commits a cause to the agency of an attorney, the neglect, omission, or mistake of such attorney resulting in the rendition of a judgment against the party is available to authorize the vacation of the judgment. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

When a trial court permits counsel to withdraw from a case without notice to his client and then adjudicated his rights "ex parte", a judgment entered is void for lack of due process. Dalton v. People in Interest of Moors, 146 Colo. 15, 360 P.2d 113 (1961); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Malfeasance by attorney, consisting of failure to notify clients of motion for summary judgment or to respond to motion while under suspension from the practice of law, furnished grounds for relief from judgment where clients were unaware of the motion or of their attorney's suspension. Valley Bank of Frederick v. Rowe, 851 P.2d 267 (Colo. App. 1993).

Action of trial court renders judgment void if defendants had no notice. The action of the trial judge in permitting the withdrawal of counsel and proceeding to judgment "ex parte" constituted a failure to protect the constitutional right of defendants to their day in court and renders judgment void if defendants had no notice that their counsel intended to seek permission to withdraw. Calkins v. Smalley, 88 Colo. 227, 294 P. 534 (1930); Blackwell v. Midland Fed. Sav. & Loan Ass'n, 132 Colo. 45, 284 P.2d 1060 (1955); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Where a judgment is entered upon a cognovit note without notice to the defendant, a motion in apt time is thereafter filed to set aside the same, and a meritorious defense is tendered by answer, it is the duty of a court to vacate the judgment and try the case on the merits. Richards v. First Nat'l Bank, 59 Colo. 403, 148 P. 912 (1915); Commercial Credit Co. v. Calkins, 78 Colo. 257, 241 P. 529 (1925); Mitchell v. Miller, 81 Colo. 1, 252 P. 886 (1927); Denver Indus. Corp. v. Kesselring, 90 Colo. 295, 8 P.2d 767 (1932); Lucero v. Smith, 110 Colo. 165, 132 P.2d 791 (1943); Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

If a judgment of dismissal has terminated and put an end to, a case remains final for all purposes and is unaffected by a motion to grant relief therefrom. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

A motion under section (b) does not affect the finality of a judgment or suspend its operation. Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

A motion, in any event, is directed to the discretion of a trial court. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

When one files such a motion, he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence, or excusable neglect on behalf of counsel or client. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

The ruling on a motion to "dismiss and vacate" is not a final judgment from which an appeal will lie. Fiant v. Town of Naturita, 127 Colo. 571, 259 P.2d 278 (1953); Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for de-

fendant's failure to request dismissal with prejudice, subsequent ''clarification'' of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

Where a judgment is set aside on jurisdictional grounds, it is vacated and of no force and effect. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Party who lets judgment become final without objection to the court's jurisdiction is precluded from attacking the subject matter jurisdiction through a motion under this rule. In re Mallon, 956 P.2d 642 (Colo. App. 1998).

Original judgment opened. Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

If an issue is not res judicata, the district court's judgment may be challenged as void through a motion pursuant to section (b) of this rule to vacate the judgment or through an independent action. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

A void judgment is a judgment entered where jurisdictional defects exist and is a nullity, whereas an erroneous judgment is one rendered in accordance with method of procedure and practice allowed by law but is contrary to law; if a trial court has jurisdiction, it may correct an erroneous judgment. In re Pierce, 720 P.2d 591 (Colo. App. 1985).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. In re Stroud, 631 P.2d 168 (Colo. 1981).

Judgment entered on legal holiday not void and becomes effective next business day. Section 13-1-118 (1) does not provide that any judicial business transacted in violation of its provisions is void. Rather, the statute is silent as to the effect of any order entered or other judicial business transacted in violation of its prohibitions. Section 13-1-118 (2) provides that the effect of having a day fixed for the opening of a court that falls on a prohibited day is that ''the court shall stand adjourned until the next succeeding day.'' Thus, the effect of the trial court's entry of an order reviving judgment on a legal holiday was not to invalidate the order but, rather, merely to postpone its effective date until the next day the courts were open. Because the challenged judgment is not void, section (b)(3) of this rule provides no basis for relief. Arvada 1st Indus. Bank v. Hutchison, 15 P.3d 292 (Colo. App. 2000).

Government agencies treated same as other litigants. Absent an express statutory mandate to the contrary, government agencies are to be treated as would be any other litigant while before the court. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

C.R.C.P. 6(b)(2) is controlling over this rule as to whether a trial court may extend the period of time for filing a motion for new trial under C.R.C.P. 59(b) (now (a)(1)) after the original filing period has expired. Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984).

Where court had lost jurisdiction under C.R.C.P. 59(b) (now (a)(1)), court had jurisdiction to set aside judgment under clause (5) of section (b) of this rule without unduly expanding the contours of the rule or undercutting C.R.C.P. 59(b) (now (a)(1)). Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Only issues contained in a motion under this rule are properly before the appellate court for review; constitutional objections not appearing in the motion will not be reviewed. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985).

No evidentiary hearing need be conducted by the trial court considering a motion under this rule nor is there an abuse of discretion when a trial court determines such a motion without conducting such a hearing. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985).

But nothing in this rule prevents a trial court from holding an evidentiary hearing on a motion under this rule if such a hearing would assist in reaching a just determination of the issues raised by the motion. Sharma v. Vigil, 967 P.2d 197 (Colo. App. 1998).

Reversal of conviction in criminal case grounds for relief from monetary forfeiture judgment. While a conviction is not required in every civil forfeiture case, the reversal of the conviction was relevant here because the court relied on that conviction in its forfeiture judgment. The physical evidence upon which the trial court had based its forfeiture judgment had been determined to be unconstitutionally seized, making it relevant. People v. $11,200.00 U.S. Currency, 316 P.3d 1 (Colo. App. 2011), rev'd on other grounds, 2013 CO 64, 313 P.3d 554.

Section (b) permits a trial court to rectify or reverse a prior judgment that, in light of new facts, is now erroneous. However, a holding that the forfeiture against a defendant's property was void does not equate to a ruling that defendant is entitled to a return of the property or monetary relief from the government because a motion under section (b) is not a claim for the return of property. To the extent that the trial court's order set aside the forfeiture judgment, the order was consistent with the power expressly granted the court under section (b). Section (b) does not empower the trial court to go further and order return of the property. People

v. $11,200.00 U.S. Currency, 2013 CO 64, 313 P.3d 554.

Father's section (b) request to vacate prior orders in a dependency and neglect proceeding not rendered moot following child's death. Denying his request for relief would have a collateral consequence in the dependency and neglect orders in father's federal action, thus the request cannot be considered moot. People in Interest of C.G., 2015 COA 106, 410 P.3d 596.

B. Default Judgments.

Law reviews. For comment on Self v. Watt, appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on Coerber v. Rath appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note. For annotations relating to motions to vacate default judgments, see the annotations under the analysis title "IV. Setting Aside Default" under C.R.C.P. 55.

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. Stiger v. District Court, 188 Colo. 403, 535 P.2d 508 (1975).

Section (b) of this rule sets forth the procedure to be followed where one seeks to set aside a judgment entered by default. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Section (b)(3) is the proper basis for vacating a default judgment if the defaulting party's due process rights were violated by failure to receive notice of a default judgment. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000); Burton v. Colo. Access, 2018 CO 11, 428 P.3d 208, cert. denied sub nom. Olivar v. Pub. Serv. Emple. Credit Union, __ U.S. __, 139 S. Ct. 87, 202 L. Ed. 2d 26 (2018).

If a judgment is void, the court must set it aside regardless of when the party seeking to set aside the judgment moves to set it aside. No time limit applies to a motion under section (b)(3). Burton v. Colo. Access, 2015 COA 111, 410 P.3d 1255, aff'd, 2018 CO 11, 428 P.3d 208, cert. denied sub nom. Olivar v. Pub. Serv. Emple. Credit Union, __ U.S. __, 139 S. Ct. 87, 202 L. Ed. 2d 26 (2018).

Section (b) of this rule and C.R.C.P. 55(c) leave the matter of setting aside defaults and judgments entered thereon to the discretion of a trial judge. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Allegations in a C.R.C.P. 55 motion for default are sufficient to assert a basis for relief from judgment on the basis of fraud. Salvo v. De Simone, 727 P.2d 879 (Colo. App. 1986).

Motion for a new trial is a jurisdictional prerequisite for appellate review of denial of a motion to vacate a default judgment, unless the hearing on the motion to vacate does not involve "controverted issues of fact". Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

The granting or denial of an application to vacate a default based on excusable neglect rests in the sound judicial discretion of a trial court. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule rests in the sound discretion of the trial court on the particular facts of the case. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A trial court's determination of a motion to vacate a judgment under this rule will not be disturbed on appellate review in the absence of a clear abuse of discretion. Columbine Valley Constr. Co. v. Bd. of Dirs., 626 P.2d 686 (Colo. 1981).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

Where the moving party has delayed substantially in seeking to set aside a default judgment, relief is disfavored by the courts. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985).

The trial court's order on a motion for relief, based on a residuary clause covering extreme situations, may not be reversed absent an abuse of discretion. Fukutomi v. Siegel, 785 P.2d 147 (Colo. App. 1989).

To warrant a reversal, it must appear that there is an abuse of the court's discretion. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule will not be disturbed on review unless it clearly appears that there has been abuse of that discretion. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

Where service is not proper, judgment is void and may be challenged at any time. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Presumption of regularity applied to district court order granting default judgment. Because the court record had been destroyed and the return of service was unavailable, the

presumption of regularity applied and the default judgment was presumed valid and properly entered. Defendant's unsworn statements that he had never been served were insufficient to make the affirmative showing of error necessary to overcome the presumption. Tallman v. Aune, 2019 COA 12, __ P.3d __.

Discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A default judgment as to a party was properly set aside by the judge on the ground that he was not subjected to the personal jurisdiction of the court at the time of the judgment due to a lack of service of process because service had been served on his behalf on his alleged wife, but at the time of service, the couple had been divorced for over a month. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to sections (b)(1) and (b)(3) of this rule. Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Where a motion is not filed within six months after the default was entered, then, under section (b) of this rule, a trial court is correct in denying the motion to vacate the default. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954).

The trial court had no jurisdiction to hear, much less grant, a motion for relief from judgment filed more than six months after entry of judgment. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Seventeen years is not a "reasonable time". Where for a period of more than 17 years one took no action to vacate or otherwise attack the validity of a default judgment, it can hardly be said that under such circumstances 17 years is a ''reasonable time''. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Petition to vacate such a judgment held filed in apt time. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943).

In cases such as this, a defendant must establish his grounds for relief by clear, strong, and satisfactory proof. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

It is not sufficient to show that the neglect which brought about the default is excusable. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

To vacate a default, a mere showing of excusable neglect is not sufficient. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant must show a meritorious defense to the action. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970); Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of ''excusable neglect'' supported by a specific statement of meritorious defense. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

A defense to the action "prima facie" meritorious must also appear. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

It must be stated with such fullness and particularity that the court can see it is substantial, not technical, meritorious, and not frivolous. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

Where there were no reasons proffered to the trial court as grounds for relief under section (b) other than youth and indifference, the trial court's denial of motion to set aside default judgment was not an abuse of discretion. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

It is not the duty of the trial court to relieve one of the consequences incident to the mistakes of his counsel. Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953).

Where it is clear that defendants' counsel was negligent and that such neglect was the primary cause for their failure, counsel's neglect is inexcusable, but this neglect should not

be imputed to the defendants. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971); Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence on the part of counsel, under certain circumstances, should be considered excusable neglect on the part of a client sufficient to permit the client to set aside a default judgment. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

Although a court recognizes the gross neglect of counsel, yet enters a default, it unwarrantly punishes defendants whose only dereliction is the misplacing of confidence in their attorney. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

To hold that such reasons are inapplicable because a defendant failed to check the progress of the litigation is to make the client erroneously totally responsible for the attorney's negligent failure to comply with the rules of civil procedure. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where one was, or should have been, aware that his interest in the action was adverse to another, his reliance on such individual does not constitute excusable neglect so as to justify vacating entry of default judgment. Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

Where the record discloses that the defendant himself was guilty of negligence separate and apart from that of his counsel, the alleged negligence of counsel would not be considered as excusable neglect for purpose of setting aside default judgment. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The entry of a default judgment does not apply to a stipulated judgment. Where parties dealing at arm's length have stipulated for the entry of a judgment, it is not a default judgment in the true sense of the word, but a stipulated judgment; consequently, there is no mistake, inadvertence, surprise or excusable neglect. Kopel v. Davie, 163 Colo. 57, 428 P.2d 712 (1967).

Where the parties to litigation, dealing at arm's length, stipulate for the entry of a judgment of dismissal, and they do not claim mistake, inadvertence, surprise, or excusable neglect, nor are any of the parties to the action seeking to have the order set aside, that judgment is final. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on a motion to vacate a judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with considerations of equity. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986); Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997); Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

The preferred procedure is to consider all three criteria in a single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986); Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

Motion to vacate judgment under this rule on basis of excusable neglect and motion to set aside default judgment under C.R.C.P. 55(c) on the basis of failure to prosecute are sufficiently analogous to justify application of the same standards to either motion; thus, the same three criteria which are legal standard are applicable in both motions. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

In determining whether a party has established excusable neglect to obtain relief, the court should not impute gross negligence of an attorney to his client for the purpose of foreclosing the client from relief. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Moving party must establish by factual averments, and not simply by legal conclusions, that claim previously dismissed was indeed meritorious and substantial. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986); Burton v. Colo. Access, 2015 COA 111, __ P.3d __, aff'd on other grounds, 2018 CO 11, 428 P.3d 208, cert. denied sub nom. Olivar v. Pub. Serv. Emple. Credit Union, __ U.S. __, 139 S. Ct. 87, 202 L. Ed. 2d 26 (2018).

In determining whether relief would be consistent with equitable considerations, court should take into account promptness of moving party in filing motion, fact of any detrimental reliance by opposing party on order or judgment of dismissal, and any prejudice to oppos-

ing party if motion were to be granted, including impairment of party's ability to adduce proof at trial in defense of claim. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Trial court abused its discretion in denying defendant's motion to set aside judgment based on excusable neglect without applying the test established by Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986), cited above. Taylor v. HCA-Healthone LLC, 2018 COA 29, 417 P.3d 943.

The mere existence of some negligence by client does not serve as per se basis to automatically deny relief, where motion was made based upon excusable neglect. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Defendant failed to show excusable neglect where he failed to seek a continuance or communicate with the trial court in any manner while seeking to remove the case to federal court and failed to appear and participate at trial even though he knew the federal court had remanded the case back to state court. Blazer Elec. Supply Co. v. Bertrand, 952 P.2d 857 (Colo. App. 1998).

Rule as basis for jurisdiction. Welborn v. Hartman, 28 Colo. App. 11, 470 P.2d 82 (1970); Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971).

Applied in Finegold v. Clarke, 713 P.2d 401 (Colo. App. 1985).

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

ANNOTATION

Law reviews. For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''The Applicability of the Rules of Evidence in Non-Jury Trials'', 24 Rocky Mt. L. Rev. 480 (1952).

A substantial right is one which relates to the subject matter and not to a matter of procedure and form. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948); Corbin by Corbin v. City & County of Denver, 735 P.2d 214 (Colo. App. 1987).

Lack of adherence to formalities which do not result in prejudice should not interfere with the determination of the issues on the merits. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955).

Allowing fewer peremptory challenges than authorized, or than available to and exercised by the opposing party, is reviewed in accordance with this rule. Laura A. Newman, LLC v. Roberts, 2016 CO 9, 365 P.3d 972 (overruling Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911); Safeway Stores, Inc. v. Langden, 532 P.2d 337 (Colo. 1975); and Blades v. DaFoe, 704 P.2d 317 (Colo. 1985)).

A new trial will not be granted for error which did not prejudice or harm the party seeking a new trial, or where the trial resulted in substantial justice. Francis v. O'Neal, 127 Colo. 432, 257 P.2d 973 (1953); Tincombe v. Colo. Const. & Supply Corp., 681 P.2d 533 (Colo. App. 1984).

To the extent there was any error in judge's comments that defendant was "playing games" by filing motions for recusal, such error was harmless where defendant filed a subsequent motion for recusal which included the arguments made in the previous recusal motions and the subsequent motion was decided. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Error in admission of immaterial evidence is not prejudicial where the findings are not based on, nor related to, any of the immaterial matter. Lloyd A. Fry Roofing Co. v. State, 179 Colo. 223, 499 P.2d 1176 (1972).

Violation of rule provisions allowing for a response from the party opposing a motion for summary judgment found to be harmless error under the circumstances. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

It was harmless error for the court to enter summary judgment on an issue which was not raised by the parties when the party against whom judgment is entered has the opportunity to respond to the new issue raised by the trial court. Ferrera v. Nielsen, 799 P.2d 458 (Colo. App. 1990); Davis v. Lira, 817 P.2d 539 (Colo. App. 1991).

Where testimony is hearsay, its admission is harmless when the essential and operative

facts upon which an award rests are established by competent evidence in the record. San Isabel Elec. Ass'n v. Bramer, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

The admission of part of the deposition of a party in court and able to testify is harmless error where the evidence contained therein is merely cumulative to the evidence already before the court. Its admission neither adds to nor detracts from evidence previously admitted. Therefore, the admission of the deposition is not reversible error. Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970).

It was harmless error to admit evidence that deposition was taken at Texas state penitentiary, since defendants failed to prove that its admission affected substantial rights. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Where a trial judge drives past the premises in question in a zoning case to gain familiarity with its location and topography so he could better understand references in the record to the property, he does not commit reversible error so long as there is no indication that when the trial judge viewed the property it was not in substantially the same condition as when the ordinance in question was passed nor is there any indication that the trial court was influenced by or based its decision upon any evidence not a part of the record. Trans-Robles Corp. v. City of Cherry Hills Village, 30 Colo. 511, 497 P.2d 335 (1972), aff'd, 181 Colo. 356, 509 P.2d 797 (1973).

Where the stated reason for a transcript record's use is to show the scope of a previous judgment, which it fails to include, its admission is error, but harmless error. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

Errors and deficiencies of counsel will be disregarded where not to do so would result in palpable injury. Griffith v. Anderson, 109 Colo. 265, 124 P.2d 599 (1942).

Although a trial court applies the wrong test, the failure to dismiss does not result in reversible error, where had the trial court applied the right rule, the result would have been the same. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

Error held harmless. Where the record is clear that adequate funds were in fact remitted on behalf of the judgment debtor, and at all times subsequent to the inaccurate change refund by the clerk, the judgment debtor was willing and able to pay the interest to the judgment creditor, and payment was obstructed solely by the latter, substantial justice would not be served by penalizing the defendant for the minor mathematical error of the clerk of the trial court, and thus the error is harmless. Osborn Hdwe. Co. v. Colo. Corp., 32 Colo. App. 254, 510 P.2d 461 (1973).

Even if the trial court erred in issuing a protective order precluding discovery by plaintiff, such error was harmless because it would not alter the court's conclusion that summary judgment was proper. Pierce v. St. Vrain Valley Sch. Dist., 944 P.2d 646 (Colo. App. 1997); rev'd on other grounds, 981 P.2d 600 (Colo. 1999).

Failure to include a citation of legal authorities in trial data certificate and late filing of authorities in trial memorandum held to be harmless error. Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Presentation of factual requirements for entry of default judgment by means of testimony and other evidence, rather than by affidavit as required by C.R.C.P. 121 § 1-14, held to be harmless error. Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

Applied in Jones v. Gates Serv. Station, Inc., 108 Colo. 201, 115 P.2d 396 (1941); Odell v. Pub. Serv. Co., 158 Colo. 404, 407 P.2d 330 (1965); McQueen v. Robbins, 28 Colo. App. 436, 476 P.2d 57 (1970); Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974); Lopez v. Motor Vehicle Div., Dept. of Rev., 189 Colo. 133, 538 P.2d 446 (1975); Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978); Kaltenbach v. Julesburg Sch. Dist. Re-1, 43 Colo. App. 150, 603 P.2d 955 (1979); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982); In re Tatum, 653 P.2d 74 (Colo. App. 1982); Jackson v. Harsco Corp., 653 P.2d 407 (Colo. App. 1982); Banek v. Thomas, 697 P.2d 743 (Colo. App. 1984), aff'd, 733 P.2d 1171 (Colo. 1986); Kedar v. Pub. Serv. Co., 709 P.2d 15 (Colo. App. 1985); Greenemeier by Redington v. Spencer, 719 P.2d 710 (Colo. 1986); Denman v. Burlington Northern R. Co., 761 P.2d 244 (Colo. App. 1988); Clark v. Buhring, 761 P.2d 266 (Colo. App. 1988); Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990); States v. R.D. Werner Co., 799 P.2d 427 (Colo. App. 1990); Cook Inv. v. Seven-Eleven Coffee Shop, 841 P.2d 333 (Colo. App. 1992); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993); Radcliff Props. v. City of Sheridan, 2012 COA 82, 296 P.3d 310.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions; Injunctions; Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 14 days after its entry; provided that an interlocutory or

final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Unless otherwise ordered by the court, the provisions of section (c) of this Rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Discretionary stay. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment: (1) pending the disposition of a motion for post-trial relief made pursuant to C.R.C.P. 59; (2) pending a motion for relief from a judgment or order made pursuant to C.R.C.P. 60; (3) during the time permitted for filing of a notice of appeal; or (4) during the pendency of a motion for approval of a supersedeas bond.

COMMITTEE COMMENT

The 1988 amendment to C.R.C.P. 62(b) is a change to make that section fully consistent with the changes made to C.R.C.P. 59. The post-trial relief features of C.R.C.P. 50 and 52(b) were brought into C.R.C.P. 59. As a result, those Rules (50) and (52) no longer bear on post-trial relief and need not be referenced in C.R.C.P. 62.

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the trial court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) Stay upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay from the trial court subject to the exceptions contained in section (a) of this Rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the State of Colorado or Municipalities Thereof. When an appeal is taken by the State of Colorado, or by any county or municipal corporation of this state, or of any officer or agency thereof acting in official capacity and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant unless otherwise ordered by the court.

(f) [There is no section (f).]

(g) Power of Appellate Court Not Limited. The provisions in this Rule do not limit any power of the appellate courts or of a justice or judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. (See Rule 8, Colorado Appellate Rules.)

(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Source: (b) amended and adopted, effective November 16, 1995; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For motion for directed verdict, see C.R.C.P. 50; for when bond not required, see C.A.R. 8(c); for stays pending appeal, see C.A.R. 8.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951). For article, ''Obtaining a Supersedeas Bond'', see 23 Colo. Law. 607 (1994). For article, ''Bonds in Colorado Courts: A Primer for Practitioners'', see 34 Colo. Law. 59 (March 2005).

No power is lodged in any court to stay an order of discharge in a habeas corpus proceeding, as such action would defeat the very purpose of habeas corpus. Geer v. Alaniz, 137 Colo. 432, 326 P.2d 71 (1958).

Generally, court may not impair creditor's right to enforce judgment. As a general rule, a court may not stay execution and thereby impair or destroy the statutory right of a judgment creditor to enforce collection of its judgment against nonexempt property of the judgment debtor. First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

Right to enforce may be statutorily limited. The substantive right of a judgment creditor to enforce collection of the judgment may be statutorily limited, as by § 7-60-128. First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

Effect of stay on certain statutory requirements. The stay of execution provided for in this rule has no effect on the requirement that a transcript of judgment be issued on payment of the fee pursuant to § 13-32-104 (1)(g). Rocky Mt. Ass'n of Credit Mgt. v. District Court, 193 Colo. 344, 565 P.2d 1345 (1977).

Applied in Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

II. AUTOMATIC STAY.

Under section (a) of this rule, a judgment order dividing property is automatically stayed and unenforceable for a period of 10 (now 15) days following its entry. Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

Section (a) is inapplicable to temporary custody order the mother was found to have violated. Order was not subject to 15-day automatic stay. In re Adams, 778 P.2d 294 (Colo. App. 1989).

A forcible medication administration order is not the type of action contemplated by section (a) and is thus not automatically stayed for 14 days after entry. People ex rel. Strodtman, 293 P.3d 123 (Colo. App. 2011).

III. STAY ON MOTION.

Unless stayed by the court, a judgment may be executed upon before a new trial motion is decided. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

IV. INJUNCTION.

Effect of section (c) is to protect rights of parties. Section (c) of this rule authorizes the trial court to enter orders which preserve the status quo, or otherwise protect the rights of the parties pending appeal, but does not give the trial court authority to enter an order which alters the rights granted, or created by the original order. Rivera v. Civil Serv. Comm'n, 34 Colo. App. 152, 529 P.2d 1347 (1974).

By virtue of this rule, a trial court can, in its discretion, suspend, modify, restore, or grant an injunction, so long as an appellate court has not granted a supersedeas. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

Injunctive power of the court has been long recognized. At least since 1887, it has been recognized statutorily that trial courts can more speedily, economically, and satisfactorily consider applications for injunctive relief in actions which are pending in an appellate court. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

An obvious reason for recognizing the court's injunctive power is that trial courts are equipped to conduct the trial process. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

But injunctive proceedings may not be invoked to bring about a forfeiture of a property right. Injunction and forfeiture cannot be equated; they are separate and distinct concepts. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

V. STAY UPON APPEAL.

Annotator's note. Since section (d) of this rule is similar to § 428 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing § 428 have been included in the annotations to this rule.

A trial court retains jurisdiction in order to enforce a judgment it has rendered where defendant does not move for stay of execution or file a supersedeas bond. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Where a defendant fails to take these affirmative steps necessary in order to prevent the trial court from making a final disposition of the case in accordance with its findings, no error is committed by a trial court in entering a final decree confirming a title after an appeal has issued. Failure of defendant to stay the execution means that the trial court retains jurisdiction, and its actions subsequent to the issuance of the notice of appeal are fully within its powers. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Effect of trial court's failure to rule on motion. In foreclosure action, where motion for stay under section (d) of this rule and for waiver of the supersedeas bond requirement had been filed in the trial court but not determined at time of appeal, and where a request for stay under C.A.R. 8 had not been filed in the court of appeals, title to secured property vested in certificate holder and appeal was moot. Mount Carbon Metro. Dist. v. Lake George Co., 847 P.2d 254 (Colo. App. 1993).

Stay may be issued before or after appeal filed. The trial court may issue a stay either before or after a notice of appeal is filed. Odd Fellows Bldg. & Inv. Co. v. City of Englewood, 667 P.2d 1358 (Colo. 1983).

The filing of a supersedeas bond is a prerequisite for obtaining an order staying execution of judgment pending appeal under section (d) of this rule. Muck v. District Ct., 814 P.2d 869 (Colo. 1991).

The issuance of a writ of supersedeas is the consideration for the giving of a supersedeas bond. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925).

There can be no supersedeas where one cannot furnish bond therefor. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

A supersedeas writ may not be granted on an invalid bond. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925).

Trial court erred in entering an order staying all proceedings relative to enforcement of family support order without requiring appellant to file supersedeas bond. Muck v. District Ct., 814 P.2d 869 (Colo. 1991).

Rule 63. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

ANNOTATION

Law reviews. For article, ''Judgment: Rules 54-63'', see 23 Rocky Mt. L. Rev. 581 (1951).

"Disability" construed. Disability includes anything that renders a judge incapable of performing his legal duties. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

Disability, under this rule, includes resignation. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982); Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

This rule specifically provides that a successor judge may complete a case providing a verdict is returned or findings of fact and conclusions of law are filed. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

This rule does not give a successor judge authority to determine the credibility of witnesses or compare and weigh testimony. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971); Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

Successor judge has discretion to rule on a motion for new trial which challenges the sufficiency of the evidence. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982); Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

A successor judge may consider challenges to rulings of law presented in a motion for a new trial. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

A successor judge may grant a new trial upon a determination that he or she is unable to rule on post-trial matters as a result of not having been at the original trial. Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

Successor judge may pass on original judge's award of attorney fees. Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

Rule inapplicable where findings and conclusions are void. This rule does not apply to a situation where the findings of fact and conclusions of law which have been filed are void.

Merchants Mtg. & Trust Corp. v. Jenkins, 659 P.2d 690 (Colo. 1983).

Interpretation of federal cases persuasive. Because F.R.C.P. 63 is identical to this rule, federal cases and authorities interpreting the federal rule are highly persuasive. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

Rule 64.

[Note: There is no Colorado rule under this heading. The number is here retained to preserve correspondence between federal and state numbering system rules 1 to 97.]

CHAPTER 7

Injunctions, Receivers, Deposits in Court, Offer of Judgment

ANALYSIS BY RULE

CHAPTER 7

INJUNCTIONS, RECEIVERS, DEPOSITS IN COURT, OFFER OF JUDGMENT

Rule 65. Injunction

(a) Preliminary Injunction.

(1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(2) **Consolidation of Hearing with Trial on Merits.** Before or after the commencement of the hearing on an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon a trial on the merits becomes part of the record on the trial and need not be repeated upon the trial, this subsection (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if: (1) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry not to exceed 14 days, as the court fixes, unless within the time so fixed, the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) business days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any county or municipal corporation of this state or of any officer or agency thereof acting in official capacity. If at any time it shall appear to the court that security given under this Rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) [There is no section (e).]

(f) Mandatory. If merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled, an injunction may be made mandatory. Such relief may include an injunction restoring to any person any property from which he may have been ousted or deprived of possession by fraud, force, or violence, or from which he may have been kept out of possession by threats or words or actions which have a natural tendency to excite fear or apprehension of danger.

(g) When Relief Granted. Relief under this Rule may also be granted on the motion of any party at any time after an action is commenced and before or in connection with final judgment.

(h) When Inapplicable. This Rule shall not apply to suits for dissolution of marriage, legal separation, maintenance, child support, or custody of minors. In such suits, the court may make prohibitive or mandatory orders, without notice or bond, as may be just.

(i) State Court's Jurisdiction When Suit Commenced in Federal Court; Stay of Proceedings; Notice; Appeal. Whenever a suit praying for an interlocutory injunction shall have been begun in a federal district court to restrain any official or officials of this state from enforcing or administering any statute or administrative order of this state, or to set aside such statute or administrative order, any defendant in such suit or the attorney general of the state may bring a suit to enforce such statute or order in the district court of the state at any time before the hearing on the application for an interlocutory injunction in the suit in the federal court; and the district courts of this state may entertain such suits and the state appellate courts may entertain appeals from judgments therein. When such suit is brought, the district court shall grant a stay of proceedings by any state officer or officers under such statute or order pending the determination of such suit in the courts of this state. Upon the bringing of such suit, the district court shall at once cause a notice thereof together with a copy of the stay order by it granted, to be sent to the federal district court in which the action was originally begun. An appeal may be taken within 14 days after the termination of the suit in the state district court to the appropriate state appellate court and such appeal shall be in every way expedited and set for an early hearing.

Source: (b) amended and effective June 28, 2007; (b) and (i) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For a temporary injunction in a proceeding for dissolution of marriage, legal separation, or child custody, see § 14-10-108, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Injunctions and Receivers: Rules 65 and 66'', see 23 Rocky Mt. L. Rev. 594 (1951). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961).

Annotator's note. Since this rule is similar to § 159 of the former Code of Civil Procedure,

which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Equity will not intervene where one has a plain and adequate remedy at law. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

Such is the case where everything that a plaintiff asserts is measurable and compensable in money and the evidence shows that defendant is amply able to respond to a money judgment and is subject to the jurisdiction of the Colorado courts. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

Where there is an adequate legal remedy which provides for the orderly termination of a nonconforming use, an injunction which is unduly harsh in its application will not be allowed to be used as a substitute for those legal means of phasing out the nonconforming use. Hobbs v. Smith, 177 Colo. 299, 493 P.2d 1352 (1972).

Injunction may not be obtained to restrain commission of a crime. Am. Television & Communications Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982).

The power to issue injunction should be exercised with great discretion. The writ of injunction is the strong arm of the court and, to render its operation benign and useful, the power to issue it should be exercised with great discretion and when necessity requires it. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908).

Trial courts have considerable latitude in injunction cases. Brennan v. Monson, 97 Colo. 448, 50 P.2d 534 (1935).

If convinced that a plaintiff should comply with certain conditions in order that equity might be done between the parties, such conditions may be prescribed, and compliance therewith required as a prerequisite to the granting of injunctive relief. Brennan v. Monson, 97 Colo. 448, 50 P.2d 534 (1935).

Prohibition for failure to comply with this rule. When an inferior court exceeds its jurisdiction by issuing injunctive orders without complying with the provisions of this rule, relief in the nature of prohibition does lie to prevent manifest injustice. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

A plaintiff who has sued out a writ of attachment upon personal property before judgment cannot secure an injunction without complying with this rule where there are no special requirements or procedure provided under statute by which an injunction or other relief shall be granted. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

If an injunction is void it can be collaterally attacked. Resler v. North E. Motor Freight, Inc., 154 Colo. 52, 388 P.2d 255 (1964).

A collateral attack on a temporary restraining order or a preliminary injunction, contained in a motion for a new trial directed to contempt orders issued for disobedience of the restraining order or injunction, is proper only if the orders granting the temporary restraining order or the preliminary injunction are void for some jurisdictional defect. Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978).

In a proper case where there will not be a double recovery, a court may issue an injunction to open a blocked easement, and, if necessary to grant an injured party complete relief for past interference with his easement, the court may also award monetary damages. Proper v. Greager, 827 P.2d 591 (Colo. App. 1992).

Applied in Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975); Sanderson v. District Court, 190 Colo. 431, 548 P.2d 921 (1976); Jeffrey v. Colo. State Dept. of Soc. Servs., 198 Colo. 265, 599 P.2d 874 (1979); Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979); In re Davis, 44 Colo. App. 355, 618 P.2d 692 (1980); State Pers. Bd. v. District Court, 637 P.2d 333 (Colo. 1981); Pasbrig v. Walton, 651 P.2d 459 (Colo. App. 1982); Gold Messenger, Inc. v. McGuay, 937 P.2d 907 (Colo. App. 1997); People v. Wunder, 2016 COA 46, 371 P.3d 785.

II. PRELIMINARY INJUNCTION.

The purpose of the preliminary injunction is to preserve the "status quo" or protect rights pending the final determination of a cause. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908) (decided under § 167 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

A preliminary injunction is to maintain the status quo. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

The granting of a preliminary injunction pursuant to section (a) of this rule is to preserve the status quo or otherwise to grant emergency relief. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

The matter of a preliminary injunction is to prevent further harm where harm is alleged, or otherwise to grant emergency relief, and a hearing on the merits is contemplated at a later date.

Graham v. Hoyl, 157 Colo. 338, 402 P.2d 604 (1965).

A court errs and is precipitous in its action by making an injunction permanent where issues remain to be tried upon which parties are entitled to be heard before any orders could be made final. Graham v. Hoyl, 157 Colo. 338, 402 P.2d 604 (1965).

Grant or denial of preliminary injunction not an adjudication of ultimate rights in controversy. The trial court erred when it determined, on a motion for a preliminary injunction, the title to the property at issue in the underlying transaction. Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984).

Different considerations govern issues relating to preliminary injunctions and requests for permanent injunctions, with the standards applicable to permanent injunctions less demanding. Henson v. Hoth, 258 F. Supp. 33 (D. Colo. 1966).

A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. Colo. Springs Bd. of Realtors v. State, 780 P.2d 494 (Colo. 1989).

Decision within court's discretion. The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984); Zuments v. Colo. H.S. Activities Ass'n, 737 P.2d 1113 (Colo. App. 1987); Baseline Farms Two, LLP v. Hennings, 26 P.3d 1209 (Colo. App. 2000).

Threshold requirement that relief necessary to protect rights. Before a trial court may enjoin the enforcement of a criminal statute in a preliminary injunction proceeding, the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing legitimate property rights or fundamental constitutional rights. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

As a prerequisite to the issuance of a preliminary injunction, there must be a showing of real, immediate, and irreparable injury which will occur pending a final hearing, and that the injunction is necessary to prevent such injury or damage. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

The prerequisites to the issuance of a preliminary injunction are: A showing of real, immediate and irreparable injury which will occur pending a final hearing, and that the injunction is necessary to prevent such injury or damage; and a showing of the reasonable probability of success on the merits on the part of the plaintiff. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

In exercising its discretion, the trial court must find that the moving party has demonstrated: (1) A reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982); Am. Television & Communications Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982); Iowa Nat. Mut. Ins. Co. v. Cent. Mortg. & Inv., 708 P.2d 480 (Colo. App. 1985); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004); Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

Each prerequisite must be established by the moving party before a preliminary injunction will issue to prevent the enforcement of a criminal statute. Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

A loss of a contractual right to manage and control a business may constitute irreparable harm. Monetary damages are an inadequate remedy for such a loss. A contractual right to participate in the management and control of a business has intrinsic value in and of itself that may not be adequately compensated by monetary damages. Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

One of the issues before a court on a preliminary injunction is the reasonable probability of success on the part of the plaintiff. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

Where a trial court issues a preliminary injunction without making any findings of fact as to the likelihood of plaintiff's success on the merits, the order must be set aside and the matter remanded for a hearing. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Decision to issue preliminary injunction is binding upon review. Absent a showing of an abuse of discretion, trial court's decision to issue a preliminary injunction is binding upon review. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

Telephone company is not entitled to preliminary injunction preventing maintenance of rates and allowing higher charges during judicial review of P.U.C. rates. Mountain States Tel. & Tel. Co. v. P. U. C., 176 Colo. 457, 491 P.2d 582 (1971).

Relief seldom granted to enjoin governmental actions. Because equitable relief in the nature of an injunction constitutes a form of judicial interference with continuing activities, the courts have generally been reluctant to grant such relief where the actions complained of are

those of departments of the executive and legislative branches of government, in the exercise of their authority. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

Preliminary injunction enjoining enforcement of criminal statute held abuse of discretion. Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

Preliminary injunction should not be enforced when a period of less than two months remains after enforcement commences until trial on the merits. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

When order deemed preliminary injunction. Where an order is issued after notice and an evidentiary hearing and for a period beyond 10 days, it is a preliminary injunction. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Effect of denial of preliminary injunction on remaining proceedings. The pending appeal of a denial of a motion for preliminary injunction does not deprive the trial court of jurisdiction to proceed in a timely and orderly fashion with the declaratory judgment and permanent injunction proceedings. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

Existence of liquidated damages does not automatically preclude imposition of an injunction. Boulder Medical Center v. Moore, 651 P.2d 464 (Colo. App. 1982).

Conditions of this rule inapplicable to C.R.C.P. 106. While this rule provides that no restraining order or preliminary injunction shall issue except upon giving security by the applicant, that no order or injunction shall issue without notice, except under certain situations, and that an early hearing shall be provided, no such conditions appear in C.R.C.P. 106. PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

Contempt is proper where preliminary injunction is lawful and is not complied with, even where eventually found to be wrongfully entered. Charles Milne Associates v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

The prerequisites of this rule apply to § 7-74-103 actions for preliminary injunction to prevent or restrain actual or threatened misappropriations of a trade secret. Bishop & Co. v. Cuomo, 799 P.2d 444 (Colo. App. 1990).

Consolidation of trial and preliminary injunction. Parties should normally receive notice of the court's intent to consolidate the trial and the preliminary injunction either before the hearing or when the parties will still have an opportunity to present their cases. Taxpayers were not denied due process and if any error occurred, it was harmless, when the trial court announced it would consolidate the injunction hearing with the trial on the merits after commencement of the preliminary injunction hearing, both parties submitted offers of proof and had a full opportunity to present their cases, and no specific harm was alleged. Leek v. City of Golden, 870 P.2d 580 (Colo. App. 1993).

III. TEMPORARY RESTRAINING ORDER.

Law reviews. For article, "In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases", see 9 Dicta 190 (1932). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933). For article on restraining orders and injunctions without notice to defendant in divorce cases, see 20 Dicta 46 (1943).

This rule relates to the issuance of restraining orders without notice to the person to be restrained, and adequate protections are afforded in the matter of a bond and prompt hearing on the question of whether the "ex parte" order should be continued. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

A court has no authority to grant a restraining order to prevent an administrative board from holding hearings as scheduled by it. Such court action is a direct and unjustified judicial interference with a function properly delegated to the executive branch of government. Banking Bd. v. District Court, 177 Colo. 77, 492 P.2d 837 (1972).

A restraining order which fails to comply with this rule is void. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959); Intermountain Rural Elec. Ass'n v. District Court, 160 Colo. 128, 414 P.2d 911 (1966).

Where a restraining order is completely devoid of virtually all of the requirements of this rule, any one of the deficiencies is sufficient to render the order a nullity. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

Requirements under sections (b) and (d) of this rule are mandatory and must be complied with before a temporary restraining order issued without notice is valid. Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n, 38 Colo. App. 519, 559 P.2d 1120 (1977).

Hearing required for determination that order wrongfully issued. Absent a hearing on the merits, no determination can be made that a temporary restraining order has been wrongfully issued. Cross v. Bd. of Dirs. of Plains Coop. Tel. Ass'n, 39 Colo. App. 569, 570 P.2d 1307 (1977).

Only after the enjoined party has been vindicated by successfully defending against the suit on the merits can it be held that he was wrongfully restrained and entitled to damages. Cross v. Bd. of Dirs. of Plains Coop. Tel. Ass'n, 39 Colo. App. 569, 570 P.2d 1307 (1977).

Orders held deficient. Orders merely stating that the defendants were engaged in a boycott, and concluding that the plaintiffs would be ir-

reparably damaged if the boycott was not restrained, do not specifically define the injury and do not state why the injury is irreparable. Either one of these deficiencies is sufficient to render the orders a nullity. Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n, 38 Colo. App. 519, 559 P.2d 1120 (1977).

In a contempt proceeding, it is proper as a defense to raise the validity of a restraining order. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

Upon hearing on a citation for contempt for violation of a temporary restraining order where the issues have not been joined in the action and only the validity of a temporary order has been challenged, it is error for a trial court to rule on the issue of a permanent injunction. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

A temporary restraining order issued under this rule is not an appealable order under C.A.R. 1(a). Freshpict Foods, Inc. v. Campos, 30 Colo. App. 354, 492 P.2d 867 (1971); O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Rationale behind nonappealability of temporary restraining orders is that they are of short duration and terminate with the ruling of the preliminary injunction so that an immediate appeal is not necessary to protect the rights of the parties. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

IV. SECURITY.

Law reviews. For article, ''In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases'', see 9 Dicta 190 (1932). For article, ''Expediting Court Procedure'', see 10 Dicta 113 (1933).

Action on bond where injunction suit dismissed at instance of plaintiff. In an action on the bond to secure a temporary injunction, the fact that the injunction, suit is dismissed at the instance of the plaintiff is not to be taken as an admission that an emergency requiring the issuance of an injunction did not exist, if the dismissal is for matters done or arising subsequent to the issuance of the injunction and the original issuance was proper. Hammaker v. Behm, 116 Colo. 523, 182 P.2d 141 (1947).

An injunction was issued without compliance with this rule where trial court determined that it would not require defendants to post any bond or other security and made no mention of potential costs and losses that might be sustained by plaintiff. Apache Village, Inc. v. Coleman Co., 776 P.2d 1154 (Colo. App. 1989).

The amount of security required by this rule is discretionary with the court so long as it bears a reasonable relationship to the potential costs and losses occasioned by a preliminary injunction which is later determined to have been improperly granted. Apache Village, Inc. v. Coleman Co., 776 P.2d 1154 (Colo. App. 1989).

Injunction, including TRO, not void or invalid for failure to post a bond, unless the court's order provides otherwise and injunction remains in effect until vacated by subsequent order or terminates by own terms. Kaiser v. Market Square Discount Liquors, Inc., 992 P.2d 636 (Colo. App. 1999).

Bond was properly ordered paid to defendant to reimburse the costs of an improvidently issued injunction even when the plaintiff's failure to prevail was based solely on a question of law. Wick v. Pueblo West Metro., 789 P.2d 457 (Colo. App. 1989).

Section (c) of this rule imposes two conditions on an enjoined defendant seeking to recover damages on a bond: First, the injunction must have been ''wrongful'', and second, the defendant must have suffered damages as a result of the issuance of the injunction. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997).

The judicial discretion standard, under which the trial court has discretion in deciding whether to award damages on the bond, is the most consistent with the plain language of section (c) of this rule. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Section (c) of this rule requires that an applicant give a bond, but it does not expressly order the court to pay that bond to a prevailing defendant. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Under the good reason rule principle of preference, which limits the judicial discretion standard, a trial court presumes that a prevailing defendant is entitled to damages on the injunction bond, unless there is good reason for not requiring such payment in the particular case. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997).

When an appellate court reviews a trial court's determination of good reason, the standard of review regarding which factors the trial court has used is akin to review by the standard of simple error used in reviewing decisions of questions of law. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Trial court considered and balanced appropriate factors in determining that good reason existed to deny damages, where it considered the outcome of the underlying suit, the fact that the claims were brought in good faith, the financial status of the parties, and the fact that the action was brought solely in the public interest. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

V. FORM AND SCOPE.

An injunction must be specific to be valid. Resler v. North E. Motor Freight, Inc., 154 Colo. 52, 388 P.2d 255 (1964).

Injunctions may be issued without being reviewed "as to form only" by counsel. Such notice is not required under C.R.C.P. 6 since that rule concerns notice of written motions as to enlargements of time and has no relevance to the issue of injunctions. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

An injunction prohibiting conduct must be sufficiently precise to enable the party subject to the equitable decree to conform its conduct to the requirements thereof. Colo. Springs Bd. of Realtors v. State, 780 P.2d 494 (Colo. 1989).

There is no requirement in this rule that an injunction must be included in a written judgment granting injunctive relief, as this rule contains no requirements with respect to judgments; it merely sets forth what must be contained in an injunction which followed the judgment at a later date. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

Inconsistencies between this rule and § 25-7-102 resolved in section's favor. Where the proceeding is a special statutory proceeding under the air pollution control act, any inconsistency between this rule and § 25-7-102 regarding the form and scope of an injunction is resolved in favor of the statutory section. Fry Roofing Co. v. Dept. of Health, 191 Colo. 463, 553 P.2d 800 (1976).

If the statute does not create a special statutory procedure for obtaining a preliminary injunction, the normal requisites of this rule apply. Because neither § 25-8-611 nor § 25-8-612 authorizes injunctions or creates a private cause of action or right to proceed in the public interest, this rule, including the requirement of a showing of real, immediate, and irreparable injury, applies to a suit to seek a preliminary injunction to enforce Colorado's Water Quality Control Act. Baseline Farms Two, LLP v. Hennings, 26 P.3d 1209 (Colo. App. 2000).

Specific oral pronouncement followed by minute order was sufficient to satisfy rule that injunctions be specific in terms and described in detail. Charles Milne Associates v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

VI. MANDATORY DECREE.

This section is a correct statement of the general law, and provides for restoration of property where proper. This section affords a complete answer to the problem of whether property obtained by force and violence, and perhaps by fraud, which prior thereto had been used by plaintiffs in the conduct of a legitimate business, may, in the administration of equitable relief, be restored to plaintiffs. Cuddigan v. San Juan Fed'n of Mine, Mill & Smelter Workers, 110 Colo. 97, 130 P.2d 923 (1942).

In an action founded on a complaint for injunction and affirmative relief wherein it is alleged that the plaintiffs were ousted by the defendants by force and violence from the possession of property and its possession ever since withheld from them by threats of violence, a decree ordering restitution of the property to the plaintiffs is a final judgment from which an appeal will lie. Sprague v. Locke, 1 Colo. App. 171, 28 P. 142 (1891).

Plaintiff seeking injunctive relief is obligated to obtain a preliminary injunction or temporary restraining order to maintain the status quo pending trial, because, if the defendant completes the act sought to be restrained pending trial, the plaintiff's action becomes moot and should properly be dismissed. Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

Injunction not available under § 30-28-110 (4). Although section (f) provides for the issuance of a mandatory injunction, the strict construction of § 30-28-110 (4) precludes the availability of such relief to a county. Bd. of County Comm'rs v. Pfeifer, 190 Colo. 275, 546 P.2d 946 (1976).

Denial of mandatory injunction held correct. Eugene Cervi & Co. v. Russell, 31 Colo. App. 525, 506 P.2d 748 (1972), aff'd, 184 Colo. 282, 519 P.2d 1189 (1974).

VII. WHEN RELIEF GRANTED.

Section (g) clearly contemplates that an injunction may be provided for in a separate document, rather than in a judgment. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

Probate court had authority under section (h) to enter no-contact order between father and children after a full hearing on motions related to parenting time and child support. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

VIII. WHEN INAPPLICABLE.

This rule does not apply to suits for divorce. Where, in a divorce action, a temporary restraining order was issued against the husband preventing him from disposing of his property, ''pending the further order of the court'', such order is not controlled by the provisions of this rule which specifically provide in section (h) that this rule shall not apply to suits for divorce, alimony, separate maintenance or custody of infants. Gillespie v. District Court, 119 Colo. 242, 202 P.2d 151 (1949).

Rule not applicable to divorce actions except in circumstances of actual emergency. Under this rule, restraining orders should not be issued in divorce actions except in circumstances of actual emergency and where it is clearly established that grounds exist for granting such extraordinary remedy. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

Only under extraordinary circumstances should third persons not involved in the marital difficulties of the parties to a divorce action, who are carrying on legitimate business transactions with one of the parties thereto, be restrained or enjoined from continuing business activities with such persons, even upon notice. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

Discretion rests with trial court to enter a restraining order without notice or bond, as may be just. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

In the judicial enforcement proceeding under the Pet Animal Care and Facilities Act, the normally applicable irreparable injury and posting of security requirements under the rule do not apply. The usually applicable discretion to postpone the effective date of agency action under the State Administrative Procedure Act, which the court may issue upon a finding of irreparable injury pending judicial review, does not apply to the statute. Kourlis v. District Court, El Paso County, 930 P.2d 1329 (Colo. 1997).

Applied in Wolfberg v. Noland, 122 Colo. 338, 222 P.2d 426 (1950); Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

Rule 65.1. Security: Proceedings Against Sureties

Whenever these Rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 66. Receivers

(a) When Appointed. A receiver may be appointed by the court in which the action is pending at any time:

(1) Before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired; or

(2) By or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; or

(3) In other cases where proper and in accordance with the established principles of equity.

(b) Oath and Bond; Suit on Bond. Before entering upon his duties, the receiver shall be sworn to perform them faithfully, and shall execute, with one or more sureties, an undertaking with the people of the state of Colorado, in such sum as the court shall direct, to the effect that he will faithfully discharge his duties and will pay over and account for all money and property which may come into his hands as the court may direct, and will obey the orders of the court therein. The undertaking, with the sureties, must be approved by the court, or by the clerk thereof when so ordered by the court, and may be sued upon in the name of the people of the state of Colorado, at the instance and for the use of any party injured.

(c) Dismissal of Receivership Action. An action in which a receiver has been appointed shall not be dismissed except by order of the court.

(d) Sole Claim for Relief; Service of Process; Notice.

(1) The appointment of a receiver may be the sole claim for relief in an action. The action shall be commenced by filing a complaint, or by service of a summons and a complaint, as provided in C.R.C.P. 3(a).

(2) If the receivership is requested in connection with a mortgage, trust deed or other lien on real property, the current owner of the property, as shown by the records of the clerk and recorder, and any other person then collecting the rents and profits as a result of that person's lien on the rents or profits, shall be named as defendants.

(3) If a receiver is appointed by the court *ex parte*, copies of the summons, complaint, and order appointing the receiver shall be served on the defendants without delay, as provided in C.R.C.P. 4 or as directed by the court. The court, in its order for appointment of the receiver, shall direct the receiver to provide written notice of the action to any persons in possession of the property or otherwise affected by the order.

Source: (d) amended and effective September 12, 1991.

Cross references: For appointment of receivers for dissolution of corporations, see § 7-114-303, C.R.S.

ANNOTATION

I. General Consideration.
II. When Appointed.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Injunctions and Receivers: Rules 65 and 66'', see 23 Rocky Mt. L. Rev. 594 (1951). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Use of Receivers in Real Estate Foreclosures'', see 16 Colo. Law. 988 (1987).

Annotator's note. Since this rule is similar to § 180 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A receiver is an officer of the court. Casserleigh v. Malone, 50 Colo. 597, 115 P. 520 (1911); McClain v. Saranac Mach. Co., 94 Colo. 145, 28 P.2d 1009 (1934).

This rule does not authorize a receiver to practice law on behalf of the receivership estate in federal court. This rule makes a receiver accountable to the state court that appointed the receiver. In re Shattuck, 411 B.R. 378 (B.A.P. 10th Cir. 2009).

His possession of property in his official capacity is the possession of the court and not of the party at whose instance he is appointed. McClain v. Saranac Mach. Co., 94 Colo. 145, 28 P.2d 1009 (1934).

One who interferes with receivership property in the custody of the law, without permission of the court in whose custody it is, is guilty of contempt. Clear Creek Power Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926).

Receiver has only right and title of owner. A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934).

A stranger has right to have receiver institute suit to try title. While the court which appoints a receiver exercises general control over the property that comes into the possession of the receiver as such, this power of control does not deprive a stranger, who claims by paramount title, of the right to have a suit or proceeding instituted by the receiver to try the question of title. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

The better practice is for the receiver to bring an independent adverse suit in the tribunal where the defendant has the right to have the controversy decided. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

The plaintiffs have established their entitlement to an evidentiary hearing relative to the appointment of a receiver. It need not appear from the movant's request for appointment that any imminent insolvency result only from fraud. Diaz v. Fernandez, 910 P.2d 96 (Colo. App. 1995).

For the power of receiver to administer assets, see Flint v. Powell, 18 Colo. App. 425, 72 P. 60 (1903).

For the duties as to management of railroad property, see Frank v. Denver & Rio Grande Ry., 23 F. 757 (D. Colo. 1885).

A court cannot appoint a receiver to manage or operate a medical or retail marijuana business unless the receiver has the proper medical or retail marijuana license. Yates v. Hartman, 2018 COA 31, __ P.3d __.

Applied in State ex rel. Colo. Dept. of Health v. I.D.I., Inc., 642 P.2d 14 (Colo. App. 1981).

II. WHEN APPOINTED.

This rule does not apply to any case in which an action is not pending. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

Action is "pending" under section (a) of this rule after it is commenced under C.R.C.P. 3, by either filing a complaint with the court or by the service of a summons. Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

The plain intent of this rule is that there shall be a controversy between two or more adverse parties moved in the court, involving some conflicting and hostile claims to property that is, at least in part, the subject matter of the litigation in the mind of the general assembly it is necessary to this jurisdiction that there should be some party in all these proceedings who is adverse to the defendant and whose right to certain property are to be protected and adjudicated. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

Appointment of receiver is discretionary. Whether a receiver will or will not be appointed upon a preliminary hearing is a matter which ordinarily rests in the sound discretion of a trial court. Melville v. Weybrew, 106 Colo. 121, 103 P.2d 7, cert. denied, 311 U.S. 695, 61 S. Ct. 140, 85 L. Ed. 450 (1940); Rigel v. Kaveny, 133 Colo. 556, 298 P.2d 396 (1956); Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

There will be no interference with the exercise of that discretion by an appellate court, save in a clear case of abuse. Melville v. Weybrew, 106 Colo. 121, 103 P.2d 7, cert. denied, 311 U.S. 695, 61 S. Ct. 140, 85 L. Ed. 450 (1940); Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Court held not to have abused its discretion in making appointment. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired, unless in cases of persons under disability which is a particular jurisdiction. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

A minor may by his guardian or next friend procure the appointment of a receiver for the purpose of collecting the rents and profits of premises deeded. Hutchinson v. McLaughlin, 15 Colo. 492, 25 P. 317, 11 L.R.A. 287 (1890).

Courts of equity have no jurisdiction to appoint a receiver except in a pending action in which the receiver is desired. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

Allegations of a complaint in a receivership proceeding held sufficient. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Complaint held insufficient where indebtedness not alleged. In a proceeding by petition for the appointment of a receiver for the purpose of an accounting where there is no complaint alleging the indebtedness and no service of process, a court has no jurisdiction to enter a judgment. Paddack v. Staley, 13 Colo. App. 363, 58 P. 363 (1899).

The appointment of a receiver to impound assets of an estate to pay a claim that does not exist is a nullity. Wright v. Halley, 95 Colo. 148, 33 P.2d 966 (1934).

While courts have jurisdiction to appoint receivers for corporations, the power should be exercised with the utmost caution and only where a receiver is imperatively necessary to protect property rights. Eureka Coal Co. v. McGowan, 72 Colo. 402, 212 P. 521 (1922).

A receiver should not be appointed for a corporation in an action by a simple contract creditor to prevent the corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured debt. International Trust Co. v. United Coal Co., 27 Colo. 246, 60 P. 621 (1900).

This rule does not give an equity court authority to appoint a receiver at the suit of an individual stockholder who complains of fraud in the management of the affairs of the corporation. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

Receiver for corporation may be appointed when no board of directors to manage. Where the principal stockholders of a corporation are engaged in a contest over the control of the property, and the outstanding capital stock is so distributed that no board of directors can be elected to manage the affairs of the company, a receiver is properly appointed. Eureka Coal Co. v. McGowan, 72 Colo. 402, 212 P. 521 (1922).

This rule does not give an equity court authority to dissolve a corporation. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

The appointment of a receiver for a corporation does not work its dissolution. Steinhauer v. Colmar, 11 Colo. App. 494, 55 P. 291 (1898).

Appointment of a receiver is authorized under appropriate circumstances without a pending request for dissolution of the company. A member of a limited liability company has a personal property interest in the company. Diaz v. Fernandez, 910 P.2d 96 (Colo. App. 1995).

Where equity will sustain a creditor's bill, it will also grant the aid of the ancillary remedies of injunction and receiver. Livingston v. Swofford Bros. Dry Goods Co., 12 Colo. App. 320, 56 P. 351 (1898).

The appointment of a receiver contrary to this rule is only an error, and not a jurisdictional question where it appears that the court had jurisdiction of the subject matter and parties. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Improper appointment cannot be considered in contempt proceedings. In proceedings where a receiver is appointed to take charge of property, the improper appointment of the receiver cannot be considered in contempt proceedings based upon interference with the receivership property. Clear Creek Power & Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926).

Where there is no objection made by defendant to the appointment of a receiver, he is deemed to have acquiesced in the court's action. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Rule 67. Deposit in Court

(a) By Party. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

(b) By Trustee. When it is admitted by the pleadings or examination of a party that he has in his possession or under his control any money or other things capable of delivery which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, upon motion, the court may order the same to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

ANNOTATION

The Colorado Governmental Immunity Act specifies the amount of plaintiff's maximum recovery from public entities or public employees, and this rule establishes the procedure by which defendant may deposit an undisputed sum into the court registry. Rudnick v. Ferguson, 179 P.3d 26 (Colo. App. 2007).

Trial court did not err in permitting defendants to tender $150,000 into the court registry and in dismissing the case as moot without requiring defendants to confess judgment, admit their liability, or enter into a settlement with the plaintiffs. Rudnick v. Ferguson, 179 P.3d 26 (Colo. App. 2007).

Trial court has jurisdiction to decide city's motion pursuant to this rule to deposit funds with the court registry after the filing of a notice of appeal because the motion did not challenge the propriety of the judgment itself. The filing of a notice of appeal generally signifies that the trial court is divested of the authority to consider matters of substance, but trial courts retain jurisdiction to act on matters that are not relative to and do not affect the judgment on appeal. Thus, the city's deposit of funds into the court's registry was acceptable. Coors Brewing Co. v. City of Golden, 2013 COA 92, 411 P.3d 767.

A motion to deposit funds with the court registry pursuant to this rule is not a post-trial motion pursuant to C.R.C.P. 59. Coors Brewing Co. v. City of Golden, 2013 COA 92, 411 P.3d 767.

This rule permits a trial court to toll the accruing post-judgment interest as of the time the judgment creditor can gain access to the money deposited in the registry of the court. Coors Brewing Co. v. City of Golden, 2013 COA 92, 411 P.3d 767.

Rule 68. Offer of Judgment

Repealed July 12, 1990, effective, nunc pro tunc, July 1, 1990.

NOTE: See Offer of Settlement Procedure, section 13-17-202, C.R.S.

CHAPTER 8

Execution and Supplemental Proceedings; Judgment for Specific Acts; Vesting Title; Proceedings in Behalf of and Against Persons Not Parties

ANALYSIS BY RULE

CHAPTER 8

EXECUTION AND SUPPLEMENTAL PROCEEDINGS; JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE; PROCEEDINGS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

Rule 69. Execution and Proceedings Subsequent to Judgment

(a) In General. Except as provided in C.R.C.P. 103 or an order of court directing otherwise, process to enforce a final money judgment shall be by writ of execution.

(b) Proceedings for Costs. Costs finally awarded by order of court may be enforced in the same manner as any final money judgment. Costs awarded by an appellate court may be enforced in the same manner upon application by filing a remittitur or other order of the appellate court with the clerk of the trial court showing the award of costs.

(c) Debtor of Judgment Debtor; Debtor May Pay Sheriff. After issuance of a writ of execution against property, the judgment debtor or any person indebted to the judgment debtor may pay to the sheriff to whom the writ of execution is directed the amount necessary to satisfy the execution. The sheriff's receipt for the amount shall be a discharge for the amount so paid.

(d) Requirement That Judgment Debtor Answer Written Interrogatories. (1) At any time after entry of a final money judgment, the judgment creditor may serve written interrogatories upon the judgment debtor in accordance with C.R.C.P. 45, requiring the judgment debtor to answer the interrogatories. Within 21 days of service of the interrogatories upon the judgment debtor, the judgment debtor shall appear before the clerk of the court in which the judgment was entered to sign the answers to the interrogatories under oath and file them.

(2) If the judgment debtor, after being properly served with written interrogatories as provided by this Rule, fails to answer the served interrogatories, the judgment creditor may file a motion, with return of the previously served written interrogatories attached thereto, and request an order of court requiring the judgment debtor to either answer the previously served written interrogatories within 21 days in accordance with the provisions of (d)(1) of this Rule or appear in court at a specified time to show cause why the judgment debtor shall not be held in contempt of court for failure to comply with the order requiring answers to interrogatories; a copy of the motion, written interrogatories and a certified order of court shall be served upon judgment debtor in accordance with C.R.C.P. 45.

(e) Subpoena for Appearance of Judgment Debtor. (1) At any time after entry of a final money judgment, a judgment creditor may cause a subpoena or subpoena to produce to be served as provided in C.R.C.P. 45 requiring the judgment debtor to appear before the court, master or referee with requested documents at a specified time obtained from the court to answer concerning property. A judgment debtor may be required to attend outside the county where such judgment debtor resides and the court may make reasonable orders for mileage and expenses. The subpoena shall include on its face a conspicuous notice to the judgment debtor that provides: ''Failure to Appear Will Result in Issuance of a Warrant for Your Arrest.''

(2) If the judgment debtor, after being properly served with a subpoena or subpoena to produce as provided in C.R.C.P. 45, fails to appear, the court upon motion of the judgment creditor shall issue a bench warrant commanding the sheriff of any county in which the judgment debtor may be found, to arrest and bring the judgment debtor forthwith before the court for proceedings under this Rule.

(f) Subpoena for Appearance of Debtor of Judgment Debtor. At any time after entry of a final money judgment, upon proof to the satisfaction of the court, that any person

has property of, or is indebted to a judgment debtor in any amount exceeding Five Hundred Dollars not exempt from execution, the court may issue a subpoena or subpoena to produce to such person to appear before the court, master or referee at a specified time and answer concerning the same. Service shall be made in accordance with C.R.C.P. 45, and the court may make reasonable orders for mileage and expenses.

(g) Order to Apply Property on Judgment; Contempt. The court, master, or referee may order any party or other person over whom the court has jurisdiction, to apply any property other than real property, not exempt from execution, whether in the possession of such party or other person, or owed the judgment debtor, towards satisfaction of the judgment. Any party or person who disobeys an order made under the provisions of this Rule may be punished for contempt. Nothing in this rule shall be construed to prevent an action in the nature of a creditor's bill.

(h) Witnesses. Witnesses may be subpoenaed to appear and testify in accordance with C.R.C.P. 45.

(i) Depositions. After entry of a final money judgment, the judgment creditor, upon order of court which may be obtained ex parte, may take the deposition of any person including the judgment debtor, in the manner provided in these Rules.

Source: (d)(1) amended May 17, 1994, effective July 1, 1994; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For sale of perishable property, see C.R.C.P. 102(q); for judgments and executions, see articles 51 to 64 of title 13, C.R.S.; for homestead exemptions, see part 2 of article 41 of title 38, C.R.S.; for certificates in name of officer, see C.R.C.P. 110(c); for civil contempt, see C.R.C.P. 107; for subpoena for attendance of witnesses, see C.R.C.P. 45; for taking depositions, see C.R.C.P. 26 to 37.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Supplementary Proceedings in Enforcement of Judgments'', see 27 Dicta 128 (1950). For article ''One Year Review of Civil Procedure'', see 35 Dicta 3 (1958).

Annotator's note. Since this rule is similar to § 265 et seq. of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule assumes the existence of valid judgment obtained over one properly made a party to the suit on the debt by service of process. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

This rule deals with supplemental proceedings available to a judgment creditor which enable him to enforce the collection of a judgment. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Supplemental proceedings are for the purpose of making effectual a judgment rendered in the main or original action. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Proceedings also for purpose of discovering what property is available to satisfy such. The purpose of supplementary proceedings in aid of execution is to discover what property the judgment debtor has that is subject to execution and to apply to the satisfaction of the judgment any such property that is in the hands of such debtor or any other person as well as due to the judgment debtor. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Original proceeding considered as still pending. Jurisdiction of the defendant having been acquired in the original proceeding, that action is considered as still pending until the judgment rendered thereon is fully discharged. Hexter v. Clifford, 5 Colo. 168 (1879); Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

This rule authorizes the court to act based upon its continuing jurisdiction over the defendant named in the underlying action. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

These proceedings are ancillary and auxiliary to the original action. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Further proceedings to enforce a judgment should be presented to the court that entered it. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

A court does not have the authority, under this rule 69 or otherwise, to prevent the sale of property under execution to satisfy a judgment where the property in question is not included within any class of assets exempt from execution under the provisions of any exemption law. Jones v. District Court, 135 Colo. 468, 312 P.2d 503 (1957).

Levy upon property. A sheriff's sale of property to which defendant had no title and satisfaction based thereon were void and defendant's subsequent pledge of stock to secure the same judgment was valid. Ada Mechanical Servs., Inc., v. Goehring, 707 P.2d 1034 (Colo. App. 1985).

Applied in People v. Barbour, 639 P.2d 1065 (Colo. 1982); Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982); First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

II. PROCEEDINGS FOR COSTS.

Where both parties each have against the other a right of execution in the same case, the costs in the supreme court may be offset against those in the court below. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922) (decided under § 461 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

III. SUBPOENA FOR APPEARANCE OF JUDGMENT DEBTOR.

Law reviews. For article, ''Discoverability of Insurance Limits'', see 40 Den. L. Ctr. J. 272 (1963).

Annotator's note. Since section (d) of this rule is similar to §§ 265 and 266 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Section (d) is constitutional. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Even if defendant is deprived of his constitutional right against self-incrimination, it does not follow that this rule requiring his presence in court is unconstitutional and void. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Section (d) does not purport to grant a judgment creditor such a right to require his debtor to answer questions which might subject the latter to a criminal prosecution. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

In addition, it must be presumed that every constitutional right of the debtor will be respected and safeguarded. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Production of documents not privileged under fifth amendment. Judgment debtor can be required to produce automobile titles and recorded deeds to real estate, determined to be within the public domain, as well as tax returns that he filed, because there is no fifth amendment privilege as to such documents. Griffin v. Western Realty Sales Corp., 665 P.2d 1031 (Colo. App. 1983).

Section (d) is a method of discovery. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It permits the judgment creditor to require a judgment debtor to appear before the court to answer questions concerning his assets. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Section (d) takes the place of former bill of discovery. These ''supplemental proceedings'' are chiefly directed to discovery, and in this respect, they are to be regarded as taking the place of the former bill of discovery. Allen v. Tritch, 5 Colo. 222 (1880).

Service on attorney. Service on an attorney in accordance with the provisions of C.R.C.P. 5(b), does not satisfy the requirements of section (d). Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Service of citation to appear under section (d) is proper if it complies with the provisions of C.R.C.P. (4)(e)(1). Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Service on registered agent. Personal delivery of interrogatories on foreign corporation's registered agent constitutes effective service. Isis Litig., L.L.C., v. Svensk Filmindustri, 170 P.3d 742 (Colo. App. 2007).

A defendant is clearly guilty of contempt in refusing to be sworn and prematurely refusing to answer question to be propounded. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

IV. SUBPOENA FOR APPEARANCE OF DEBTOR OF JUDGMENT DEBTOR.

Annotator's note. Since section (e) of this rule is similar to § 268 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (e) is a method of discovery. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It permits the court, upon proper proof, to examine a third person who is believed to hold property of, or owe a debt to the judgment

debtor. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in the original action, and no notice to defendant is necessary. Hexter v. Clifford, 5 Colo. 168 (1879).

Other parties are entitled to their day in court. In supplementary proceedings in aid of execution, a court has no power to order a receiver to take possession of and sell property belonging to other parties without according them their day in court. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Notice, affidavit, or other showing of indebtedness waived by insurers. In an action for damages where the parties and insurers stipulate for entry of judgment and for determination by the court of the issue of liability as between the insurers and provide for hearing in accordance with this rule, the trial court has jurisdiction to determine such issue, the stipulation being a waiver of notice, affidavit, or other showing of indebtedness pursuant to this rule. Traders & Gen. Ins. Co. v. Pioneer Mut. Comp. Co., 127 Colo. 516, 258 P.2d 776 (1953).

Where person, not a party to original action, appears pursuant to a subpoena under subdivision (e) and denies that he is obligated to or in possession of any property of a judgment debtor, trial court is precluded from proceeding further in a proceeding under this rule, and creditor's sole remedy is a creditor's bill. Equisearch, Inc. v. Lopez, 722 P.2d 426 (Colo. App. 1986) (decided under former rule); In re Livingston, 999 F. Supp. 1413 (D. Colo. 1998).

V. ORDER TO APPLY PROPERTY ON JUDGMENT; CONTEMPT.

Law reviews. For article, ''The Enforcement of Divorce Decrees in Colorado'', see 21 Rocky Mt. L. Rev. 364 (1949). For comment on Urbancich v. Mayberry, appearing below, see 24 Rocky Mt. L. Rev. 259 (1952). For article, ''The Nuts and Bolts of Collecting Support'', see 19 Colo. Law. 1595 (1990).

Annotator's note. Since section (f) of this rule is similar to §§ 270 and 271 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Section (f) is an enforcement provision. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It provides that, if certain prerequisites are met, the trial court may order property applied to the judgment. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Including property held by court. Where a judgment debtor is ''discharged'' on a prior occasion from a citation issued pursuant to section (d) of this rule, such fact does not bar a judgment creditor from seeking to obtain, under the provisions of this section (f), known property held by a third person, including the court. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It is not, however, adapted to reach disputed property of a judgment debtor, since no contested title to property can be determined. Allen v. Tritch, 5 Colo. 222 (1880); Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Where title to real property claimed to belong to a judgment debtor stands in the name of another, a creditor's suit is the proper proceeding to subject the property to the satisfaction of a judgment, and not supplementary proceedings in aid of execution. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

This rule does not contemplate that real property may be sold under an order of court made in a supplementary proceeding, even when title stands in the name of the judgment debtor. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Rather, in such case, the judgment creditor may cause execution to be levied upon the property and it requires no order of court. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

The fact that the property sought is a trust fund interposes no obstacle in subjecting it to the satisfaction of a judgment when the fund was created by the debtor himself and the fund sought to be reached has risen from the sale of his own property. Hexter v. Clifford, 5 Colo. 168 (1879).

Contingent fees not yet earned cannot be reached in proceedings supplementary to execution. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Remedy of contempt is specifically authorized to be exercised by the court which pronounced the judgment sought to be collected and not any other court. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

VI. WITNESSES.

Judgment debtor not within purview of C.R.C.P. 45. Although a judgment debtor may testify as a witness in a hearing under this rule, he is not a witness within the purview of C.R.C.P. 45 for the purposes of service of process. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

ANNOTATION

Law reviews. For note, ''Decrees in Rem Under the New Rules'', see 13 Rocky Mt. L. Rev. 140 (1941).

This rule does not apply in situation where party holding title to leases is willing to vest title and party held to have lawfully contracted for such leases is unwilling to take them. Schnier v. District Court, 696 P.2d 264 (Colo. 1985).

This rule offers relief only when there is noncompliance with an order issued by the court. The rule can not provide relief if there is no previous order for the action. In re Dauwe, 97 P.3d 369 (Colo. App. 2004).

A Colorado court may invoke its equitable authority under this rule to enforce a judgment for attorney fees awarded under 42 U.S.C. § 1983. Duran v. Lamm, 701 P.2d 609 (Colo. App. 1984).

A trial court has authority under this rule to enter a judgment divesting title of defendant to the subject property and vesting it in the claimants. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Failure of the general assembly to act to satisfy a judgment sufficiently expressed its unwillingness to comply with the valid judgment of the trial court justifies invocation of this rule. Duran v. Lamm, 701 P.2d 609 (Colo. App. 1984).

Applied in Circle Sav. & Loan Ass'n v. Norton, 28 Colo. App. 167, 471 P.2d 625 (1970).

Rule 71. Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

ANNOTATION

Person who has advanced money on realty may be awarded lien. In an action to quiet title where the plaintiff names as defendants all ''persons who claim any interest in the subject matter of this action'', a person who has advanced money in connection with the realty has a sufficient interest to be a party and to be awarded a lien to secure such advance. Hahn v. Pitts, 118 Colo. 173, 193 P.2d 716 (1948).

Rule 71-A. Condemnation of Property

No Colorado Rule

Rules 72 to 76.

[Note: There are at present no Colorado Rules 72 to 76.]

CHAPTER 9

Court Administration

ANALYSIS BY RULE

CHAPTER 9

COURT ADMINISTRATION

Rule 77. Courts and Clerks

(a) Courts Always Open. Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules. Each term shall be deemed open and continuous until the commencement of the next succeeding term.

(b) Proceedings in Court and Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted in open court or by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state; but no hearing, other than on ex parte, shall be conducted outside the judicial district in which the action is pending without the consent of all parties affected thereby who are not in default.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open at such hours and on such days as may be provided by law, and by local rule not in conflict with law. All motions and applications in the clerk's office for issuing process, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Orders in Any County. Any ex parte order in any pending action may be entered by the court, or by any judge thereof in any county of the district, irrespective of the county in which said action is pending.

ANNOTATION

Law reviews. For article, ''In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases'', see 9 Dicta 190 (1932). For article, ''Expediting Court Procedure'', see 10 Dicta 113 (1933). For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 78. Motion Day

Each court may establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing, upon brief written statements of reasons in support and opposition. Trial courts may also provide by local rule for notices to set motions for hearing or for calling upon motions for hearing without prior setting.

ANNOTATION

Law reviews. For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 79. Records

(a) Register of Actions. The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below. The register of actions may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file.

(2) A microfilm roll, film jacket, or microfiche card.

(3) Computer magnetic tape or magnetic disc storage, where the register of actions items appear on the terminal screen, or on a paper print-out of the screen display.

(4) Any other form or style prescribed by supreme court directive. A register of actions shall be prepared for each case or matter filed. The file number of each case or matter shall be noted on every page, film, or computer record whereon the first and all subsequent entries of actions are made. All papers filed with the clerk, all process issued and return made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order, or of the entry of judgment, shall show the date the order or judgment was ordered in open court, in chambers, or under the provisions of Rule 55 regarding default. When trial by jury has been demanded or ordered, the clerk shall enter the word jury on the page, film, or computer record assigned to that case.

(b) Copies of Civil Judgments and Orders. (Repealed effective September 4, 1974.)

(c) Indices; Calendars. The clerk shall keep suitable indices of all records as directed by the court. The clerk shall also keep, as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any of the following forms or styles:

(1) A page or sheet in a book or separate file.

(2) A mechanical or hand-operated index machine or card file.

(3) Computer magnetic tape or magnetic disc storage, where the information appears on the terminal screen, or on a print-out of the screen display.

(4) Microfilm copies of 1, 2, and 3 above.

(5) Any other form or style prescribed by supreme court directive.

(d) Judgment Record. The clerk shall keep a judgment record in which a notation shall be made of every money judgment. The judgment record may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file.

(2) Computer magnetic tape or magnetic disc storage, where the judgment and subsequent transactions appear on the terminal screen, or on a paper print-out of the screen display.

(3) A microfilm copy of 1 and 2 above.

(4) Any other form or style prescribed by supreme court directive.

(e) Retention and Disposition of Records. The clerk shall retain and dispose of all court records, including those created under Rule 79(b) prior to its repeal, in accordance with instructions provided in the manual entitled, Colorado Judicial Department, Records Management.

Cross references: For provisions on records and indices required to be kept by clerks, see §§ 13-1-101 and 13-1-102, C.R.S.; for order of selecting jurors from list of jurors, see C.R.C.P. 47(g).

ANNOTATION

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951).

Although trial judge had power and obligation to assure that records and reporter's notes in dissolution of marriage action were preserved by the clerk for an extended period of time and to enter any order with respect to those records and notes, the trial court was not re-

quired to enter an order obligating itself to preserve such records. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

The rules provide that a motion for a new trial must be filed not later than 10 days following the notation of judgment in the trial court's register of actions (or judgment docket). In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976).

Relation back of judgment unconstitutional. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determinations made on May 28. Under these circumstances, the 10-day period of C.R.C.P. 59 expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976).

Admissibility of register in action upon bond of clerk. In an action upon the official bond of a clerk of the district court for fees collected and not paid over, where it appears that he made entries of fees collected by him in his register of actions such register is admissible in evidence and the entries therein are prima facie evidence against the clerk and also against the sureties on his bond. Cooper v. People ex rel. Bd. of Comm'rs, 28 Colo. 87, 63 P. 314 (1900) (decided under § 416 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

For purposes of timely filing of a motion for new trial under C.R.C.P. 59 a judgment is "entered" only upon notation in the judgment docket pursuant to C.R.C.P. 58(a)(3) and section (d) of this rule. City and County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Entry of judgment effective on notation in register. Both C.R.C.P. 58(a)(3) and section (a)(4) of this rule clearly state that entry of a judgment is effective upon notation in the register of actions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Then judgment becomes final, though not recorded in judgment record. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Applied in Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

Rule 80. Reporter; Stenographic Report or Transcript as Evidence

Repealed February 14, 2019, effective immediately.

Cross references: For supreme court reporters and other employees of the supreme court, see § 13-2-111, C.R.S.

COMMENT

[1] C.R.C.P. 80 has been repealed as Chief Justice Directive 05-03 entitled, Management Plan for Court Reporting and Recording Services, addresses matters related to court reporters in District Court matters.

CHAPTER 10

General Provisions

ANALYSIS BY RULE

CHAPTER 10

GENERAL PROVISIONS

Rule 81. Applicability in General

(a) Special Statutory Proceedings. These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) Dissolution of Marriage and Legal Separation. These rules shall not govern procedure and practice in actions in dissolution of marriage and legal separation insofar as they may be inconsistent or in conflict with the procedure and practice provided by the applicable statutes.

(c) Appeals from County to District Court. These rules do not supersede the provisions of the statutes of this state now or hereafter in effect relating to appeals from final judgments and decrees of the county court to the district court.

Cross references: For application of the Colorado Rules of Civil Procedure to proceedings for dissolution of marriage or legal separation, see § 14-10-105, C.R.S.; for limitation on taking appeals by appellate court, see C.A.R. 1(b).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform'', see 38 U. Colo. L. Rev. 137 (1966).

Applied in Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976); People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976); Fry Roofing Co. v. Dept. of Health, 191 Colo. 463, 553 P.2d 800 (1976); Rueda v. District Court, 194 Colo. 327, 575 P.2d 370 (1977); In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).

II. SPECIAL STATUTORY PROCEEDINGS.

Law reviews. For article, ''Again — How Many Times?'', see 21 Dicta 62 (1944).

There is a recognized distinction between "proceedings" and "special proceedings". Hewitt v. Landis, 75 Colo. 277, 225 P. 842 (1924); Sitler v. Brians, 126 Colo. 370, 251 P.2d 319 (1952) (decided under former C.R.C.P. 111).

This rule expressly provides that, where a matter is specifically covered by statute, the rules of civil procedure are inapplicable. Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

The rules of civil procedure do not apply where there is a special statutory proceeding which sets forth remedies. Brown v. Hansen, 177 Colo. 39, 493 P.2d 1086 (1972).

The rules of civil procedure do not govern the procedure and practice in any special statutory proceeding so far as they are inconsistent or in conflict therewith. Wright v. Tinsley, 148 Colo. 258, 365 P.2d 691 (1961); City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986).

If a statute creates a special statutory procedure relating to a type of action then the rules of civil procedure by express exception do not

apply. Dallas v. Fitzsimmons, 137 Colo. 196, 323 P.2d 274 (1958).

Mere amendment of pleadings cannot accomplish ends which are inconsistent with statutory procedures. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Thus, the rules of civil procedure are not applicable to "habeas corpus", which is special statutory proceeding, insofar as they are inconsistent with the applicable statute pertaining to the special statutory proceeding. Hithe v. Nelson, 172 Colo. 179, 471 P.2d 596 (1970).

Likewise, water adjudication proceedings are ''special statutory proceedings'' as contemplated under this rule. Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1245, 31 L. Ed. 2d 465 (1972); S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

The proceedings prescribed by § 37-92-302 for adjudication of water rights are special proceedings, and their scope is governed by statute. State, Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983); Meyring Livestock Co. v. Wamsley Cattle Co., 687 P.2d 955 (Colo. 1984).

Annexation review is a special statutory proceeding. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

Likewise, proceedings under marketing act. If the procedure and practice set forth in the marketing act under § 35-28-119 are in any particulars inconsistent or in conflict with the rules of civil procedure, the statute, and not the rules, would govern. People ex rel. Orcutt v. District Court, 164 Colo. 385, 435 P.2d 374 (1967).

Rehearing by the public utilities commission is a special statutory proceeding. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 698 P.2d 255 (Colo. 1985).

Statutory procedures detailing methods for district court review of public utilities commission decisions are special statutory proceedings and govern over conflicting rules of civil procedure. Silver Eagle Servs. v. P.U.C., 768 P.2d 208 (Colo. 1989).

Release proceedings are special statutory proceedings. In view of the detailed procedure prescribed by § 16-8-115 the release proceedings are special statutory proceedings governed by this rule. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Historically, the supreme court has considered mental health proceedings to be special statutory proceedings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

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

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

Proceedings under § 16-5-209 are special statutory proceedings not exempt from application of the rules of civil procedure because said section lacks adequate, exclusive, full, and complete procedures. Moody v. Larsen, 802 P.2d 1169 (Colo. App. 1990).

Provisions of the Torrens Title Registration Act govern service of process in case brought under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

Applied in Boxberger v. State Hwy. Comm'n, 126 Colo. 526, 251 P.2d 920 (1952); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

III. DIVORCE AND SEPARATE MAINTENANCE.

Law reviews. For article, ''What Divorce Statutes Are Now in Effect in Colorado?'', see 21 Dicta 68 (1944). For article, ''Comments on the Rules of Civil Procedure'', see 22 Dicta 154 (1945).

The rules of procedure do not govern procedure and practice in actions in divorce or separate maintenance where they may conflict with the procedure and practice provided by the applicable statutes. Moats v. Moats, 168 Colo. 120, 450 P.2d 64 (1969).

Where the divorce statutes are silent as to any method of procedure the rules govern. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

The rules of civil procedure apply to a divorce action, unless a contrary rule appears in the divorce statutes. Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974).

Applied in People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943); Ingels v. Ingels, 29 Colo. App. 585, 487 P.2d 812 (1971).

IV. APPEALS.

Applied in Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Rule 82. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of any court.

Cross references: For service of process, see C.R.C.P. 4.

ANNOTATION

Law reviews. For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951).

Applied in Andrews v. Lull, 139 Colo. 536, 341 P.2d 475 (1959).

Rule 83. Rules by Courts

Repealed April 1, 1982, effective July 1, 1982.

Cross references: For present provisions relating to adoption of local rules, see C.R.C.P. 121.

Rule 84. Forms

The forms contained in the Appendix to Chapters 1 to 17A are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

ANNOTATION

Law reviews. For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Court Administration and General Provisions: Rules 77-85'', see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 85. Title

Repealed December 5, 1996, effective January 1, 1997.

Rule 86. Pending Water Adjudications Under 1943 Act

In any water adjudication under the provisions of article 9 of chapter 148, C.R.S. 1963, as amended, pending on August 12, 1971, in which any applicant files any statement of claim asking that his date of priority antedate any earlier decrees or adjudications, in order not to be forever barred the owners of affected rights must object and protest within the times and in the manner provided by the Water Right Determination and Administration Act of 1969; and the judge shall direct the clerk to publish once in a newspaper or newspapers of general circulation in the water division as set forth in said Act of 1969, within which the water district is incorporated, to provide, and which shall be, notice to all water users within the division. The language of such notice shall be substantially as follows:

''There has been filed in this proceeding a claim or claims which may affect in priority any water right claimed or heretofore adjudicated within this division and owners of affected rights must appear to object and protest as provided in the Water Right Determination and Administration Act of 1969, or be forever barred.''

Editor's note: Article 9 of chapter 148, C.R.S. 1963, was repealed concurrent with the enactment of the ''Water Right Determination and Administration Act of 1969'' (see L. 69, p. 1223, § 20), which act is now numbered as article 92 of title 37 (see C.R.C.P. 87).

Rule 87. Application of Following Water Rules

Rules 88 through 91 shall govern proceedings under article 92 of title 37, C.R.S. 1973.

Rule 88. Judgments and Decrees

(a) Record and Indices. The water clerk shall prepare and maintain books of all judgments and decrees in the sequence of their entry by the court, or shall keep microfilm or magnetic tape copies of the same. The water clerk shall prepare and maintain suitable indices of the judgments and decrees.

(b) Entry and Finality of Judgment. Immediately following the issuance of a judgment and decree the water clerk shall make an entry of record concerning the same, and the judgment and decree shall then be deemed final.

(c) Notice. A copy of such judgment and decree or notice thereof shall be given promptly to applicants and to any protestors and objectors, or their attorneys.

Rule 89. Notice When Priority Antedating an Adjudication Is Sought

Whenever a claimant makes application for the determination of a water right or a conditional water right and claims that his date of priority will antedate any earlier adjudication or claims a priority date earlier than the effective date of one or more priorities awarded by a previous decree or decrees within the water division in which the application is filed (except when provision for such antedation or earlier priority is made by statute), in order not to be forever barred, the owners of affected rights must object and protest within the times and in the manner provided by statute, and the water clerk shall include in the resume required by statute a specific notification in boldface type substantially as follows:

''The water right claimed by this application may affect in priority any water right claimed or heretofore adjudicated within this division and owners of affected rights must appear to object and protest within the time provided by statute, or be forever barred.''

COMMENT

Following the announcement on March 24, 1971, of **United States v. District Court in and for the County of Eagle,** 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971), and **United States v. District Court in and for Water Division Number 5,** 401 U.S. 527, 91 S. Ct. 1003, 28 L. Ed. 2d 284 (1971). The Colorado Supreme Court appointed a water advisory committee for study and recommendations as to the necessity and possible content of rules of court as a result of the two United States Supreme Court opinions. An attempt was made to have the membership of this committee representative of the different interests that might be affected by proceedings conducted in the light of these opinions and **United States v. District Court,** 169 Colo. 555, 458 P.2d 760 (1969), which was affirmed by the first mentioned United States Supreme Court opinion. After conferences and study the committee established tentative guidelines and recommended that a 5-man briefing and drafting committee be appointed for performance under the guidelines. Accordingly, a briefing and drafting committee was appointed, consisting of the following attorneys: Kenneth Balcomb, Glenwood Springs, Colorado; Charles J. Beise, Denver, Colorado; Kenneth L. Broadhurst, Denver, Colorado; Gene Alan Erl, Washington, D.C.; and Donald H. Hamburg, Denver, Colorado, with Mr. Beise acting as chairman. Early in the work of the briefing and drafting committee, Messrs. Beise and Balcomb prepared a memorandum which is set forth later herein.

After the briefing and drafting committee completed its work, it submitted proposed rules to the entire water advisory committee which, after some revision, unanimously approved them and recommended their adoption by the Colorado Supreme Court. The seven water judges of the state (Fred Calhoun, Donald A. Carpenter, Richard E. Conour, C. H. Darrow, William S. Eakes, William L. Gobin and Don Lorenz) then studied and conferred with respect to the proposed rules. After some revision, the water judges recommended their adoption. Accordingly, the proposed rules were adopted substantially as recommended on August 12, 1971, as Rules 86 through 91, C.R.C.P.

While the Colorado Supreme Court does not comment nor pass upon the contents of the memorandum prepared by Messrs. Beise and Balcomb, it believes that the bench and bar will find value in it and, therefore, sets it forth in its entirety:

By and large the Colorado Rules of Civil Procedure are to apply in conformity with section 37-92-304(3), C.R.S. 1973, unless varied by the proposed rules.

Experience gained from the use of forms presently furnished indicated an insufficiency of

information therein, requiring in many cases, statements of opposition and protests when, with additional information, the same would be unnecessary.

Recommendations regarding the duties of the water clerk in the treatment of files, decrees, and judgments are made for the sake of simplicity, uniformity, and permanency.

The proposed rule relating to publication of a claim of right on the part of any claimant to antedate in priority previous orders, decrees, and judgments of courts establishing priorities gave the committee the greatest trouble, but the committee is satisfied that the requirements of due process are met by the proposed rule.

Due process relates to the right to be heard, and this right is subject to reasonable limitations.

The type or kind of notice to be given to and the method of service thereof on other parties possibly affected by water adjudication proceedings has varied in Colorado as changes in water law have occurred. In the original statutes of 1879 and 1881, personal service in addition to publication and posting was required where possible, with mailing of notice where not possible.

In 1905 special supplementary adjudication proceedings became possible. Original adjudication proceedings in a water district still required the 1879-1881 service treatment,[1] but after 1905 the supplementary proceedings required only such notice as was required by the court. As a matter of practice this was generally confined to publication and posting. Countless decrees were entered in such special proceedings. All priorities so established and fixed are recognized in the present system of administration.

The 1943 law abolished special proceedings, and substituted general supplementary proceedings. It required by way of notice publication plus the mailing of the notice to those persons who had not theretofore adjudicated their claims according to the records of the state engineer and to all users who within the preceding calendar year had diverted water according to a list furnished by the water commissioner or division engineer.

The incompleteness and insufficiency of these lists as a means of reaching claimants of water rights is well recognized. Factually, it is impossible to reach all claimants by any means other than publication.

The salient feature of the previous statutory notice provisions to be noted here is that the requisite statutory publication, posting and mailing was confined to the district boundaries, and did not extend to the division of which the district was a part, even though the priority or priorities awarded related to and affected rights in the entire division.

In 1887 the legislature required the division engineers to treat priorities awarded in the districts on a division-wide basis. The claim was made in **O'Neil v. Northern Colorado Irrigation District,** 56 Colo. 545, 139 P. 536 (1914), that if retrospective effect was given this statute allowing curtailment of plaintiffs' priority awarded subsequent to 1887 in favor of defendants' priority entered before 1887 without notice to the plaintiff but in another water district within the division, it resulted in a taking of plaintiffs' property without due process of law. The challenge was made more than four years after entry of defendants' decree. The Court held the four year statute effectively barred the suit irrespective of the 1887 statute. This result was affirmed by the Supreme Court of the United States in an opinion by Mr. Justice Holmes, 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123 (1916).

We are not unmindful of the service of process requirement of due process in other types of litigation (condemnation) and have considered other cases very kindly furnished by interested members of and advisors to the committee as a whole. Neither are we unmindful of Rule 4 of our Rules of Civil Procedure which by the statute and the rule here under consideration would have no application to notice requirements in water courts. We believe **O'Neil** followed by **Eagle County**[2] and **Darrow**[3] control.

Mr. Justice Holmes in **O'Neil** held that due process requirements were met when a party, though not entitled to be heard in the first instance, was allowed by statute a reasonable time thereafter to be heard. This was predicated on the fact that a decree regarding water priorities was a public fact. The fact that rights might be lost by inaction on the part of a claimant was likewise considered immaterial by Mr. Justice Holmes because the rule of limitation applied to him was likewise consistently applied by Colorado Courts to all similar situations. Plaintiff in **O'Neil** could not have been misled by contradictory rulings regarding applications of the rule.

Eagle County, of course, holds that the McCarren Amendment allows joinder the United States in adjudication proceedings under the 1943 Act. **Darrow** goes even farther and says such joinder can effectively be made under other but dissimilar state adjudicatory procedures. The key is the presence of a state statute providing the procedure for adjudication. The procedural steps themselves are a matter of

[1] **Nichols v. McIntosh,** 19 Colo. 22, 27 (1893).
[2] 169 Colo. 555, 458 P.2d 760, 401 U.S. 520, 28 L. Ed. 2d 278, 91 S. Ct. 998 (1971).
[3] #24821, 401 U.S. 527, 28 L. Ed.2d 284, 91 S. Ct. 1003 (1971).

state concern and need only be equally and fairly applied.[4]

The Supreme Court of Colorado in its review in **Eagle County** held the trial court had the power to require the giving of whatever additional notice of the claim of right to antedate previous decrees it deemed necessary.

The 1969 Act gives notice by requiring publication of the resume in one or more newspapers within the division as will give general circulation to water claimants in each county in the division. We do not believe this requires publication in every county which has a newspaper, but rather requires publication in a newspaper of general circulation in such county even if published elsewhere in the division. Thus publication in but one newspaper in the division might be found by the water court to be sufficient general circulation to meet due process requirements. Under this 1969 Act a well owner seeking his actual date of priority without prejudice because of his failure to participate in earlier adjudications antedates prior decrees. The only notice required is publication. Personal service is not required. The proposed rule is consistent with this procedure.

The additional statutory requirement of mailing to those requesting a copy of the resume relates not to the jurisdiction of the court or due process, but is for informational purposes only.

The final and important safeguard regarding notice is met when the statute requires the referee to direct mailing to those he deems affected by a particular claim.

On the surface **O'Neil** dealt with a statute of limitations, and in **Eagle County** and **Darrow** the problem of notice was not directly involved. But in **O'Neil** the only notice which could have possibly reached the adjacent district, other than the important notice the statute itself gave, was the publication. The same is true in **Eagle County**. In **Darrow,** however, as the rule herein under consideration will require, the notice was given division wide, and this was more effective as notice in the area affected than any previous statutory notice requirements.

We thus conclude that publication once in a newspaper or newspapers of general circulation within the division as required by statute and the proposed rule meets the requirements of due process, because:

1. Three years is a reasonable time for anyone to establish the error, if any, in the decree and judgment.[5]
2. In this day and age of rapid communication and transit, many newspapers are in general circulation throughout the state and not just a division.
3. The system has been effectively in force and in operation for nearly two years with relation to well owners and is the accepted state method of giving notice.

Rule 90. Dispositions of Water Court Applications

(a) The water clerk shall receive and file all applications and number them upon payment of filing fees. The water clerk shall not accept for filing any application that is not accompanied by the required filing fee. Each application filed within each division shall be consecutively numbered, preceded by the year and the letters CW (e.g. 2009CW100) to identify such applications as concerning water matters. The applicant for a finding of reasonable diligence relating to a conditional water right and/or to make a conditional water right absolute shall include in the application a listing of the original and any other prior case numbers pertaining to the conditional water right included in the application; thereafter, the assigned case number for the application shall appear on any document, pleading, or other item in the case. Referee rulings and water court judgments and decrees shall include all relevant prior case numbers.

(b) The water clerk shall include in the resume all applications filed during the preceding month that substantially contain the information required by Rule 3 of the Uniform Local Rules for All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a), which together provide the information sufficient for publication to the public and potential parties. The water clerk, in consultation with the referee pursuant to Rule 6 of the Uniform Local Rules For All State

[4] **Ft. Lyon Canal Co. v. Arkansas Sugar Beet & Irrigated Land Co.,** 39 Colo. 332, 34 P. 278 (1907). At page 344 thereof the court said:

All persons are bound to take notice of a public law. The irrigation statutes are public, and apply to all persons taking water from the same source. The waters of the state belong to the public, and, as we said, in substance, in the original opinion, the state in its sovereign capacity had the right to provide a reasonable method whereby such rights might be adjudicated and settled, and to require claimants of such rights to present them in a prescribed manner, within a prescribed time, and unless the law in this respect was obeyed, that all claims not thus presented should be barred. That is what the statutes on the subject of the use of water for irrigation have provided. All persons are bound to take notice of these provisions.

[5] This limitation was increased from two to three years by the 1970 amendment, section 37-92-304(10), C.R.S. 1973.

Water Court Divisions, shall promptly refer to the water judge for consideration and disposition any application that does not substantially contain the information required by Rule 3 of the Uniform Local Rules For All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a). Any such application shall not be published in the resume pending disposition by the water judge. The water clerk shall promptly inform the applicant that the application has been referred to the water judge and provide the applicant with a list of the required information that was not contained in the application.

(c) In determining whether or not to order publication of the application in the resume pursuant to C.R.S. § 37-92-302(3)(a), the water judge shall promptly review the application and shall employ an inquiry notice standard in conducting the review. Upon a finding that the application does not provide sufficient inquiry notice contemplated by Rule 3 of the Uniform Local Rules for All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a) to justify publication, the water judge shall set a date pursuant to C.R.C.P. 41(b)(2) and C.R.C.P. 121, Section 1-10, by which date the application will be dismissed unless, prior to that date, a sufficient application is filed. The application will retain its original filing date unless and until the application is dismissed.

(d) For purposes of relation back of the filing date of a subsequent applicant's application for a water right or conditional water right pursuant to C.R.S. § 37-92-306.1, the subsequent application shall be filed within sixty days of the date the prior application is published in the resume.

(e) Upon request, the water clerk shall provide a prospective applicant or opposer with one copy of the form for the relevant application or statement of opposition. The standard forms for applications and statements of opposition may also be found in the ''Water Courts'' section of the Colorado Judicial Branch web page.

Source: Entire rule amended and effective February 19, 2009.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

ANNOTATION

Law reviews. For article, ''Statutory and Rule Changes to Water Court Practice'', see 38 Colo. Law. 53 (June 2009).

Rule 91. Entry of Decree When No Protest Has Been Filed

The water judge may enter a decree at any time upon any ruling of the referee to which no protest has been filed, and it shall be sufficient for such purpose to enter thereon substantially the following language:

No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the Judgment and Decree of this Court.

Dated: _____

_____
Water Judge

Rule 92. Conditional Water Rights — Extension of Time for Entry of Findings of Reasonable Diligence

Where a decree or other determination with respect to a conditional water right was entered not earlier than June 7, 1971, and not later than June 6, 1973, the time during

which the owner or user thereof must obtain a finding of reasonable diligence in the development of the proposed appropriation in order to maintain the conditional water right shall be extended by two years.

Rules 93 to 96.

[Note: There are at present no Colorado Rules 93 to 96.]

CHAPTER 11

Change of Judge; Place of Trial

ANALYSIS BY RULE

CHAPTER 11

CHANGE OF JUDGE; PLACE OF TRIAL

Rule 97. Change of Judge

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

Cross references: For disqualification of a judge, see Canon 2, rule 2:11, of the Code of Judicial Conduct (Appendix to Chapter 24); for change of judge in criminal cases, see Crim. P. 21.

ANNOTATION

I. General Consideration.
II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Disqualification of Judges'', see 13 Colo. Law. 54 (1984). For article, ''Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants'', see 34 Colo. Law. 37 (September 2005).

Annotator's note. Since this rule is similar to § 32 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of rule. The intent of the rule under which a judge should disqualify himself from a case if he has served as counsel for either of the parties is to insure a fair and impartial hearing of the issue involved. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Purpose of disqualification rule is to prevent judge with a ''bent of mind'' from presiding over action. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Trial judge's duty to preside. In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the trial judge has the duty of presiding over the case. Blades v. DaFoe, 666 P.2d 1126 (Colo. App. 1983), rev'd on other grounds, 704 P.2d 317 (Colo. 1985).

Upon reasonable inference of a ''bent of mind'' that will prevent judge from dealing fairly with party seeking recusal, it is incumbent on trial judge to recuse himself. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

The requirements for disqualification of a judge are that he be interested or prejudiced, or related to counsel for any party, or has been counsel for or related to any party, as required by this rule. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

Generally, a judge's ruling on a legal issue cannot form the basis for recusal. Brewster v. Dist. Court, 811 P.2d 812 (Colo. 1991); People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

Also, a judge's opinion formed against a party from evidence before the court in a judicial proceeding, even as to the guilt or innocence of a defendant, is generally not a basis for disqualification. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

What a judge learns in his or her judicial capacity usually cannot form the basis for disqualification. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

Disqualifying interest must relate to subject matter of suit. The interest of a judge upon which he may disqualify himself must necessarily relate to the subject matter of the litigation, or be of a pecuniary interest in the outcome of the litigation, and not as it might relate to a determination of the facts and legal questions presented. Primarily, it is the duty of a judge to sit in a case in the absence of a showing that he is disqualified. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951); Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Rule does not apply to ordinary transfer for convenience. This rule, providing for designation by the chief justice of a justice to try a cause wherein the trial judge is disqualified, has no application to the ordinary transfer of causes for convenience from one division to another in a district court having more than one judge. Smaldone v. People, 102 Colo. 500, 81 P.2d 385 (1938) (decided under former Supreme Court Rule 14C).

There should be a supporting affidavit to the motion to disqualify, in compliance with the rules. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

In all cases necessary material or pertinent facts should be set out. In case of the prejudice of the judge, his attention would be called to some forgotten or unknown circumstance. Justice requires that the judge should not be charged with prejudice while left in surprise at a cause he may not imagine, or may believe exists only in the imagination of the applicant, and without the necessary knowledge upon which to act in the exercise of that discretion to allow or deny the charge. Hughes v. People, 5 Colo. 436 (1880).

The law contemplates that, upon application for change of venue, facts shall be stated sufficient to inform the judge of the nature of the causes for the change, and their alleged foundation. Hughes v. People, 5 Colo. 436 (1880).

The facts are not to be set out beyond what is necessary where they involve the judicial acts or character of the judge. Hughes v. People, 5 Colo. 436 (1880).

Only question on motion is sufficiency of facts alleged. The motion and supporting affidavit speak for themselves and the only question involved is whether the facts alleged are sufficient to compel the judge to disqualify himself. Kovacheff v. Langhart, 147 Colo. 339, 363 P.2d 702 (1961).

Supporting affidavits insufficient to warrant recusal where the allegations, even if accepted as true, did not state actual facts and statements evidencing impartiality or bias. In re Goellner, 770 P.2d 1387 (Colo. App. 1989).

Motion and supporting affidavits are insufficient to require disqualification if only allege opinions or conclusions and are unsubstantiated by facts supporting reasonable inference of actual or apparent bias or prejudice. Goebel v. Benton, 830 P.2d 995 (Colo. 1992); In re Elmer, 936 P.2d 617 (Colo. App. 1997).

Reasonable question as to impartiality requires disqualification. Where one might reasonably question the trial judge's impartiality, it is improper for him to preside over the trial. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

Trial judge must accept affidavits filed with motion to disqualify as true, even though judge believes that the statements contained in the affidavits are false or the meaning attributed to them by the party seeking recusal is erroneous. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

Disqualification is within trial court's discretion. Whether to disqualify in a civil case is a matter within the discretion of the trial court, and its ruling will not be disturbed on appeal except for an abuse of discretion. In re Mann, 655 P.2d 814 (Colo. 1982); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982); Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Whether to disqualify himself in a civil case is a question within the discretion of the trial judge, and the judge's ruling on that issue will not be disturbed on appeal absent a showing of an abuse of that discretion. Colo. State Bd. of Agric. v. First Nat'l Bank, 671 P.2d 1331 (Colo. App. 1983).

Trial court's denial of motion for recusal constitutes an abuse of discretion and is reversible error when there was, at least, an appearance of bias or prejudice due to the existence of a professional relationship between the trial judge and an expert witness for defendants. Hammons v. Birket, 759 P.2d 783 (Colo. App. 1988).

It is judge's duty to pass only upon legal sufficiency of facts alleged in affidavit and when motion and supporting affidavits allege facts which demonstrate that judge had a ''bent of mind'', refusal of judge to disqualify himself constitutes abuse of discretion. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Appearance of impropriety, not actual prejudice, is sufficient to warrant recusal. Where recusal is sought based upon the relationship of the judge to another person, it is the closeness of the relationship and its bearing on the underlying case that determines whether disqualification is necessary. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

This rule does not require a hearing on a motion for change of judge on the grounds of prejudice. Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

The parties do not require an opportunity to introduce evidence in support of a motion to

have the trial judge disqualified. Kovacheff v. Langhart, 147 Colo. 339, 363 P.2d 702 (1961).

Nor does it require notice. There is no abuse of discretion in calling the motion to disqualify the trial judge up for hearing without notice where the parties to the action, and their attorneys, were present in response to the trial setting, and trial could not proceed until the motion was disposed of. The motion was directed against the judge, was self-explanatory, and notice to the parties could not have afforded the court any better opportunity to rule upon it. Brackett v. Cleveland, 147 Colo. 328, 363 P.2d 1050 (1961).

This rule does not fix the time when a motion should be filed. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

A motion to disqualify a trial judge should be filed promptly when grounds therefor are known and prior to taking any other steps in the case. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957); Dominic Leone Constr. Co. v. District Court, 150 Colo. 47, 370 P.2d 759 (1962).

Where defendant waited two years before filing a motion for recusal based on the judge's comments, motion was untimely. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

Where plaintiff waited until one year of legal proceedings had occurred before seeking recusal on grounds of comments made in an earlier case, motion was untimely. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Petitioner did not waive right to file a motion to disqualify judge when petitioner waited two months after the grounds for disqualification were known to file his motion. Johnson v. District Court, 574 P.2d 952 (Colo. 1984).

Court may deny motion to recuse if it is untimely. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Without an assertion of actual prejudice, counsel's failure to timely move for disqualification cannot be the basis of a valid claim for ineffective assistance of counsel. A party must show actual prejudice on the part of the judge, in that the result of the proceeding would have been different. People ex rel. A.G., 262 P.3d 646 (Colo. 2011).

Mother's allegation of prejudice was based upon the appearance of impropriety created by the judge's clerk's relationship to a material witness for the government. The mere allegation of prejudice is insufficient to satisfy the element of prejudice necessary to show that counsel's errors deprived the party of a fair trial. People ex rel. A.G., 262 P.3d 646 (Colo. 2011).

Appearance for purpose other than to question authority waives objection. Where a party seeks to disqualify a judge for bias and prejudice, and at the same time asks for affirmative relief by motion for a change of venue, appearance before such judge for any other purpose than to question his authority to act, waives the right to object to his authority. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

Failure to comply with rule bars objections to judge on review. Where a party has failed to comply with this rule, the reviewing court will not entertain objections to a trial judge sitting in judgment of the acts of its own public administrator, which are not properly preserved in the proceeding below. Jones v. Estate of Lambourn, 159 Colo. 246, 411 P.2d 11 (1966).

Filing of motion to disqualify a trial judge suspends all other proceedings in the case until ruling is made thereon. Dominic Leone Constr. Co. v. District Court, 150 Colo. 47, 370 P.2d 759 (1962); Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

A motion to disqualify the judge has the effect, as a matter of law, of suspending any further proceedings until the judge rules on the motion to disqualify. City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978).

Judge is obligated to review motion. Because a motion to disqualify a judge has been made, judge is obligated to review the motion and decide its sufficiency, and judge does not have the authority to determine any other substantive matter pending before the court, including a motion for change of venue. Johnson v. District Court, 674 P.2d 952 (Colo. 1984).

Writ of mandamus proper for failure to rule on disqualification motion. The trial judge must initially rule on the disqualification motion, and if he fails to rule, a writ in the nature of mandamus is a proper remedy. City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978).

Motion does not deprive court of jurisdiction. Where the trial court ruled upon a motion for change of judge, it did not lose jurisdiction to proceed. Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

Procedural requirements for judge to disqualify himself. The power of a judge to disqualify himself may be exercised even though the proper procedural steps leading to disqualification have not been pursued by any party to the litigation. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Where the plaintiff failed to object to the appointment of a judge within the appropriate time period, the objection will be deemed waived and the plaintiff will be estopped to object. In re Fifield, 776 P.2d 1167 (Colo. App. 1989).

Adjudicating board abused its discretion by concluding that complainant waived his right to raise the issue of disqualification on the basis of implied waiver by conduct when unequivocal evidence of the intent to waive his right was absent. Venard v. Dept. of Corr., 72 P.3d 446 (Colo. App. 2003).

Mere friendship of a judge with an officer of a corporate party does not warrant disqualification unless the nature of the friendship creates an appearance of impropriety. Pierce v. United Bank of Denver, 780 P.2d 6 (Colo. App. 1989).

Once judge disqualifies himself from a case, he is without jurisdiction to rule on motions filed by the parties which involve an exercise of judicial discretion. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Judge should not appoint his own successor. When a judge is charged with bias and prejudice and sustains a motion so charging, or steps aside without ruling on the motion, proper procedure requires that he not select his successor or assign the case to another judge, but that he proceed in accordance with this rule. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

Proceeding with hearing without objection waives objection. Proceeding with a preliminary injunction hearing without objection, after being informed by the court that defense counsel had been appointed to a district commission for the evaluation of the performance of judges pursuant to § 13-5.5-104, is a waiver of the right to object. Bishop & Co. v. Cuomo, 799 P.2d 444 (Colo. App. 1990).

Purpose of disqualification requirement is to prevent a party from being forced to litigate a matter before a judge with a ''bent of mind.'' Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Applied in In re Johnson, 40 Colo. App. 250, 576 P.2d 188 (1977); Marks v. District Court, 643 P.2d 741 (Colo. 1982).

II. ILLUSTRATIVE CASES.

Filing of complaint with qualifications commission insufficient. To allow a litigant to file a letter critical of a trial judge or to inform the judge of the filing of a complaint with the judicial qualifications commission and later assert the judge's knowledge of the complaint as a basis for disqualification would encourage impermissible judge-shopping. In re Mann, 655 P.2d 814 (Colo. 1982).

Assistance of judge in preparation of arbitrator's findings not prejudicial. The participation of the trial judge in the preparation of the arbitrator's findings after reference of case did not disqualify him from rendering judgment, where it did not appear that such participation had been to the extent of creating prejudice in examining and determining issues of law which might be involved. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

Continuing jurisdiction over attack of decree is not sufficient ground. In a proceeding to attack an adoption decree before the same judge who granted the decree, the suggestion in a motion to disqualify the judge that he will undoubtedly be called as a witness is not ground for disqualification, since, in a matter of adoption proceedings, the judge who entered the adoption decree had a continuing jurisdiction and was the proper one to review or consider that judgment or decree when it was attacked. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

The initiation of an ex parte communication by a judge with a party in a dependency hearing regarding the adequacy of her attorney's representation was improper, but judge would not be disqualified where disqualification motion and affidavits failed to allege facts from which it might be inferred that the ex parte communication demonstrated a bias against the party or her attorney. S.S. v. Wakefield, 764 P.2d 70 (Colo. 1988).

Where the trial judge owned controlling shares of stock in a bank in which the plaintiff maintained substantial deposits, his pecuniary interest in the outcome of the litigation was such that he should have disqualified himself. Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1987).

Purchase of water from corporate defendant is not disqualifying interest. A motion to disqualify a trial judge on the ground of prejudice because the defendants in the case are socially and politically influential and because the judge is a water user of the corporate defendant, presents no sound basis for disqualification, where the company is a mutual nonprofit corporation and where no pecuniary advantage could possibly accrue to the trial court by his action. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

Previous service of judge as county attorney unrelated to action. No showing has been made that in his duty as county attorney 17 years prior to the institution of this action, the trial judge was in any manner concerned with the question of title to this property, or that the defendant's right to a fair and impartial hearing was in any manner affected by the refusal of the trial judge to disqualify himself. The trial judge was correct in refusing to disqualify himself. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Similarly, where judge appointed as attorney to represent inductees in quiet title action. In the absence of more positive representation than is usually performed by an attorney appointed to represent persons in or about to be inducted into military service in a quiet title action, it is questionable whether the mere ap-

pointment of an attorney and his subsequent approval of a quiet title decree disqualifies him later as judge to determine whether the decree is ''res judicata'' in another proceeding in which some of the parties are the same. Martinez v. Casey, 178 Colo. 62, 495 P.2d 216 (1972).

Partiality or appearance of bias or prejudice. Judge should have disqualified himself when affidavits filed reported actual events and statements which, if true, evidence partiality or the appearance of bias or prejudice against the petitioner on the part of the judge. Johnson v. District Court, 674 P.2d 952 (Colo. 1984).

Judge should have disqualified herself when she allowed marked personal feelings toward the contempt defendant to affect her judgment in the proceedings and after she referred the case to the district attorney for potential criminal prosecution. In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

Judge's Catholic faith insufficient to support a reasonable inference that he was biased and should recuse himself from case under this rule. A judge's particular religious affiliation, even though the same as that of the father in dissolution of marriage case and of the special advocate, did not create sufficient appearance of bias or bent of mind to require recusal. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

Appearance of impropriety was created by administrative adjudicator's position as a direct adversary of complainant's counsel in a similar, previous personnel matter. Thus, it was an abuse of discretion for board to allow administrative adjudicator to sit in on case. Venard v. Dept. of Corr., 72 P.3d 446 (Colo. App. 2003).

No appearance of impropriety was found and trial court's decision not to grant relief from summary judgment was proper. Giralt v. Vail Village Inn Assocs., 759 P.2d 801 (Colo. App. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989).

Affidavit insufficient. Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984).

Refusal of judge to disqualify himself was error. Geer v. Hall, 138 Colo. 384, 333 P.2d 1040 (1959).

For actions of judge effectively disqualifying himself from case, see Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Refusal of judge to disqualify himself was error where judge's ex parte communication with party significantly involved in provision of health care services to mentally ill, an issue of critical significance to judge's ultimate ruling on adequacy of state's remedial plan. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

The fact that the defendant had brought a civil action against the judge complaining of judicial conduct and defendant's conclusory statements that the judge was biased were insufficient to show that recusal was required. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Legal rulings against a party on issues appropriately before the judge are not grounds for recusal, nor does the judge's direction to the clerk not to accept fax filings from the party support a reasonable inference of bias. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Imposition of discovery sanctions did not indicate bias where issues were appropriately before the judge and findings were based on the motions filed and the arguments of counsel. M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc., 40 P.3d 3 (Colo. App. 2001).

Trial court judge erred by determining the relationship between his court clerk and the witness did not warrant judge's recusal. Where court clerk's daughter, as caseworker, was material witness in the case, absent waiver, judge abused his discretion by not recusing from the case. Judge's relationship with clerk and her relationship to witness created the appearance of impropriety. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Rule 98. Place of Trial

(a) Venue for Real Property, Franchises, and Utilities. All actions affecting real property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.

(b) Venue for Recovery of Penalty, etc. Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite the place where the offense was committed;

(2) Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

(c) Venue for Tort, Contract, and Other Actions. (1) Except as provided in

sections (a), (b), and (c)(2) through (6) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(2) Except as provided in subsection (3) of this section, an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county where the same was to be performed.

(3) (A) For the purposes of this Rule, a consumer contract is any sale, lease, or loan in which (i) the buyer, lessee, or debtor is a person other than an organization; (ii) the goods are purchased or leased, the services are obtained, or the debt is incurred, primarily for a personal, family, or household purpose; and (iii) the initial amount due under the contract, the total amount initially payable under the lease, or the initial principal does not exceed twenty-five thousand dollars.

(B) An action on a consumer contract shall be tried (i) in the county in which the contract was signed or entered into by any defendant; or (ii) in the county in which any defendant resided at the time the contract was entered into; or (iii) in the county in which any defendant resides at the time the action is commenced. If the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(C) In any action on a consumer contract if the plaintiff fails to state facts in the complaint or by affidavit showing that the action has been commenced in the proper county as described in this Rule, or if it appears from the stated facts that venue is improper, the court may, upon its own motion or upon motion of any party, dismiss any such action without prejudice; however, if appropriate facts appear in the record, the court shall transfer the action to an appropriate county. Any provision or authorization in any consumer contract purporting to waive any rights under subsection (3) of section (c) of this Rule is void.

(D) Any debt collector covered by the provisions of the Federal ''Fair Debt Collection Practices Act'' shall comply with the provisions of said Act set forth in 15 U.S.C. 1692(i) concerning legal actions by debt collectors, notwithstanding any provision of this Rule.

(4) An action upon a contract for services may also be tried in the county in which the services were to be performed.

(5) An action for tort may also be tried in the county where the tort was committed.

(6) An action in interpleader may also be tried in any county where a claimant resides.

(d) Venue for Injunction to Stay Proceedings. When any injunction shall be granted to stay a suit or judgment, the proceeding shall be had in the county where the judgment was obtained or the suit is pending.

(e) Motion to Change Venue; When Presented; Waiver; Effect of Filing. (1) Except for actions under section (c)(3), (f)(2), or (g) of this Rule, a motion to change venue shall be filed within the time permitted for the filing of motions under the defenses numbered (1) to (4) of section (b) of Rule 12, and if any such motion, or any other motion permitted by Rule 12, is filed within said time, simultaneously therewith. Unless so filed, the right to have venue changed is waived. A motion under sections (c)(3), (f)(2), or (g) of this Rule, shall be filed prior to the time a case is set for trial, or the right to have venue changed on said grounds is waived, unless the court, in its discretion, upon motion filed or of its own motion, finds that a change of venue should be ordered.

(2) If a motion to change venue is filed within the time permitted by section (a) of Rule 12 for the filing of a motion under the defenses numbered (1) to (4) of section (b) of Rule 12, the filing of such motion by a party under the provisions of subsection (1) of this section (e) alters his time to file his responsive pleading as follows: If the motion is overruled the responsive pleading shall be filed within 14 days thereafter unless a different

time is fixed by the court, and if it is allowed the responsive pleading shall be filed within 14 days after the action has been docketed in the court to which the action is removed unless that court fixes a different time.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the court to which the action is removed.

(f) Causes of Change. The court may, on good cause shown, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county; (2) When the convenience of witnesses and the ends of justice would be promoted by the change.

(g) Change from County. If either party fears that he will not receive a fair trial in the county in which the action is pending, because the adverse party has an undue influence over the minds of the inhabitants thereof, or that they are prejudiced against him so that he cannot expect a fair trial, he may file a motion supported by an affidavit for a change of venue. The opposite party may file a counter motion and affidavit. If the motion is sustained the venue shall be changed.

(h) Transfers Where Concurrent Jurisdiction. All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of the court, be transferred by either court to such other court of the same county. Upon transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein.

(i) Place Changed if All Parties Agree. When all parties assent, or when all parties who have entered their appearance assent and the remaining nonappearing parties are in default, the place of trial of an action in a district court may be changed to any other county in the district. The judgment entered therein, if any, shall be transmitted to the clerk of the district court of the original county for filing and recording in his office.

(j) Parties Must Agree on Change. Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be.

(k) Only One Change; No Waiver. In case the place of trial is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time.

Source: (e)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For change of venue in criminal cases, see Crim. P. 21; for change of judge, see C.R.C.P. 97; for transfer of venue of multiple proceedings under the ''Colorado Probate Code'', see § 15-10-303, C.R.S.; for types of pleadings, see C.R.C.P. 7(a).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For an article on change of venue in actions involving performance of contracts, see 16 Dicta 13 (1939). For article, ''Rules Committee Proposes Changes in Civil Procedure'', see 21 Dicta 159 (1944). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For note, ''One Year Review of Civil Procedure'', see 41 Den. L. Ctr. J. 67 (1964).

This rule determines place of trial or venue in courts of record of general jurisdiction. Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Statute fixing place where an action must be brought does not control place of trial. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925) (decided under § 25 et seq. of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bringing an action and trying it are two different matters. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925); Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953).

Where a statutory remedy provides for a jury trial and there are no change of venue provisions provided for in that statute, then the procedure to obtain a change of venue is governed by this rule of civil procedure. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

The substance, not the form, of the action must control in ascertaining the proper venue. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

In ascertaining the venue of an injunctive proceeding, the court should probe for the primary purpose of the suit. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

Dismissal on basis of forum non conveniens limited. The power of a Colorado court to dismiss an action on the basis of forum non conveniens is severely limited. State Dept. of Hwys. v. District Court, 635 P.2d 889 (Colo. 1981).

Change of venue absent affidavit or hearing is abuse of discretion. The court abused its discretion when it ordered a change of venue in the absence of a supporting affidavit or an evidentiary hearing. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

Improper venue not a jurisdictional defect which can be raised for the first time on appeal. Where trial court made an express finding of proper venue and defendant did not contest venue at trial, appellate court refused to reverse on grounds of improper venue. Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Denying such change of venue because remedy is sought pursuant to "habeas corpus" is incorrect. A trial court incorrectly bases its denial of a motion for change of venue on the belief that a change of venue is not available because the remedy sought arises pursuant to a writ of ''habeas corpus''. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

This rule governs venue in habeas corpus proceedings. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977).

This rule does not apply to workers' compensation division-sponsored independent medical examination proceedings. Kennedy v. Indus. Claim Appeals Office, 100 P.3d 949 (Colo. App. 2004).

Venue subservient to jurisdiction, so trial court not deprived of subject matter jurisdiction by purported transfer to a foreign nation of an action involving property located in that nation. Sanctuary House, Inc. v. Krause, 177 P.3d 1256 (Colo. 2008).

Applied in In re Femmer, 39 Colo. App. 277, 568 P.2d 81 (1977); Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981); In re U.M. v. District Court, 631 P.2d 165 (Colo. 1981); First Nat'l Bank v. District Court, 653 P.2d 1123 (Colo. 1982); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

II. VENUE FOR PROPERTY, FRANCHISES, AND UTILITIES.

Annotator's note. Since section (a) of this rule is similar to § 26 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The substance of the action, not the form, controls in determining the question of venue under section (a). Colo. Nat'l Bank v. District Court, 189 Colo. 522, 542 P.2d 853 (1975); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

This section deals with a specified class of cases. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Form of relief not determinative. Although the complaint prayed for a variety of relief, both legal and equitable, where the substance of the action directly affected the ownership of a ranch and sought to have declared the respective rights and interests of the petitioners and respondent in the ranch, the action should be tried where the ranch is located. Colo. Nat'l Bank v.

District Court, 189 Colo. 522, 542 P.2d 853 (1975).

Action in personam is not an action dealing with property within the contemplation of section (a) of this rule. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

It has reference exclusively to actions in rem, where specific property is to be directly affected. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042, 1913B Ann. Cas. 461 (1911).

This provision is applicable to county courts as well as to district courts. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

This provision is not restricted to real property. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

It concerns actions affecting specific property and does not control in an action in which there is no issue as to title, lien, injury, quality, or possession, but which is concerned only with recovery of the purchase price. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

Language of this section is mandatory. Insofar as the designation of the venue is concerned, the language used in this section is mandatory. Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893).

The word "affect", as used in this rule, is as broad a term as ''to determine a right or interest in''. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

An action does not "affect" a utility under this section when the defendants are being sued, not as a utility, but in their proprietary or quasi-private capacities as parties to a contract; as such, petitioners are not entitled to relief under this section. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

This section deals with the situation where the lawsuit directly affects the construction or operation of the utility itself. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Rule eliminates issue of where greater portion of property is found. Since an action may be brought in the county where a substantial portion of the property is located, the difficult question of where the greater portion of franchise is located is eliminated. People ex rel. City & County of Denver v. District Court, 80 Colo. 538, 253 P. 24 (1927).

Section applies to municipal corporations. The fact that defendant irrigation district happens to be a quasi-municipal or municipal corporation cannot abrogate the provision of this section as to venue. Bd. of County Comm'rs v. Bd. of County Comm'rs, 3 Colo. App. 137, 32 P. 346 (1893); Bd. of County Comm'rs v. Bd. of County Comm'rs, 2 Colo. App. 412, 31 P. 183 (1892); North Sterling Irrigation Dist. v. Dickman, 66 Colo. 8, 178 P. 559 (1919).

Section 36-1-128, concerning venue for suits by the state board of land commissioners, does not conflict with this rule requiring all actions affecting property to be tried in the county in which the subject of the action or a substantial part thereof is situated. Dallas v. Fitzsimmons, 137 Colo. 196, 323 P.2d 274 (1958).

Section controls an action against an irrigation district. An action for an injury to lands by seepage from the ditch of an irrigation district is properly brought in the county in which the lands are situated. North Sterling Irrigation Dist. v. Dickman, 66 Colo. 8, 178 P. 559 (1919).

A sanitation district is a municipal utility, and being such, it should be sued in the county in which it was located. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

Section contrives an action to cancel real estate mortgage. An action to cancel a real estate mortgage indemnifying a surety against loss on a contractor's bond, under this provision, was triable in the county where the property was situated, although the responsibility of the contractor was a question to be determined in another county. Allen v. Sterling, 76 Colo. 122, 230 P. 113 (1924).

An action to terminate lease and recover possession of real estate, upon the ground that covenants of the lease have been violated, is an action ''affecting'' real estate and is properly brought in the county in which the said real estate is located. Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P.2d 336 (1951).

Claim to quiet title to property. The proper venue for the claim to quiet the title to the property was laid in the county where it is located. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Actions to determine county boundaries. The venue of an action to determine county boundaries is controlled by this section. People ex rel. Bd. of Comm'rs v. District Court, 66 Colo. 40, 179 P. 875 (1919).

Action on land use regulation not within scope of section (a). Where the relief sought is directed to the validity of county land use regulations and there is no issue as to title, lien, injury, quality or possession, property is not affected within the meaning of section (a). Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

In case when requested relief is directed to the validity and operative effect of H.B. 1041 land use regulations passed by county, there is no issue as to the title, lien, injury, quality, or possession of the property, franchises, or

utilities within the meaning of section (a). Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, Pueblo county board passed the amended regulations in its official capacity, and the regulations address facilities planned to be located in Pueblo county and impacts that may occur there. That the city's planning for project features and water delivery in El Paso county may ultimately be impacted by such regulation does not mandate venue in El Paso county district court. Substance of city's complaint addresses the validity and enforceability of the Pueblo county board's adoption of the challenged H.B. 1041 regulation. Thus, venue is proper only in the Pueblo county district court under section (b)(2). City of Colo. Springs v. Bd. of County Comm'rs, 147 P.3d 1 (Colo. 2006).

Likewise actions concerning water rights. An action to quiet title to a water right is triable in the county in which the water right is situated. People ex rel. City & County of Denver v. District Court, 80 Colo. 538, 253 P. 24 (1927).

A water right can be said to be ''situated'' under this section only at the point of diversion or at the place of use. Field v. Kincaid, 67 Colo. 20, 184 P. 832 (1919).

Actions for injury due to flooding. In view of this provision, an action for damages resulting from flooding plaintiff's land is triable in the county in which the subject of the action is situated. Twin Lakes Reservoir & Canal Co. v. Sill, 104 Colo. 215, 89 P.2d 1012 (1939).

An action to rescind a contract to sell timber is in substance an action to determine title to the timber, and thus must be tried in the county in which the timber or a substantial part of it is located. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

Transitory, in personam actions are not subject to this section. This section does not apply to an action to restrain interference with the business of a railway company by unlawfully dealing in its nontransferable tickets. Such an action is a transitory action in personam. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

Railroad tickets do not have the characteristics of property as that term is used in this subdivision. At most a railroad ticket is mere evidence of a contract, a mere token to show that the person properly in possession of it has paid his fare. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

This section does not apply to an action on an oral contract for leasing sheep. This section dealing with specified classes of cases does not apply to an action on an oral contract for the leasing of sheep. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Section not applicable to foreclosure proceedings. There is no requirement that foreclosure proceedings be filed in the county where the property affected is located. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

An action to recover the reasonable value of furniture, fixtures, and equipment of a restaurant and liquor sales business sold to defendant was not an action affecting property within section (a) of this rule. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

A dissolution of marriage action is not an action "affecting real property, franchises, or utilities" within the meaning of section (a). Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

Where defendants made no showing that ownership of land was disputed and did not seek any remedies pertaining directly to the property, the action was not an action ''affecting real property''. Sanctuary House, Inc. v. Krause, 177 P.3d 1256 (Colo. 2008).

III. VENUE FOR RECOVERY OF PENALTY.

Annotator's note. Since section (b) of this rule is similar to § 28 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section deals with a specified class of cases. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Consent of all defendants is not required for a motion to change venue under section (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

An action to recover a penalty, whether it be one ex contractu or ex delicto, comes under the provisions of this section. Woodworth v. Henderson, 28 Colo. 381, 65 P. 25 (1901).

Claims for injunctive relief against public officers arise, within the meaning of section (b) of this rule, in the county in which the public body has its official residence and from which any action by the board pursuant to the injunction must emanate. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974).

The mere fact that public officers were named defendants, does not constitute an action against public officers within the meaning of section (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

Section (b)(2) controls venue for all actions against public officers for acts done or the failure to perform acts in public office. Execu-

tive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

The language of section (b)(2) indicates that it is the official act, or failure to act, by the public officer that gives rise to the cause of action and establishes venue. Executive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

An action to set aside an order of a public official is sufficiently similar to an action for injunctive relief against public officers to be governed by the same venue rules. Farmers Cafe v. State Dept. of Rev., 752 P.2d 1064 (Colo. App. 1988).

"Some part" of plaintiffs' 42 U.S.C. § 1983 claim against public officers in Fremont county did not arise in Boulder county by virtue of plaintiffs' phone call from Boulder county, where the basis of plaintiffs' claim was that such public officers deprived plaintiffs by refusing visitation of prisoners at the department of corrections facility in Fremont county, not the visitation arrangement itself. It was the DOC's refusal in Fremont county to allow visitation that gave rise to the plaintiffs' claim and establishes venue in this case. Executive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

Section 18-4-405 establishes a statutory penalty requiring the case to be tried in the county where the claim arose. Ehrlich Feedlot, Inc. v. Oldenburg, 140 P.3d 265 (Colo. App. 2006).

An action to recover damages for personal injury is not an action to recover a penalty. An action to recover damages for personal injuries is not to recover a penalty simply because punitive damages were asked and awarded. Such an action is to recover compensatory damages; exemplary damages are only an incident, not the basis, of the cause of action. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

In case involving determination of proper venue for lawsuit concerning validity of H.B. 1041 land use regulations passed by county, venue is proper under section (b)(2) where the actions of the governing board giving rise to the dispute took place. Regardless of the potential impact outside the county, a claim involving the validity and effectiveness of regulations passed by a governing board must be heard in the county where the board acted to pass those regulations. Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, substance of city's complaint is directed at the official actions of the Pueblo county board, and the primary purpose of the lawsuit is to determine the validity of those actions as they apply to the city's water supply and storage project. Because issue here is the validity and enforceability of land use regulations adopted by Pueblo county board, venue is proper in Pueblo county where challenged official actions occurred. City of Colo. Springs v. Bd. of County Comm'rs, 147 P.3d 1 (Colo. 2006).

IV. VENUE FOR TORT, CONTRACT, AND OTHER ACTIONS.

A. In General.

Annotator's note. Since section (c) of this rule is similar to § 29 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of section. The general assembly by these provisions intended to limit the right to bring actions in any court having competent jurisdiction and imposed a limitation as to the forum in which the action should be commenced. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

The first sentence of this section is construed as a general rule, which is modified in particular instances by the succeeding sentences. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

General rule. The general rule is that personal actions, such as actions for breach of warranty, shall be tried in the county in which the defendants, or any of them, reside at the time of the commencement of the action, or in the county where plaintiff resides when service is made on the defendant in such county, unless the case is brought within some of the exceptions of this section. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Section (c) applies only if sections (a) and (b) are not controlling. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974).

Section (c)(1) does not apply to motions made under subsection (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

Section provides more than one proper county. The counties designated in the first sentence of this section are proper counties for the trial of all cases except those enumerated in the two preceding sections; but where the action is for goods sold and delivered, or upon a contract, or upon a note or bill of exchange, or for a tort, the county where the goods were sold, or the contract was to be performed, or the bill of exchange was made payable, or the tort was committed, is also a proper county for trial. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Where trial may be lawfully had in either of two counties under this section, the selection rests with the plaintiff. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Nonresidence of defendant is no objection to court's jurisdiction. Nonresidence of the defendant within the territorial jurisdiction of the court is no objection to the jurisdiction of the court of the cause, if actual jurisdiction of the person of such defendant is obtained by service of process within the territorial jurisdiction of such courts. Weiner v. Rumble, 11 Colo. 607, 19 P. 760 (1888).

Nonresident may be sued in county designated by complaint. In a suit for breach of contract, where the defendant is a nonresident, the proper county in which to institute the action is that ''designated in the complaint''. Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931).

Where the defendant is a nonresident of Colorado, the action may be tried in the county designated in the complaint. International Serv. Ins. Co. v. Ross, 169 Colo. 451, 457 P.2d 917 (1969).

Once the district court determined that a change of venue was warranted under subsection (c), it has no jurisdiction over the cause of action except to order the change of venue. Millet v. District Court of El Paso County, 951 P.2d 476 (Colo. 1998).

Applied in City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

B. Actions on Contracts.

General rule. Actions on contracts are triable in the county in which the defendants or any of them reside at the commencement of the action, or in the county where the plaintiff resides, when service is had on the defendants in such county, or in the county where the contract is to be performed. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Contract action relating to real property. A contract action, seeking only damages and not claiming title to any property, is properly brought in Colorado even though the real property involved is located in Kansas. Centennial Petroleum, Inc. v. Carter, 529 F. Supp. 563 (D. Colo. 1982).

Action may be tried in county where contract is to be performed. One of the exceptions to the general rule of place of trial is that actions on contracts may be tried in the county in which the contract is to be performed, where by its terms it is to be performed at a particular place. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

This exception applies only where the contract is, by express terms, to be performed at a certain place. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919); People ex rel. Tripp v. Fremont County Court, 72 Colo. 395, 211 P. 102 (1922).

The words in this section, ''the county in which the contract was to be performed'', refer to contracts which by their terms are to be performed at a particular place. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926); Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

Where a contract is silent as to place of performance the provision relative to the right of trial in the county where the contract is to be performed is not applicable. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923); Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

Where there is no place of performance expressed in a contract, no change of venue can be granted on that ground. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Contract did not specify place of performance. The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

An indemnity bond given to a sheriff to indemnify him against damage for seizing personal property under a writ of attachment, which contains no provision making it payable in any particular county, is not a contract to be performed in the county wherein the attachment is levied within the meaning of this section providing that actions upon contracts may be tried in the county in which the contract was to be performed. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

Where place of performance of contract was changed by assignment of promissory note to California company, and payer was directed to mail its payments to San Diego rather than to Denver as originally stated in the note, venue was not proper in Denver. Trial court should have transferred case to Boulder county, where defendants resided. Resolution Trust Corp. v. Parker, 824 P.2d 102 (Colo. App. 1991).

The place where a cause of action for a breach of contract arises is generally — almost universally — the place where the contract is to be performed. Grimes Co. v. Nelson, 94 Colo. 487, 31 P.2d 488 (1934).

In determining the place of trial of an action for breach of warranty the question is, where were defendants required to perform the things they were to do under the contract. What plaintiff was to do, is not in the case. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Action may be brought in county of defendant's residence. Personal actions on contracts which are silent as to place of performance, are triable in the county of defendant's residence.

Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

In an action on contract, no place of performance being expressly specified, the action should be tried in the county where defendant resides unless the case is brought within some of the exceptions of the rule. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923).

Where the terms of the contract were not sufficient to indicate an intent to perform in the county of the plaintiff's residence the defendant was entitled to change of venue to its place of residence. Maxwell-Chamberlain Motor Co. v. Piatt, 65 Colo. 140, 173 P. 867 (1918).

An action upon a contract against a school district must be tried in the county of that district, unless the case is within one of the exceptions provided for in this section. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919).

An action for breach of contract, which is silent as to the place of performance, must be regarded as a personal one and triable in the county of defendant's residence. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Where it was sufficiently shown that the county in which the action was brought was the county in which the contract was to be performed, and was therefore the proper county for trial, the motion for change was correctly denied. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Generally, unless service is made in the county of plaintiff's residence, trial shall be in the county of defendant's residence. Regardless of residence and place of service, actions upon contract may be tried in the county in which the contract is to be performed. Grimes Co. v. Nelson, 94 Colo. 487, 31 P.2d 488 (1934); E. F. Gobatti Eng'r & Mach. Corp. v. Oliver Well Works, Inc., 111 Colo. 193, 139 P.2d 269 (1943).

Where, under the terms of an agency contract, plaintiff was required to and did confine his business activities within the limits of a specified county, his action was properly instituted in such county, and there was no error in the refusal of the court to change the venue to another county wherein the principal maintained its offices and where it was served with summons. Navy Gas & Supply Co. v. Schoech, 105 Colo. 374, 98 P.2d 860 (1940).

This rule permits actions on contract to be tried in the county where the contract is to be performed. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Where a contract is entered into, and payment of the fee is to be made in Denver, the action is properly tried in Denver. Bamford v. Cope, 31 Colo. App. 161, 499 P.2d 639 (1972).

Under this section an action upon contract may be instituted and prosecuted in the county where the contract was to be performed. Even though defendant resides in another county he is not entitled to a change of venue. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

This section does not make the trial mandatory in the county where the contract is to be performed. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Rather, it merely makes such venue permissive by providing that the action may also be tried in the county in which the contract is to be performed at the election of the plaintiff. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

An action for breach of contract in which there are several defendants is properly brought in the county where one such defendant resides. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Debt presumed payable where creditor resides. In an action on contract for the payment of money advanced by a bank, no other place of payment being stipulated, the debt is presumed to be payable at the bank, and the action was properly brought in the county of the creditor's residence under this section. People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921); Chutkow v. Wagman Realty & Ins. Co., 80 Colo. 11, 248 P. 1014 (1926).

Where the contract is silent as to the place of payment, the debtor is obliged to seek the creditor in the county of residence and his usual place of business or abode and make payment there. Unless an insurance policy contains a provision definitely fixing the place of payment elsewhere, the county of plaintiff's residence is a proper place for the trial of an action to collect thereon. Progressive Mut. Ins. Co. v. Mihoover, 87 Colo. 64, 284 P. 1025 (1930).

A breach of the contract does not abrogate this section as to the place of trial of an action thereon, nor spell anything as to what the contract says as to place of performance. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Signers of bond must be sued in county of their residence where bond is silent as to place of payment. The signers of a bond must be sued in the county of their residence, or where some of them reside, unless the bond itself specifically provides that the place of performance is elsewhere. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

C. Tort Actions.

The general rule is that personal actions may be tried in either the county in which the defendant resides, or any of them reside, or in the county where the plaintiff resides when service is made on the defendants in such county. Denver Air Ctr. v. District Court,

839 P.2d 1182 (Colo. 1992); Magill v. Ford Motor Co., 2016 CO 57, 379 P.3d 1033.

Venue requirements must be satisfied for all defendants where the defendants did not act in concert or engage in the same tortious act. Spencer v. Sytsma, 67 P.3d 1 (Colo. 2003).

Rule authorizes prosecution of action in county in which defendant has its principle place of business and in which it was served with process. Combined Com. Corp. v. Pub. Serv. Co., 865 P.2d 893 (Colo. App. 1993).

Merely having a registered agent in a county does not mean the company resides there. So the action must be brought in the county where the plaintiff or defendant resides. Magill v. Ford Motor Co., 2016 CO 57, 379 P.3d 1033.

Section provides equally proper counties. In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Carlson v. Rensink, 65 Colo. 11, 173 P. 542 (1918).

Plaintiff must bring case within exception for place of tort to prevent change to defendant's residence. In an action for tort brought against a defendant in another county where the summons was served in the county in which defendant lived, it was incumbent upon plaintiff in resisting a motion for a change of venue to bring the case within the exception to this section that actions for torts can be brought in the county in which the tort was committed. Byram v. Piggot, 38 Colo. 70, 89 P. 809 (1906).

Where an action was brought in Logan county by a resident of that county against a resident of Weld county to recover damages for a tort committed in Morgan county, with service of summons in Logan county, a motion for change of place of trial from Logan county to Weld county was properly denied. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

Exemplary damages have no bearing upon question of venue. Where a plaintiff asks for both compensatory and exemplary damages in a tort action, exemplary damages is only an incident, not the basis, of the cause of action, and has no bearing upon the question of venue. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

Action for breach of warranty. In an action for the breach of the warranty where fraudulent misrepresentations inducing purchase were alleged and plaintiffs resided in Lincoln county, the action was properly brought in Lincoln county, both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and defendant was not entitled as of right to change the venue to the county of its residence. Denver Horse Importing Co. v. Schafer, 58 Colo. 376, 147 P. 367 (1915).

Action for conversion of machinery. In an action by a lessee of a mine against his lessors for damages for an alleged conversion of machinery and appliances, where the complaint charged the wrongful conversion by defendant of personal property belonging to plaintiff, the cause is properly brought in the county where defendants or any of them reside. Updegraff v. Lesem, 15 Colo. App. 297, 62 P. 342 (1900).

Action by receivers. The court's power of control in receivership proceedings does not deprive a stranger who claims by paramount title, of the right to have the suit or proceedings instituted by the receiver to try the question of title, determined as are other actions under the rules of civil procedure, in the appropriate court of the county where the defendant resides, and where process is served upon him, where the tort was committed in the county of the defendant's residence. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

D. Other Actions.

The word "goods", as used in section (c) of this rule, should not be restricted to merchandise sold in course of trade. The word should be given the broad meaning ordinarily ascribed to it and be held to include furniture and equipment. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

Action of guaranty distinguished from action for goods sold and delivered. An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator is an action upon the guaranty contract, and not an action for goods sold and delivered, and the provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

Action on partnership account may be brought in county where plaintiff resides. This section expressly authorizes an action by one partner against his copartner for the balance found due upon a settlement of the partnership affairs to be brought in the county where the plaintiff resides. Bean v. Gregg, 7 Colo. 499, 4 P. 903 (1884).

Actions on notes are triable in county where made payable. This section expressly provides that all cases, unless otherwise provided, shall be tried in the county of defendant's residence, unless service of summons is

made upon defendant in the county where plaintiff resides, with an exception, among others, that actions upon notes or bills of exchange may be tried in the county where the same are made payable. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

This section applies to actions for divorce. The provisions of this section that in certain circumstances civil actions shall be tried in the county of the defendant's residence applies to actions for divorce. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

This rule governs venue in dissolution of marriage proceedings. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

On the question of venue in divorce actions, this section is controlling, notwithstanding statutory provisions concerning divorce actions and kindred matters. People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943).

Petitioner and respondent in dissolution of marriage proceeding are equivalent of plaintiff and defendant. For the purpose of the venue requirements in this rule, the petitioner and respondent in a dissolution of marriage proceeding are the equivalent of a plaintiff and defendant, respectively. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

The divorce act must be read in connection with this and following sections. In view of the fact that the divorce act provides the rules of civil procedure shall apply, except as expressly modified by its own provisions, the mandate of the act with respect to where actions for divorce shall be brought must be read in connection with this and the following section. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

Residence of corporation is place where principal office is to be kept. The residence of a corporation is the place where, by the certificate of incorporation, its principal office is to be kept. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

Thus, an action begun in the Mesa county of plaintiff's residence against a corporation resident of another county, summons in which is served in a third county, where the corporation carries on business, must, on proper application, be removed to the county in which the defendant has its residence. The fact that the corporation filed its certificate of incorporation in the county of its business, and failed to file one in the county where its office was to be kept, is immaterial. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

A creditor of a corporation cannot take advantage of its failure to file the certificate of incorporation in the county where its principal office is to be kept, in order to prosecute an action against it in another county. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

Action against foreign corporation. A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the city of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the county of Denver, on the ground that its residence was in that county. Under this section the motion was properly denied, as the corporation was a resident of New York and a nonresident of Colorado within the meaning of this section. New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 P. 899 (1911).

Undesignated action. An action for damnification brought by a mortgagor against an assuming grantee who failed to pay the mortgage debt, thus forcing the mortgagor to pay, is one of the undesignated actions under section (c), and a motion for change of venue to the county of defendant's residence was properly granted. Cave v. Belisle, 117 Colo. 180, 184 P.2d 869 (1947).

V. VENUE FOR INJUNCTION TO STAY PROCEEDINGS.

Annotator's note. Since section (d) of this rule is similar to § 162 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of that section has been included in the annotations to this rule.

This section does not specify where action must be brought. This section, even giving to it the most strict and limited construction permissible, simply specifies, like the provision upon places of trial, the county in which the action may or shall be tried, subject to change of the place of trial, and not where it must or shall be brought. If commenced in another county, it is not a jurisdictional or fatal defect. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

Proceedings after complaint and order tried in county of judgment. By the terms of this section, the proceedings to enjoin must be had in the county where the judgment was rendered. The proceedings referred to could be only those subsequent to the mere commencement of the suit by the filing of a complaint and to the issuance of a temporary restraining order. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

Privilege of conducting proceedings where judgment rendered may be waived. The district court has jurisdiction to entertain an application for writ of injunction to restrain the enforcement of an invalid judgment rendered in another county, and in the absence of an application for change of venue seasonably made the

parties waive their privilege to have the proceedings conducted in the county where the judgment was rendered. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

VI. MOTION TO CHANGE VENUE.

Annotator's note. Since section (e) of this rule is similar to § 25 et seq. of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Doctrine of forum non conveniens has only limited application in Colorado courts, and except in most unusual circumstances the choice of a Colorado forum by a resident plaintiff will not be disturbed. McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976).

The doctrine of forum non conveniens has little place in Colorado courts. Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Venue motions to be filed together. Section (e)(1), of this rule, when read together C.R.C.P. 12, requires that all venue motions, except those based on sections (c)(3), (f)(2), and (g) of this rule, must be filed together. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

Where both parties to a dissolution case reside in a county outside of the judicial district where the case is filed, a directive or rule of court could properly authorize that court on its own motion to change venue, unless for good cause shown by the parties, or either of them, venue should be retained by the court in which the case is filed. Walsmith v. Lilly, 194 Colo. 270, 571 P.2d 1107 (1977).

Right to change venue waived by failure to make motion to change at proper time. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

The right of a defendant to a change of a place of trial upon the ground of residence is a personal privilege which may be waived by not applying in apt time. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

If, after a change of venue is granted, the resisting party elects to proceed to trial without further objection, he thereby waives any error in granting the change of venue. Smith v. Huber, 666 P.2d 1122 (Colo. App. 1983).

Change of venue not restricted by time of filing or consent of all parties. A discretionary change of venue under section (f)(2) is not restricted by the time of filing or by the necessity for the consent of all parties to the request. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

Where enlargement of time not obtained. By failing to file motions for change of venue within 20 days after service of the summons and complaint as required by this rule, then, by not having obtained enlargement of the time from the court, the right to file over objection is lost. Town of Grand Lake v. District Court, 180 Colo. 272, 504 P.2d 666 (1972).

VII. CAUSES OF CHANGE.

A. In General.

Annotator's note. Since setion (f) of this rule is similar to § 31 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The duty of changing the place of trial is not devolved upon the court of its own motion. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Presumption is that suit is brought in proper county. It will be presumed that the county in which the suit was brought is the proper county for trial unless there should be a disclosure of something to the contrary; and the court commences the consideration of an application for a change of venue with the assumption of the existence of the necessary conditions requiring the retention of the case in that county, except insofar as the contrary may appear from the application. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

The change of venue is required to be made only "on good cause shown". These words plainly imply that a party considering himself aggrieved by the bringing of the action in a wrong county, or considering himself likely to be prejudiced by the trial thereof in the county where the action is pending, must apply to the court and show good cause therefor, in order to have the place of trial changed. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Inconvenience and expense not sufficient to change forum. Inconvenience and expense are inherent in all litigation and are insufficient to oust a resident plaintiff from his chosen forum. McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976); Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Burden of proof on motion to change venue is on party seeking change, but the party opposing must balance the showing made by the moving party. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960); Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979).

The burden of proof on a motion for change of venue is upon the party seeking the change. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

The substance, not the form, of the action must control in determining a motion for change of venue. Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

Right to change of venue depends on conditions existing at the time of demand, and must be determined by conditions at the time the party claiming the right first appears in the action. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Absent most unusual circumstances, choice of forum of resident plaintiff will not be disturbed. Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Venue of joined claim should not be changed. Where the venue of one claim for relief is properly laid in the county in which it is brought, a court should not, except under extraordinary circumstances, change the venue of another claim properly joined with the first claim. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Statute on place where trial must be brought is consistent with right of change. There is nothing in the statutory provisions concerning eminent domain proceedings inconsistent with the right of change of venue. The action must be brought in the county of the plaintiff municipality, but bringing an action and trying it are two different things. The statute as to place of trial means what it says, and its provisions are not jurisdictional. An action may be brought in a county where, if objection were made, it could not be tried. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925).

The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Bringing an action in improper county is not a jurisdictional or fatal defect. If it were so regarded, a plea in abatement or to the jurisdiction of the court would be the proper remedy. Instead of this, this section expressly provides for a change of the place of trial. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

The jurisdiction of courts of record is coextensive with the state, and where an action is brought in a county other than that in which it should be tried, the defendant's only remedy, if he objects to the venue, lies in an application to remove the case to the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

If an action for injunction under section (d) of this rule is commenced in another county from where it may be tried, it is not a jurisdictional or fatal defect. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

The fact that an action is brought in a county other than the one in which the real property is situate does not affect the jurisdiction of the court to hear and determine the case unless the defendant moved to change the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

The right is a mere personal privilege. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892); Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893); Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906); Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

The provision in section (c) that an action on a promissory note may be tried in the county where the same is made payable does not give a defendant sued elsewhere an absolute right to a change of venue, but, at best, only a privilege that may be waived. Reed v. First Nat'l Bank, 23 Colo. 380, 48 P. 507 (1897).

The right may be waived. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892); Reed v. First Nat'l Bank, 23 Colo. 380, 48 P. 507 (1897); Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898); People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906); Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Privilege waived by failure to appear. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Waiver through failure to apply for a change of venue to proper county. Forbes v. Bd. of County Comm'rs, 23 Colo. 344, 47 P. 388 (1896).

The defendant entered a general appearance, indicating no intention whatever to exercise his right to have the place of trial changed, taking no steps to bring that matter to the attention of the court until 80 days thereafter, indicating submission of the case in all its phases to the court in which the action was brought. Hence, the defendant waived his right to a change of the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

If the right to a change of venue is waived, it is not error for the trial court to refuse to change the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

Right is not waived by answer and trial. Where a motion for change of venue filed by a defendant is denied, he may thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said

motion, or the right, if any, to a change of venue. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Erroneous denial of motion may require reversal of judgment. The party who resists a motion for change of venue, to which his opponent is clearly entitled as a matter of right, does so at his peril. If the motion erroneously is denied and the moving party suffers adverse judgment, a reversal of the judgment with direction to change the venue would certainly follow. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952); Denver & Rio Grande W. R. R. v. District Court, 141 Colo. 208, 347 P.2d 495 (1959).

Error in granting change of venue may be waived. Where plaintiffs, without objection, went to trial, they invested the court with full jurisdiction to proceed therein, waived the error in granting the change of venue, and cannot now be heard to urge that objection. Raymond v. Harrison, 27 Colo. App. 484, 150 P. 727 (1915).

Where a judge in vacation of his own motion ordered a cause transferred to the district court of another county, and the court to which the transfer was made had jurisdiction of the subject matter, and when the cause was called for trial the plaintiff appeared and consented to proceed with the trial, he waived objection to the order of the court transferring the case. Cheney v. Crandell, 28 Colo. 383, 65 P. 56 (1901).

A district court is without jurisdiction to transfer a cause involving a receivership while the case is pending in the supreme court. George Sparling Coal Co. v. Colo. Pulp & Paper Co., 88 Colo. 523, 299 P. 41 (1931).

Applied in Britto v. District Court, 176 Colo. 197, 489 P.2d 1304 (1971).

B. Sufficiency of Pleading.

A change of venue is not required under this section where no compelling reason has been shown to interfere with the discretion of the trial judge. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Affidavits in support of motions for change of venue should state facts. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Application should negate every favorable hypothesis. An application to change the trial of a cause from one county to another should negate every hypothesis in favor of the county in which the action was commenced. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

Motion must negate allegation that contract was to be performed where action was brought. Where a complaint alleges that the contract upon which recovery is sought was to be performed in the county in which the action is brought, a motion to change the place of trial on the ground that defendant resides in another county and was served with summons there, and which fails to negate the allegation of the complaint that the contract was to be performed in the county where the action is brought is insufficient and is properly denied. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); E. F. Gobatti Eng'r & Machinery Corp. v. Oliver Well Works, Inc., 111 Colo. 193, 139 P.2d 269 (1943).

In an action for the price of apples alleged to have been sold and delivered in the county in which the action was brought, an application for change of place of trial on the ground of the residence of defendant in another county, which fails to negate the allegation that the apples were sold and delivered in the county in which suit was brought was insufficient and was properly denied. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

Where plaintiff met the defendant's affidavit in support of a motion to change venue to county of defendant's residence with an affidavit alleging that the note was by its terms payable in the county where the action was brought, which is a proper county under section (c), and these statements were not controverted, the application to change the place of trial to the county of defendant's residence was properly denied. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Or that all defendants reside in county where action is brought. In an action against two defendants, an application to change the venue to another county on the ground that one of the defendants resides in the county to which the change is sought is insufficient unless it also negates the residence of the other defendant in the county in which the action is brought. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

To sustain a motion for change of place of trial for actions brought under section (c) of this rule, it must appear that no defendants reside where the suit is brought, where the motion is made on the ground that some of the defendants reside in another county. People ex rel. Tripp v. Fremont County Court, 72 Colo. 395, 211 P. 102 (1922).

It need not negate all exceptions in section (c). Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negate all the exceptions provided in section (c) whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

Application consistent with assumed jurisdiction fails. Application for change will be

denied if the supposition of the jurisdiction of the court in which an action is brought is consistent with the statements made in the application. People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921).

In an action against two defendants, an application to change the place of trial which alleged that one of the defendants resided in the county to which the change was sought, and that the other defendant was not within the state, was insufficient, as an allegation that one of the defendants was not within the state at the time the application was made did not negate the fact of his residence in the county in which the action was brought, but was entirely consistent with such residence. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

There was no error in denying a motion for change of venue on the ground that all proper defendants were nonresidents of the county, where from the allegations of the complaint it appeared that the one defendant who resided in the county where the action was commenced was alleged to be a party to the contract and was therefore a proper party to the suit. Newland v. Frost, 83 Colo. 207, 263 P. 715 (1928).

C. When County Is Improper.

Right to change place of trial is controlled by this section. The right to change the place of trial of an action against a county is controlled by this section, which necessarily requires the change of the place of trial to the county designated as the place of trial by statute. Forbes v. Bd. of County Comm'rs, 23 Colo. 344, 47 P. 388 (1896).

Venue in improper county will be changed on motion. Where the action is not brought in the proper county, the venue will be changed to the county where the cause is triable on application of the defendant. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

When an action is brought in a county other than that in which it should be tried, the defendant may avail himself of his right to change the venue to the proper county. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

Upon sufficient application, the duty to change venue is mandatory. While the action may be brought in any county, at the election of the plaintiff, upon sufficient application by the defendant, made within the proper time, to change the place of trial of the cause on the ground that the county designated in the complaint is not the proper county, the duty of making the change becomes mandatory upon the court. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Upon a proper showing that an action has been brought in a county other than that in which it should be tried, the duty of the court to grant the change is mandatory. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

The right of a defendant to a change of place of trial upon the ground of residence is one which, when the showing is in compliance with the rules, the court to which it is addressed must grant without discretion, unless it has been waived. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

Where it is clear from the face of the pleading that the substance of an action is that of an action affecting not only a substantial part of the property which finally became the subject of the action, but all of the property, and that that property was located in a certain county, it is mandatory upon the trial court to grant the motion for change of venue as provided in this rule. Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953).

A proper application for a change of venue from an improper county, timely made, leaves the trial court no alternative but to grant such application. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

The court's jurisdiction is divested except for the purpose of making the order of removal to the proper county. Denver & New Orleans Constr. Co. v. Stout, 8 Colo. 61, 5 P. 627 (1884); Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899); Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906); Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909); People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921); Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

When a party requests a change of venue upon a ground which entitles it to the change as a matter of right, the trial court loses all jurisdiction except to order the change. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

If an action involving real estate is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892).

Where an application for a change of place of trial is made by a defendant based upon a ground which entitles him to the change as a matter of right, the court is ousted of jurisdic-

tion to proceed further with the cause other than to enter the order of removal. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

When an application, sufficient in form, uncontradicted, and supported by allegations in the plaintiff's complaint itself, is made for a change of place of trial, the court has jurisdiction of the cause only for purpose of removal to the proper county. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

The court's retention of the case after motion for change constitutes reversible error. Byram v. Piggot, 38 Colo. 70, 89 P. 809 (1906).

All subsequent proceedings therein are void. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899); Woodworth v. Henderson, 28 Colo. 381, 65 P. 25 (1901); Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Further proceedings in a trial court after an erroneous denial of a proper motion for change of venue are a nullity and void. Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the resubmission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893).

Prohibition lies to prevent court from proceeding further. Where a defendant in a divorce suit made application for a change of place of trial to the county of his residence under circumstances which entitled him to the change as a matter of right, and the application was denied, the supreme court will issue a writ of prohibition to prevent the court denying the change from proceeding further in the cause and directing that all proceedings had in excess of jurisdiction be quashed and that an order be entered removing the cause to the proper county, notwithstanding the fact that the erroneous action of the court in denying the change of venue was reviewable on appeal or writ of error. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

In an action in one county by a firm of architects against a school district of a second county for services rendered in the building of a school house, the contract not specifying the place of performance or payment, a motion for a change of venue having been denied by the district court, prohibition was granted. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919).

In an action on contract where no place of performance is specified, it appearing that defendant was entitled to have the case tried in the county of his residence, prohibition is allowed against trial in another county. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923).

Where the venue is proper in either of two counties, then a change of venue cannot properly be granted from either unless some other provision requiring the change arises. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Where an action on an accident insurance policy might be commenced under section (c) either in the county of the defendant's residence, when service is had there, or in the county where the contract was to be performed, either county was the proper one, and from neither can a change of venue be properly granted. Progressive Mut. Ins. Co. v. Mihoover, 87 Colo. 64, 284 P. 1025 (1930).

In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Carlson v. Rensink, 65 Colo. 11, 173 P. 542 (1918).

The provision in section (c) that suit may be brought on a contract where it is to be performed does not give the defendant, if served with summons elsewhere, an absolute right to a change of venue to the county in which it is to be performed; for, notwithstanding this provision, an action on such contract may be tried in the county in which the defendant resides at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county. Bales v. Cannon, 42 Colo. 275, 94 P. 21 (1908).

Although proper for the plaintiff to bring the action in the county of defendant's residence, he was not obliged to do so. He had a right to bring it in the county where the contract was to be performed under section (c) of this rule, and having done so, there was no error in denying the motion for a change of venue. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

Under section (c) of this rule, in an action for the price of goods sold, it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of venue, in such case, solely upon the ground that such county is not the proper county, should be denied. Raymond v. Harrison, 27 Colo. App. 484, 150 P. 727 (1915).

Where the plaintiffs claimed under a decree adjudicating water rights first entered in one county, and the defendants under a decree entered in a second county, the subject matter of

the action was situated in both counties, both counties were proper for venue under section (a) of this rule, and the defendant's petition for change of the place of trial was properly denied. Field v. Kincaid, 67 Colo. 20, 184 P. 832 (1919).

Refusal to order change was error. Where an action involving the title to real estate was brought in a different county from the one in which the land was located, it was reversible error to refuse to change the place of trial to the county where the land was located, upon motion seasonably made by defendant. Campbell v. Equitable Sec. Co., 12 Colo. App. 544, 56 P. 88 (1899).

When a defendant files a motion for a change of venue on the grounds that neither the plaintiff nor the Colorado defendants reside in the county in which the action was filed and that the tort underlying the action did not occur there, it was error not to grant the defendant's motion. Denver Air Center v. District Court, 839 P.2d 1182 (Colo. 1992).

Proper to refuse change of venue. In an action by a lessee of a mine against his lessors for damage for an alleged conversion of machinery and appliances placed by the lessee for the purpose of working the mine, where the complaint charged the wrongful conversion by defendants of personal property belonging to plaintiff, the venue will not be changed to the county in which the mine is located on the ground that it involved an interest in real estate, since if it should be determined that the subject matter of the action is real estate, no recovery could be had under the complaint. Updegraff v. Lesem, 15 Colo. App. 297, 62 P. 342 (1900).

D. When Convenience and Justice Are Promoted.

Section (f)(2) is directed to a change of venue which contemplates that venue is properly placed in the court in which the motion is filed. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

Change for convenience or justice is discretionary. A motion to change the place of trial, on grounds of convenience or justice, is addressed to the sound discretion of the court. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

A motion to change venue based on the convenience of the parties lies in the sound discretion of the trial court. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

A motion for change of venue on the ground of convenience of witnesses is addressed to the sound discretion of the trial court, whose decision will be accepted as final on review unless an abuse of discretion is apparent. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977); Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979); In re Agner, 659 P.2d 53 (Colo. App. 1982); Weston v. Mincomp Corp., 698 P.2d 274 (Colo. App. 1985).

An application for a change of venue in a will contest, for the convenience of witnesses, is within the discretion of the trial court. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

A motion for change of venue for the convenience of the witnesses in a divorce proceeding is addressed to the sound discretion of the trial court. Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974).

Burden of proof on motion to change venue for convenience. While the movant, under section (f), must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue, the party opposing the change must at least balance the showing made by the moving party; otherwise, the motion should be granted. State Dept. of Highways, v. District Court, 635 P.2d 889 (Colo. 1981).

The decision of the court on the question will be accepted upon review as final. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931); Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Unless an abuse of discretion is apparent. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931); Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

The determination of the trial court will not be disturbed if no abuse of the discretion appears. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

It is unlike the cases where the ground alleged is one of absolute right. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

The filing of this motion does not deprive the court of jurisdiction except to order the change. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Section (f)(2) requires showing of identity, testimony, and accommodation. When a motion for a change of venue is made under section (f)(2), the movant must show, through affi-

davit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue. Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979); Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

The court must of necessity rely largely on the good faith of the affidavits or other evidence of what the testimony at the trial will be. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Application properly denied. There was no abuse of discretion or error in denying the application for a change of venue demanded upon the ground of the convenience of witnesses where it appeared from the affidavits filed that the expense and inconvenience to plaintiff occasioned by the change and consequent delay would have been great, and where it appeared also that no sufficient excuse was given for not interposing the motion at an earlier moment. Bean v. Gregg, 7 Colo. 499, 4 P. 903 (1884).

The allegation that the convenience of witnesses, and the ends of justice, would be subserved by the change of venue was not supported where the defendant in his affidavit named 11 witnesses who were stated to be able to prove that the plaintiff fairly lost the race and wager on which he put up the money in the complaint mentioned, which matter was not and could not become an issue in the case, and evidence of it, if offered, would not have been admissible. Corson v. Neatheny, 9 Colo. 212, 11 P. 82 (1886).

Retention of court file by original court. In a case in which the change of venue is discretionary with the original court, the original court should retain the court file for ten days to allow for reconsideration of the order changing venue, before forwarding the file to the receiving court. After ten days, the original court loses jurisdiction to reconsider its order changing venue. Therefore, a motion for the original court to reconsider or vacate its initial discretionary order must be filed during the ten days before the original court forwards the case file to the receiving court. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

The existence of prejudice justifying a change of venue is a question of fact within the discretion of the trial court. The movant bears the burden of establishing such prejudice by affidavit or evidence. Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Although all parties did not stipulate to the change of venue, the facts stipulated to by a majority of the defendants provided sufficient good cause for change. Moreover, defendants did not allege prejudice to their substantial rights, so procedural flaws, if any, would constitute harmless error. Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

VIII. CHANGE FROM COUNTY.

Annotator's note. Since section (g) of this rule, is similar to §§ 31 through 33 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Where a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

If a community is prejudiced against a citizen, or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

The burden of establishing that undue prejudice in the community exists is on the party seeking the change. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Whether community prejudice against a party exists is a question of fact that may be developed at "voir dire". Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Feeling of inhabitants immaterial where trial is by court. The fact that the issues between defendants and the landowners are of such magnitude that strong local feeling and bitter prejudices will be engendered is of no consequence, the cause being a chancery cause, triable to the court. If the trial judge should imbibe any of the local feeling, a change of venue could be granted, or the judge of another district called in. People ex rel. Walpert v. Rogers, 12 Colo. 278, 20 P. 702 (1888).

Petition should set out facts. In a petition for change of venue, in respect to the prejudice of inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. De Walt v. Hartzell, 7 Colo. 601, 4 P. 1201 (1884).

Denial of motion was not abuse of discretion. Where an application for a change of venue on the ground of prejudice of the inhabitants of the county was supported by the affidavits of the applicant and six residents of the county, and counter affidavits were filed by 10 citizens of the county who stated that they had never heard of the controversy between the parties and denied that the inhabitants of the county were prejudiced, it was not an abuse of discretion of the trial court to deny the application. Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902).

Denial of motion for change of venue on the ground of prejudice of the inhabitants was not prejudical error. Western Wood Prods. v. Tittle, 79 Colo. 473, 246 P. 791 (1926).

This rule presupposes that the action is pending in the county where venue for trial is properly laid. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977).

It is for the trial court to consider the facts and grant or deny the motion for change of venue. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Where a motion for change of venue is not supported by an affidavit as required, it is properly denied as not complying with this rule. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Section is mandatory only when party brings case within provisions. This section providing for a change of venue where the inhabitants of the county wherein the action is pending are prejudiced against the applicant is only mandatory upon the court where the party applying has brought himself within its provisions. Roberts v. People, 9 Colo. 458, 13 P. 630 (1886).

This is true although no counter affidavits are filed. Daugherty v. People, 78 Colo. 43, 239 P. 14 (1925).

Motion directed to discretion of court. The granting or refusing a motion for change of venue on the ground of prejudice of the inhabitants is within the sound discretion of the trial court. Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902); Fitzhugh v. Nicholas, 20 Colo. App. 234, 77 P. 1092 (1904); Nordloh v. Packard, 45 Colo. 515, 101 P. 787 (1909).

Ruling is reviewable for manifest abuse of discretion. Unless there is a manifest abuse of such discretionary power, the action of the trial court in refusing such application is not reviewable. Power v. People, 17 Colo. 178, 28 P. 1121 (1892); Michael v. Mills, 22 Colo. 439, 45 P. 429 (1896); Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902); Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Matters not per se contemptuous may be set forth in a petition for a change of venue without subjecting the petitioner to punishment for contempt. Mullin v. People, 15 Colo. 437, 24 P. 880 (1890).

IX. TRANSFERS WHERE CONCURRENT JURISDICTION.

Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all defects in the jurisdiction of the county court are waived. Brown's Estate v. Stair, 25 Colo. App. 140, 136 P. 1003 (1913).

Transferor court can still accept notices and filings. Since after the change of venue order in the case of filing of an answer or of a notice to dismiss the power of the court to act is not invoked, the clerk of the transferor court can accept notices and filings. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

X. PLACE CHANGED IF ALL PARTIES AGREE.

A subsequent intervenor must abide with a change of venue agreed upon by original parties to an action. North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

Location of default hearing proper. An action filed in the county having proper venue, where the defendant was in default, could be heard in an adjoining county for the convenience of the court and of counsel under the provisions of section (i), and the default judgment entered subsequent to this hearing was neither irregular, erroneous, nor void. Orebaugh v. Diskocil, 145 Colo. 484, 359 P.2d 671 (1961).

XI. PARTIES MUST AGREE ON CHANGE.

Consent is not a mere acquiescence; it is not a vacant or neutral attitude, it is affirmative in its nature. Kirchhof v. Sheets, 118 Colo. 244, 194 P.2d 320 (1948).

Statement that venue is immaterial does not constitute consent to change. A motion for change of venue is properly overruled when made by one defendant, when another defendant states that venue is immaterial, since this statement does not constitute consent to the codefendant's motion. Kirchhof v. Sheets, 118 Colo. 244, 194 P.2d 320 (1948).

Action by two of five defendants in filing answers to the complaint clearly demonstrated their acquiescence in the choice of venue by petitioner and such action foreclosed any favorable consideration of the request by the remaining defendants for a change of venue. Howard v. District Court, 678 P.2d 1020 (Colo. 1984).

XII. ONLY ONE CHANGE; NO WAIVER.

This section has no application in an action for divorce. People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943).

Change based on error of court does not violate section. There was no violation of sec-

tion (k) of this rule, which allows only one change of venue on a particular ground, where further change of venue was ordered based on error of court. Liber v. Flor, 160 Colo. 7, 415 P.2d 332 (1966).

What is considered "apt time" must be determined by the circumstances of each particular case in which the question arises. It would be impossible to formulate a rule which would serve as a guide in all cases. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

Application for the change of the venue was not in apt time. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

Rule 99. No Rule

CHAPTER 12

Elections

ANALYSIS BY RULE

CHAPTER 12

ELECTIONS

Rule 100. Contested Elections

(a) Statement of Contest; Where Filed. Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme court justice, court of appeals judge, district, or county judge, shall within 35 days after the canvass of the secretary of state, in case of a presidential elector, supreme court justice, court of appeals judge, or district judge, file in the office of the secretary of state a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the proper county within 35 days after the canvass by the county board of canvassers, which statement shall set forth: (1) The name of the contestor; (2) the name of the contestee; (3) the office; (4) the time of the election; (5) the particular cause of contest. The statement shall be verified by the affidavit of the contesting party.

(b) Trial. The contestor, or some one in behalf of the person for whose benefit the contest is made, shall, within 35 days after the filing of the statement of contest, file a complaint in the office of the clerk of the supreme court, if the contest relates to a presidential elector or supreme court justice, or in the office of the clerk of the court of appeals, if the contest relates to a court of appeals judge, or in the office of the clerk of the district court in the proper county, if the contest relates to a district or county judge. Upon the filing of such complaint the clerk shall issue summons. When the case is at issue, the court shall hear and determine the same in a summary manner, without the intervention of a jury.

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

Editor's note: Judges of courts of record, except Denver county judges, are appointed to office pursuant to section 20 of article VI and are elected pursuant to section 25 of article VI of the state constitution.

Cross references: For election contests, see part 2 of article 11 of title 1, C.R.S.; for canvassing of votes, see article 10 of title 1, C.R.S.

ANNOTATION

Annotator's note. Since section (b) of this rule supplanted rule 87 of the former Supreme Court Rules, cases construing that rule have been included in the annotations to this rule.

Election contests, for whatever office, necessarily are and must be summary. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The method of procedure to be followed depends upon the office sought to be contested. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The sufficiency of a complaint may be questioned by motion. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The incorporation of the notice of contest in contestor's petition, without further allegation of facts, does not constitute a statement of the grounds of contest as required by this rule and by logical pleading. Sparks v. Eldred, 78 Colo. 55, 239 P. 730 (1925).

CHAPTER 13

Seizure of Person or Property

ANALYSIS BY RULE

CHAPTER 13

SEIZURE OF PERSON OR PROPERTY

Rule 101. Arrest and Exemplary Damages

Repealed May 29, 1986, effective January 1, 1987.

Rule 102. Attachments

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for tort committed against the person or property of a resident of this state, or at any time after the filing but before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an *ex parte* order of court in the manner and on the grounds prescribed in this Rule, unless the defendant shall give good and sufficient security as required by section (f) of this Rule. No *ex parte* attachments before judgment shall be permitted other than those specified in this Rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), his agent or attorney, or some credible person for him shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed against the person or property of a resident of this state, stating the nature and amount of such indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this Rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him.

(4) The defendant is presently about to remove his property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process or execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having his property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the plaintiff shall furnish a bond that complies with the requirements of C.R.C.P. 121, § 1-23, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of his right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 21 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ to be executed on such day.

(k) No Final Judgment Until 35 Days After Levy.

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 35 days after such levy has been made; and any creditor of the defendant making and filing within said

35-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim, as the law gives to the original plaintiff.

(2) **Judgment Creditors.** Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 35 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking or complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) Traverse of Affidavit. (1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained, otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within 7 days from the filing of the traverse and upon no less than two business days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and reasonable attorney's fees. A claim for damages under this subsection may be brought as part of the existing action, and the defendant shall be permitted to amend his answer and any counterclaim for this purpose.

(o) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(p) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property.

(q) Perishable Property May Be Sold. Where property taken by writ of execution or attachment, or seized under order of court, is in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may

apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court.

(r) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(s) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

(t) Procedure When Judgment is For Defendant. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(u) Defendant May Release Property; Bond. The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided in section (v) of this Rule. All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(v) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held by him under any writ of attachment without taking a sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby.

(w) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued, for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(x) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 21 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(y) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

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

Cross references: For exemption of certain properties and funds from attachment, see § 8-42-124 (workers' compensation insurance), § 10-7-205 (group life insurance policies), § 10-14-503 (benefits from fraternal benefit societies), § 13-54-102 (miscellaneous property), § 13-54-104 (wages), §§ 31-30.5-208 and 31-31-203 (police officers' and firefighters' pension plans), § 38-22-106 (certain liens), and § 38-41-201 (homesteads), C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Seizure of Person or Property: Rules 101-104'', see 23 Rocky Mt. L. Rev. 603 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Property'', see 40 Den. L. Ctr. J. 181 (1963). For article, ''Federal Practice and Procedure'', see 57 Den. L.J. 263 (1980).

Constitutionality. Attachment procedure specified in this rule comports with the requirements of the due process clause of the fourteenth amendment. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

1975 modified rule not retroactive. In view of the substantial modifications made to this rule by its repeal and reenactment and in view of the fact that the supreme court has not indicated otherwise, the new rule has no retroactive effect. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

But the supreme court neither approved nor disapproved of this holding and, therefore, the holding of the court of appeals has no precedential effect. Inwood Indus., Inc. v. Priestley, 191 Colo. 543, 560 P.2d 822 (1976).

Remedy of attachment was unknown at common law and existed only by reason of statute or rules of procedure enacted pursuant to statutory authority. Rocky Mt. Oil Co. v. Central Nat'l Bank, 29 Colo. 129, 67 P. 153 (1901); Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

It is in derogation of the common law and must be strictly followed. Any failure to conform to prescribed procedures, all being necessary and mandatory, is fatal and the writ is of no validity. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913); Jayne v. Peck, 155 Colo. 513, 395 P.2d 603 (1964); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

It is a special remedy at law, except in some states where it is authorized in chancery. Dygert v. Clem, 26 Colo. App. 286, 143 P. 823 (1914).

This rule controls as there is no statute empowering attachment in Colorado. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

Foreign corporation was found to be a "resident" of this state for purposes of section (a) where it was authorized to, and did, conduct business in this state and had three offices here. Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

"Residence", as distinguished from "citizenship", "domicile", and "legal residence" of a corporation, discussed in Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

Insurer's obligation to defend and indemnify a nonresident insured defendant is nonexempt property subject to attachment for the purposes of establishing quasi in rem jurisdiction. Baker v. Young, 798 P.2d 889 (Colo. 1990).

Personal liability cannot be imposed upon defendant's insured through a quasi in rem action against the insurance policy. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Plaintiff did not sustain his burden of proof that defendant intended to hinder him from collecting on a judgment, when defendant demonstrated he had sufficient funds to pay a judgment excluding proceeds from the pending sale. Haney v. Castle Meadows, Inc., 816 F. Supp. 655 (D. Colo. 1993).

Applied in In re Harms, 7 B.R. 398 (Bankr. D. Colo. 1980); In re Tarletz, 27 B.R. 787 (Bankr. D. Colo. 1983); Crow-Watson Props., Inc. v. Carrier, 719 P.2d 365 (Colo. App. 1986).

II. AFFIDAVIT.

The 1975 revised rule requires that the affidavit set forth specific facts supporting the

grounds of attachment. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

A sufficient affidavit is a jurisdictional requirement and a court has no authority to issue a writ of attachment without it. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896); Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927); Markle v. Dearmin, 117 Colo. 45, 184 P.2d 495 (1947).

The affidavit must state the grounds for attachment positively. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1923).

An affidavit for attachment which alleges that the defendant is indebted for ''goods, wares, and merchandise sold by the plaintiff to the defendant'', states the nature of the action sufficiently. Plummer v. Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 P. 294 (1896).

But an affidavit stating that ''the debt is for farm products, house rent, household furniture'', and other necessaries for the debtor and his family does not state grounds for attachment under this rule. Markle v. Dearmin, 117 Colo. 45, 184 P.2d 495 (1947).

This requirement is not satisfied by allegations on information and belief merely. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1924).

An affidavit which fails to state definitely the nature of the demand is defective. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

But not so defective as to render the proceeding absolutely void because of section (q) (now section (o)) of this rule permitting amendment. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

Affidavit must contain an allegation of indebtedness and also one or more grounds of attachment. It is indispensable that the affidavit for attachment contain an allegation of indebtedness from the defendant, and also some one or more of the grounds upon which the statute authorizes an attachment. If either allegation is absent from the affidavit, there is no power to issue the writ. Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927); Gibson v. Gagnon, 82 Colo. 108, 257 P. 348 (1927).

It cannot be attacked by a third person in a collateral proceeding. Where the affidavit is not attacked by the defendant in the attachment proceedings, nor does the record disclose that he contemplated interposing any defense whatever to the proceedings, the affidavit cannot be attacked by a third party in a collateral proceeding but must be raised between the parties to the suit. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

Nor can it be attacked for the first time in an appellate court. Rice v. Hauptman, 2 Colo. App. 565, 31 P. 862 (1892).

The burden is upon plaintiff to prove by a preponderance of the evidence the allegations in the affidavit. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

The affidavit stands as a pleading, not alone in cases commenced originally by attachment, but where sued out in aid of an action the affidavit answers to the complaint in that proceeding, and hence is so far a pleading that it is properly brought up by the record without being included in the statement required by the code. Goss v. Bd. of Comm'rs, 4 Colo. 468 (1878).

A material allegation in an allegation must be taken to be true unless denied. Wehle v. Kerbs, 6 Colo. 167 (1882).

III. CAUSES.

A. In General.

The words, "in an action", used in this section are not used to denote an action pending, but rather as introductory to the words describing the kind of action, to wit, ''an action on contract, express or implied'', in which the plaintiff may have the property of the defendant attached. So the words, ''at the time of issuing the summons'', in this section, meant precisely what they said as to the time when the writ of attachment might issue. When we consider that the chief utility of an attachment consists in the writ being served in time to prevent a delinquent debtor from placing his property beyond the reach of the creditor, it would be unfortunate, indeed, if the writ could not issue until the debtor should have notice of the proceedings by the service of the summons. Schuster v. Rader, 13 Colo. 329, 22 P. 505 (1889).

Whether one seeks restitution or damages does not change the underlying basis for his action, whether contract or tort. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

This rule refers only to those contracts existing within the intention of the parties making them. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

The phrase "implied contract" within the meaning of this rule is not inclusive of contracts implied in law. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

When the cause of attachment is that the action is for the price of value of an article or thing sold and delivered, which, according to the contract of sale, was to be paid for on delivery, there must be a concurrence of three facts in addition to that of indebtedness: (1) The thing must have been delivered, (2) there must have been no credit given, and (3) the contract to pay on delivery must be unconditional. If there has been a credit of ever so short a time

beyond the delivery, or if the payment depends upon any condition whatever, as a demand, the contract does not come within the operation of the statute. Miller v. Godfrey & Co., 1 Colo. App. 177, 27 P. 1016 (1891).

An attaching creditor does not occupy the status of a bona fide purchaser for value, and attachment can only operate upon the right and title of a debtor existing at the time of the levy. Nisbet v. Federal Title & Trust Co., 229 F. 644 (8th Cir.), cert. denied, 241 U.S. 669, 36 S. Ct. 553, 60 L. Ed. 1229 (1916).

Private right of action arising under section 10(b) of the Securities Exchange Act of 1934 cannot be characterized as one ''on contract''. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

B. Grounds.

Grounds for attachment changed. The grounds for attachment under the former rule, namely, that defendant refused to pay the value of goods upon delivery, has been eliminated from the revised rule. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

Action by resident defendant will not sustain attachment before judgment. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

Temporary absence from state. A finding of the trial court that a defendant in an attachment suit was a resident of the state so as to defeat an attachment based on the ground of nonresidence is supported by evidence which shows that defendant had been a resident of the state for a number of years, that he had gone out of the state and was absent from the state when the attachment was sued out, and where defendant and his wife testified that he had only temporarily left the state to accept a three-months job of work, leaving his household goods in the state. Newlon-Hart Grocer Co. v. Peet, 18 Colo. App. 147, 70 P. 446 (1902).

Intent may be proved by circumstances as well as by direct evidence. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

The question of intent is for the jury to determine. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

Where intent is doubtful, it is proper to receive testimony of person making the conveyance. Where the fraudulent intent is not a conclusive legal presumption from the facts, the party who made the conveyance is a competent witness as to what his purpose actually was. If, from the evidence, the intent is doubtful, as he is the only person who could know with certainty, what, in fact, it was, it is proper to interrogate him in relation to it, and a refusal to permit him to answer the question would be error. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

Testimony not proper where the intent appears upon the face of the transaction. Where the intent of the party appears upon the face of the transaction, or where the undisputed facts are irreconcilable with a lawful purpose, his testimony as to what his motives really were would be without effect and should not be received. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

Fraudulent intent should not be equated with secretive actions for purposes of section (c). Chaffin, Inc. v. Wallain, 689 P.2d 684 (Colo. App. 1984).

The giving of a mortgage was not sufficient of itself to prove an intent on the part of the defendants to hinder or delay the plaintiff in the collection of its debt. Such intent must be apparent from all the facts and circumstances in evidence before an attachment can be sustained on the ground alleged. If a mortgage is given with such intent, the property of the mortgagor is subject to attachment, even though the mortgagor had no purpose eventually to defeat the creditor in the collection of his demand, and even though the debt secured by the mortgage is a valid and subsisting liability. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

Where the transaction results in the hindering or delaying of creditors, it is for the court to say whether it was fraudulent or not. When a party has intentionally executed an assignment or conveyance of his property, which must hinder or defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not necessarily becomes a question of law, and not of fact. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

It is not necessary to show that transfer was made with a dishonest motive. To justify an attachment on the ground that the debtor has transferred his property so as to hinder or delay his creditors, it is not necessary to show that the transfer was made with a dishonest motive or with a purpose to cheat creditors and deprive them of the power ever to realize on their claims. If a debtor assigns or transfers his property for the purpose of hindering or delaying his creditors in the collection of their claims, his act is fradulent within the meaning of the law and will justify an attachment although he may intend that eventually the proceeds of the property shall be applied to the payment of their claims, and honestly believes that by preventing them from sacrificing his property they will ultimately realize more money. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900); Kalberer v. Wilmore, 65 Colo. 411, 177 P. 147 (1918).

An honest transfer of property by a husband to his wife in satisfaction of a prior obligation cannot be made on the basis of a proceeding in attachment. City of Loveland v. Kearney, 14 Colo. App. 463, 60 P. 584 (1900).

Attachment lies for goods or money embezzled or stolen, or obtained by other species of frauds. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

The wrongful conversion of funds by an officer constitutes fraudulently contracting an obligation which will sustain an attachment. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

Misappropriation by an agent of a principal's money in a fraudulent way results in a breach of duty subjecting the agent to an action either ex delicto or assumpsit. In such a case the party injured may elect to sue upon the implied contract and waive the action ex delicto. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

IV. THE WRIT.

A. In General.

The 1975 revised rule would invalidate the writ obtained by plaintiff because it was issued by the clerk of the district court and not by the court itself, and because the writ failed to advise defendant of his right to traverse. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

A failure to pursue the requirements of the rule is almost universally held fatal to a levy. Graham v. Reno, 5 Colo. App. 330, 38 P. 835 (1894).

Where lien is preserved and continued in force. Where a writ of attachment was levied on real estate of a debtor and judgment entered without service of either the attachment writ or summons, but afterwards, on discovering the error, the judgment was set aside and a new judgment entered, after personal service of an alias summons and of a copy of the attachment writ, the lien acquired at the commencement of the action by the levy of the writ was preserved and continued in force. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

Defendants who obtained a favorable verdict in a tort case but did not assert a counterclaim may not use a writ under section (a) to attach the property of plaintiffs to recover their statutory costs. Section (a) authorizes a court to issue a writ of attachment only for the party bringing the claim, which would be a plaintiff or a defendant who has asserted a counterclaim. Hiner v. Johnson, 2012 COA 164, 310 P.3d 226.

Trial court properly discharged defendants' writ of attachment as it was improperly issued because: (1) Although section (a) uses the term ''any party'', it qualifies the term by limiting it to the party filing a claim ''in an action on contract . . . or an action to recover damages for tort''; (2) defendants failed to assert a counterclaim; and, (3) without a basis for the court to issue a writ of attachment, the writ of attachment was improperly issued; therefore, the trial court properly discharged the writ under section (w). Hiner v. Johnson, 2012 COA 164, 310 P.3d 226.

Plaintiffs not entitled to damages, attorney fees, and costs under the rule because sections (d) and (n)(2) do not authorize courts to make such awards to plaintiffs unless defendants have asserted a counterclaim. Section (d) only provides the basis for a defendant to recover costs and damages if the defendant recovers judgment or the court determines that the plaintiff was not entitled to the writ of attachment. Section (n)(2) only provides a basis for a defendant to recover damages if the plaintiff does not prevail at the hearing on a traverse of an affidavit accompanying a writ of attachment. Neither section of the rule includes a reciprocal statement that plaintiffs, in cases in which defendants do not assert a counterclaim, are entitled to damages. Hiner v. Johnson, 2012 COA 164, 310 P.3d 226.

B. Service.

Where possible personal service must be made before the court acquires jurisdiction. The mere levy of an attachment does not give the court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same. Where a defendant resides in this state, and there is no question but that he can be personally served, the service is complete when a copy of the writ is served upon him, and the property levied upon. Then, and not until then, does the court acquire jurisdiction to finally hear and determine the same. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Where there was no personal service on the defendant, the mere levy of an attachment did not give the court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same. Great W. Mining Co. v. Woodmas of Alston Mining Co., 12 Colo. 46, 20 P. 771 (1888).

Service by publication is permissible under section (g), which incorporates applicable rules for service of process. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Jurisdiction of persons acquired by service of process or by appearance and of the property by attachment. If, when property is attached, there is no service of summons upon the defendant and no appearance by him to the

action, the proceeding is purely in rem. The jurisdiction of the court is confined to the property attached, and, if the attachment fails, there is nothing for the court to adjudicate. It can render no judgment of any kind. If the defendant is served with summons, or appears to the action, the proceeding is both in personam and in rem. The court has jurisdiction of the person by virtue of service of its process, or of appearance; and of the property by virtue of the attachment. But the court acquired no jurisdiction of the property merely by virtue of its jurisdiction of the person. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896).

Service of writ is required to enable the debtor to deposit the money sued for and prevent the lien. The service of the attachment writ is required for the purpose of enabling the debtor to deposit the money sued for, and thus prevent the lien from taking effect; or, if the lien already exists, thus to secure its dissolution; and also to enable him, in case he shall see fit so to do, to traverse and put in issue the matters stated in the affidavit of attachment. In a majority of cases, the levy of the writ will either precede or be made simultaneously with the service thereof. In some cases, the officer may serve the writ before he makes the levy, and in such cases the section provides that, if the amount of the claim be deposited, the levy shall not be made. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

The lien does not become effective until the writ is properly and completely served. By filing a copy of the writ of attachment, together with a description of the property to be attached, with the recorder of the county, a valid levy is made, and a valid lien upon the property is thereby created. By the levy under a writ of attachment before the service thereof, the plaintiff acquires a provisional lien upon the property levied on; but, before a valid judgment can be rendered by which the attachment lien is preserved and made effective, there must be proper service of the summons and the writ of attachment. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

In the absence of a general appearance by defendant, an attachment lien does not become valid and effective and enforceable until the attachment writ is properly and completely served. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Proper service includes delivery of a copy of the writ to defendant and filing a copy with the recorder; and no judgment establishing the lien, or ordering a sale of the property, is valid without such service, or without a general appearance, if that does away with the necessity for service. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Mere filing of certificate is ineffective as to subsequent purchasers. Under this section a writ of attachment is not effectually levied upon lands unless a copy of the writ, with a description of the lands taken, is filed with a recorder in the county. The mere filing of a certificate of the levy is without effect as to subsequent purchasers. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913).

Where defendant dies before copy of writ delivered to him. In an action against a resident defendant where an attachment had been levied upon real estate by filing a copy of the writ together with a description of the property with the recorder, but the defendant died before a copy of the writ was delivered to him, the attachment lien could not be perfected by service upon the executrix of the deceased defendant, nor by her general appearance in the action. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

A writ directed to the sheriff of a county cannot be executed by the sheriff of any other county, and cannot be executed by the sheriff to whom it is issued outside of his own county. McArthur v. Boynton, 19 Colo. App. 234, 74 P. 540 (1903).

Use of a private process server, instead of the sheriff, to serve a writ on a defendant incarcerated in another state complied with the requirements of this rule. Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

Dismissal of the action error. Where a motion of a defendant raises only the question of the sufficiency of service in an attachment proceeding, dismissal of the action is error, since failure to obtain proper service does not warrant dismissal of a cause of action. Aero Spray, Inc. v. Ace Flying Serv., Inc., 139 Colo. 249, 338 P.2d 275 (1959).

C. Execution.

Execution of this writ serves as a lien on specified property throughout the duration of the litigation, thus securing for the plaintiff the practicality of benefiting from any judgment he might be awarded. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

A valid levy of a writ of attachment may be made on real estate and a valid lien acquired by indorsing thereon a description of the property attached and filing a copy of such writ, so indorsed, in the recorder's office of the county wherein the real estate is situated. The levy of the writ creates a provisional lien; but, before a valid judgment can be rendered which will preserve and make the lien effective, there must be service of the writ and summons on the defendant. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

Personal property capable of manual delivery can be attached only by being taken into custody by the officer. An attempted levy of an attachment upon personal property, capable of manual delivery, where the property was left in the custody of the defendant, and was not separated from defendant's other property, was not such levy as would give the attaching creditor or the officer any right in the property. Gottlieb v. Barton, 13 Colo. App. 147, 57 P. 754 (1899); Nichols v. Chittenden, 14 Colo. App. 49, 59 P. 954 (1899).

Taking physical custody of tax lien certificates was not necessary where county treasurers of counties in which property was located were served with writs of garnishment in aid of attachment. Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

This rule, C.R.C.P. 103, and § 4-8-112 may be harmonized so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).

Where failure to sue out writ is excusable. Where defendant and his wife both were nonresidents, absconders, and he was a fugitive from justice, and neither had an agent in Colorado on whom service or execution of the writ of attachment could be made, had a writ of attachment been sued out by the creditor, it was impossible to execute it as required by this section because all the required steps essential to a valid levy must be taken or no valid seizure can be made. Failure, therefore, of plaintiff to sue out a writ of attachment was excusable. No seizure or levy upon the property by or under an attachment was possible in this state, and the only remedy, if any, left to the creditor was that invoked by him, a creditor's suit, by which, in this state, as generally, an equitable lien may be procured, or an equitable levy made. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

When sheriff's duties are terminated. This section provides that real estate ''shall be attached by filing a copy of the writ, together with a description of the property attached with the recorder of the county''. The sheriff's duties are terminated when those acts are performed and he can exercise no further agency or control. The lien created by the attachment, whatever may be its character, is in the attaching creditor, and he only can release or discharge it. Barton v. Continental Oil Co., 5 Colo. App. 341, 38 P. 432 (1894).

Wherever the wrongful levy of a writ is the gravamen of a suit, the burden must of necessity be with the plaintiff to show that in fact a levy was made, unless it concerns personalty, and there be some circumstances of dispossession or disturbance of the owner's rights which will sustain a suit. Graham v. Reno, 5 Colo. App. 330, 38 P. 835 (1894).

An attack by a third person upon a void levy is not an attack upon the judgment. Where an insufficient and void levy of an attachment upon lands is made and the plaintiff in the action recovers judgment, and one not a party to that action institutes a suit in equity to set aside, as a cloud upon his title, such void and insufficient levy, the latter action is not an attack upon the judgment in the former. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913).

Seizure of property of nonresident as a condition precedent to jurisdiction is a judicial requirement. The rule requiring the seizure of property within the state belonging to a nonresident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial, and not a statutory requirement. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

Jurisdiction is aided by the same presumptions as in cases of personal service. The jurisdiction of a court of general jurisdiction in attachment proceedings is general, and its actions therein are aided by the same presumptions as in cases of personal service, and where jurisdiction is obtained in a case by attachment of the property of a nonresident, a judgment rendered therein and the property sold under a special execution, a sheriff's deed thereunder is sufficient to establish ownership in the purchaser. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

Upon a collateral attack, it will be conclusively presumed that everything necessary to be done was done, unless the contrary appears from the record. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

The return of the officer upon a writ of attachment is the record of the levy, and is the legal evidence of the fact that the levy was made. It cannot be proved by parol evidence. Gottlieb v. Barton, 13 Colo. App. 147, 57 P. 754 (1889).

Sheriff is not entitled to costs for making out the inventory. The making of an inventory of attached property is not a matter necessarily involving the expenditure of money out of pocket, and the sheriff is not entitled to costs therefor in addition to the statutory fees prescribed by statute for serving and otherwise executing attachment writs. Cramer v. Oppenstein, 16 Colo. 495, 27 P. 713 (1891).

V. NO FINAL JUDGMENT UNTIL 30 DAYS AFTER LEVY.

Purpose of provision. The plain purpose of this section is to permit creditors to prorate the proceeds of attached property, not to permit them to establish rights in a strange and unusual way. The provision simply makes it possible for

all creditors to put themselves in a position of equality, in respect to the satisfaction, out of the property attached, of claims properly asserted and regularly adjudicated; and it is a matter of administrative policy and convenience that all creditors intervening are, upon application, named as plaintiffs in one general proceeding for the purpose of determining and adjudicating their respective rights. Trinidad Nat'l Bank v. Jamieson House Furnishing Co., 60 Colo. 356, 153 P. 441 (1915).

The "like remedies" secured to an intervening attachment creditor by this subdivision are no more or less than such means as were available to the original plaintiff to establish and secure his claim, that is to say, upon the filing of affidavit, undertaking and complaint, with application to be made a party plaintiff in the original proceeding, the intervening creditor merely places his claim, in point of time of action, and for the purpose of proration, upon an equal basis with that of the original plaintiff, and should enforce his rights by the same legal modes as were available to the one first to act, but it certainly was not intended thereby to put an intervening creditor in a better position than he who first attached, and the section grants no privilege which obviates taking the steps ordinarily requisite to jurisdiction in order to recover a valid judgment upon a claim properly established. Trinidad Nat'l Bank v. Jamieson House Furnishing Co., 60 Colo. 356, 153 P. 441 (1915).

Creditors making themselves co-plaintiffs cannot assert any right superior to that of their co-plaintiff. Where in an attachment suit other creditors come in and make themselves co-plaintiffs with the original plaintiff in the attachment suit for the purpose of pro rata distribution of the attached fund as provided in this subdivision, such creditors thereby preclude themselves from asserting any right in the case superior to that of their co-plaintiff. Rouse v. Wallace, 10 Colo. App. 93, 50 P. 366 (1897).

Where petition comes too late. Petition for intervention comes too late where, before it was presented, judgment had been entered, execution issued, and levy and sale had thereunder. Hartner v. Davis, 100 Colo. 464, 68 P.2d 456 (1937).

VI. TRAVERSE OF AFFIDAVIT.

The denial of grounds for attachment should be clear and specific. The plaintiffs set forth in the affidavits in aid of the writs of attachment the nature of the indebtedness, part of which was based on services rendered by the plaintiffs. A denial that the debt was owed was sufficient to put in issue the question whether services had been rendered for which payment was due at the time the services were rendered. Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

A "verified traverse" by the defendant's attorney, without an accompanying affidavit by a person with knowledge of the facts and containing merely a general denial that the defendant was about to transfer property fraudulently, is not sufficient. Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

The separate traversing affidavit is not a pleading so as to permit a traverse, by an officer of a corporation, upon information and belief. An officer or an attorney of a corporation, who undertakes to traverse an affidavit in attachment, is presumed to know what his corporation did and must make his affidavit positively. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1923).

When the grounds of an attachment have been traversed and there is no evidence to sustain any one of them, the attachment should be dissolved. Mount Lincoln Coal Co. v. Lane, 23 Colo. 121, 46 P. 632 (1896).

A traverse of an affidavit which does not deny the allegations as of the time stated in the affidavit is not good. Where traverse is in present tense in saying that the grounds of attachment are false but does not relate to the time in the past when the attachment was made, this section is not complied with. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1897).

The traverse affidavit must speak and deny as of the date on which the affidavits in support of attachment are filed in order to specifically put in issue the causes for attachment set forth in the affidavits. Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

In the absence of a traverse, the court is not required to investigate the truth of the affidavit. This section does not require an investigation of the truth of the allegations of the affidavit, or that the court shall make any finding or order concerning either the attachment or the property attached. These matters are merely incidental to the action and, there being no issue as to them, the court does not appear to have any duty appertaining thereto to perform. Brown v. Tucker, 7 Colo. 30, 1 P. 221 (1883).

Waiver of order dissolving attachment. Where defendant, having obtained an order dissolving an attachment, afterwards stipulated that the issues in the main cause, as well as those framed upon the traverse of the affidavit in attachment should be tried at the same time, he thereby waived the order dissolving the attachment, and all rights thereunder. Reyer v. Blaisdell, 26 Colo. App. 387, 143 P. 385 (1914).

If the prescribed procedure for release of attached property is not invoked, the levy remains in force. Collins v. Burns, 16 Colo. 7, 26 P. 145 (1891).

Lien becomes absolute if the ground for it is not successfully traversed. Under this rule an attachment plaintiff is in reality, and for many purposes, an incumbrancer. It is quite true the lien which he acquires is contingent rather than inchoate, and dependent not only upon a compliance with the rule which provides for its issue, but also upon the subsequent recovery of a judgment and proof of a cause of action on which he had a right to sue when he commenced his action. In this sense, it is contingent; in another, it is absolute, or becomes absolute, if the ground for it is not successfully traversed and the plaintiff ultimately succeeds. Day v. Madden, 9 Colo. App. 464, 48 P. 1053 (1897).

Where the statements of the affidavit are regularly traversed by the defendant without the court's attention being called to its supposed defects, and the issues are found against him upon the trial; or, if the amount of actual damage proved by the plaintiff be less than the amount averred in the affidavit, the judgment will not be reversed on such grounds. De Stafford v. Gartley, 15 Colo. 32, 24 P. 580 (1890).

VII. INTERVENTION.

This rule is not intended to put an intervening creditor in a better position than he who first attached, and the rule grants no privilege which obviates taking the steps ordinarily requisite to jurisdiction in order to recover a valid judgment upon a claim properly established. Consolidated Fin. Corp. v. Thorp, 168 Colo. 144, 450 P.2d 320 (1969).

Jurisdiction does not depend upon the record of the permission to intervene. Permission is presumed where nothing to the contrary appears and the court has assumed jurisdiction. Grove v. Foutch, 6 Colo. App. 357, 40 P. 852 (1895).

VIII. DEFENDANT MAY RELEASE PROPERTY; BOND.

Trial court may set the amount of a bond at zero, effectively waiving the bond requirement, if the court determines that the plaintiff can respond in damages if necessary. Old Republic Nat'l Title Ins. v. Kornegay, 2012 COA 140, 292 P.3d 1111.

Judgment against the attaching creditor releases the property, restores proceeds, if any, and dissolves the writ. Vigil v. Pacheco, 95 Colo. 405, 36 P.2d 766 (1934).

This rule authorizes parties whose property has been attached to obtain a bond releasing the property attached, but assuring the creditor if judgment is obtained, that the property will be returned to the sheriff for final action. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Bond releases property from officers' custody but does not dissolve the attachment lien. Chittenden v. Nichols, 31 Colo. 202, 72 P. 53 (1903).

Enforceable undertaking. An undertaking given by the defendant with sureties for the purpose of releasing money in the hands of a garnishee is enforceable where, by reason of its execution, the money was in fact paid over by the garnishee to the defendant. Schradsky v. Dunklee, 9 Colo. App. 394, 48 P. 666 (1897).

Where person is estopped from controverting validity of undertaking. When a person signs an incomplete undertaking and delivers the same to another for a particular purpose and with ostensible authority to fill in any needed matter to make it effective, and it is accepted in its completed form by the obligee, he is estopped from controverting its validity to the prejudice of the obligee. Palacios v. Brasher, 18 Colo. 593, 34 P. 251 (1893).

Property in the hands of the sheriff. The sheriff has no authority to accept an undertaking for the release of money garnisheed, nor to execute a release for money in the hands of a garnishee, such property not being ''in the hands of the sheriff''. Nevertheless, where parties, through the instrumentality of an undertaking executed by them, procure money from the garnishee, they having thus received the benefit of the undertaking, cannot be heard to deny its binding obligation upon themselves upon the happening of the contingencies therein provided for. Abbot v. Williams, 15 Colo. 512, 25 P. 450 (1890).

Lien not affected by redelivery bond. When property has been lawfully levied upon under proper process, and taken into possession by a sheriff, the lien thereby created is not affected by any subsequent levy or surrender of possession under a redelivery bond, but whatever becomes of the property after such levy, it is subject at all times to the lien created by the first levy. Curry v. Equitable Sur. Co., 27 Colo. App. 175, 148 P. 914 (1915).

This does not apply to money in the hands of a garnishee. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Neither officer nor plaintiff can refuse to accept property on account of damage. Where attached property has been released on a redelivery bond and the identical property is returned to the sheriff, it is the right of the bondsmen to have the property sold and the proceeds applied on the judgment and neither the officer nor the plaintiff can refuse to accept the return of the property on account of damage or diminution in value, nor is the plaintiff estopped by such acceptance to sue upon the bond for damage to the property resulting from use by the defendant after it has been released to

him under the bond. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Defective complaint. In a suit against the sureties on a redelivery bond given by defendant to plaintiff in an attachment suit to release the property attached, a complaint which fails to allege that demand was made on the defendant in the attachment suit for the return of the property released is fatally defective. It is not sufficient to allege that demand was made on the sureties in the bond. Murray v. Ginsberg, 10 Colo. App. 63, 48 P. 968 (1897).

Return of property in damaged condition constitutes a breach of the bond. Where property, released from an attachment under a forthcoming bond, is damaged from use by the defendant after the execution of the bond, its return to the officer in such damaged condition is not a return of substantially the same property and constitutes a breach of the bond. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Measure of damages in such a case. In an action by an attachment plaintiff upon a redelivery bond where the property had been returned to the officer in a damaged condition resulting from use by the attachment defendant, the measure of plaintiff's damage was the diminution in value of the goods between the date of their release and the date of their return to the attaching officer, not to exceed the unpaid residue of the judgment. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Where attached property has been released on a redelivery bond and after judgment sustaining the attachment the property is returned to the officer and the property is regularly and fairly sold as provided by statute and the proceeds applied on the judgment, as between the parties, the selling price is conclusive of the value thereof, and in an action by an attachment plaintiff upon a redelivery bond for damage to the property from use by the defendant after the execution of the bond, an instruction that undertakes to charge plaintiff with the value of the property returned regardless of the amount it brought at the sale is erroneous, and the fact that the plaintiff was the purchaser at the sale is of no significance. Creswell v. Woodside, 15 Colo. App. 408, 63 P. 330 (1900).

Bond not required to be executed under seal. A bond to release attached property is not required to be executed under seal, and if so executed the liability of the obligors is in no manner affected thereby. To authorize an agent to sign his principal's name to such bond, it is not necessary that such authority be under seal, and parol evidence is sufficient to establish such authority, or to establish a ratification of an unauthorized signing. Lynch v. Smyth, 25 Colo. 103, 54 P. 634 (1898).

Where attachment improperly issued. Looking to the affidavit and complaint, where there is no express or implied contract between the appellant and appellee, it follows that the attachment was improperly issued and should have been discharged under the motion. Goss v. Bd. of Comm'rs, 4 Colo. 468 (1878).

IX. NEW TRIAL; APPEAL.

An order in attachment proceedings dissolving the writ and releasing the property is a final judgment. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956); Wilson v. Kirkbride, 899 P.2d 323 (Colo. App. 1995).

Time for filing notice of appeal began to run upon the denial of plaintiffs' rule 59 motion. Wilson v. Kirkbride, 899 P.2d 323 (Colo. App. 1995).

When a final judgment is entered, party adversely affected who wishes to appeal must file a motion for new trial as prescribed under C.R.C.P. 59(f) just as in the review of any other final judgment. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956).

Procedure. Steps necessary to effectively prosecute error to the usual judgment in civil actions also are essential to validate an appeal to a final judgment in attachment proceedings. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956).

Where final judgment sustaining writ of attachment was not questioned in a prior proceeding on error, in which the judgment on the merits was reversed, and thus became a final judgment binding upon the parties, reversal did not reopen the question of the validity of the attachment proceedings. Burt Chevrolet, Inc. v. Barth, 144 Colo. 180, 355 P.2d 538 (1960).

Rule 103. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment — Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1

WRIT OF CONTINUING GARNISHMENT
(ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) ''Continuing garnishment'' means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) ''Earnings'' shall be defined in section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 26, C.R.C.P. It shall also include at least one (1) ''Calculation of Amount of Exempt Earnings'' form to be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request of the judgment creditor. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, ''Objection to the Calculation of the Amount of Exempt Earnings'' (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with C.R.C.P. 4, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due, the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to C.R.S. 14-14-105 is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the Exemption Chart contained in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings and the blank copy of C.R.C.P. Form 28, ''Objection to the Calculation of the Amount of Exempt Earnings'' (Appendix to

Chapters 1 to 17A, Form 28, C.R.C.P.), to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ.

(2) For all pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings and the ''Judgment Debtor's Objection to the Calculation of Amount of Exempt Earnings'' to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings. A judgment debtor's objection to calculation of exempt earnings shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(2) Unless payment is made to an attorney or licensed collection agency as provided in paragraph (k)(1), the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(3) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court and a copy is delivered to the garnishee, the garnishee shall send the garnished nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2

WRIT OF GARNISHMENT
(ON PERSONAL PROPERTY OTHER THAN
EARNINGS OF A NATURAL PERSON)
WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. ''Writ of garnishment with notice of exemption and pending levy'' means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated ''writ with notice.''

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with C.R.C.P. 4.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 ''Claim of Exemption to Writ of Garnishment with Notice'' (Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with C.R.S. 13-54.5-107 (2).

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid

to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within 182 days from the date of service of such writ.

SECTION 3

WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) ''Writ of garnishment for support'' means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) ''Earnings'' shall be as defined in Section 13-54.5-101 (2), C.R.S., as applicable.

COMMITTEE COMMENT

The Colorado Legislature amended Sections 13-54-104 and 13-54.5-101, C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of ''earnings'' applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced. Sections 1 and 3 of the Rule and Forms 26 and 31 have been revised to deal with this legislative amendment.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17A, Form 31, C.R.C.P. and shall include at least four (4) ''Calculation of Amount of Exempt Earnings'' forms which shall be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with C.R.S. 14-10-122 (1)(c), a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with C.R.C.P. 4.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, as directed in the writ of garnishment for support, to the family support registry, the clerk of the court which issued such writ, or to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period of such writ.

(h) Disbursement of Garnished Earnings. The family support registry or the clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4

WRIT OF GARNISHMENT — JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. ''Writ of garnishment — judgment debtor other than natural person'' means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by a garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated ''writ of garnishment — other than natural person.''

(b) Form of Writ of Garnishment — Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17A, Form 32, C.R.C.P.

(c) When Writ of Garnishment — Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment — Other Than Natural Person. Service of the writ of garnishment — other than natural person shall be made in accordance with C.R.C.P. 4. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment — other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness be paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to section 12-14-101 et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5

WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. ''Writ of garnishment in aid of writ of attachment'' means the exclusive procedure through which personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For purposes of this rule, such writ is designated ''writ of garnishment in aid of attachment.''

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17A, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with C.R.C.P. 102, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with C.R.C.P. 4. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by C.R.S. 13-55-102. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in

attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6

JUDGMENT DEBTOR'S OBJECTION — WRITTEN CLAIM OF EXEMPTION — HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) The written objection shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(5) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor,

the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2(d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6(a) of this rule or the filing of a claim of exemption pursuant to Section 6(b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within 182 days.

(1) Notwithstanding the provisions of Section 6(a)(2) and Section 6(b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within 182 days from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings of property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow, but in no event shall a hearing be held pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6(a)(2) and Section 6(b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and

determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6(c)(5) and 6(d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7

FAILURE OF GARNISHEE TO ANSWER (ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 42 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with C.R.C.P. 45 and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8

TRAVERSE OF ANSWER (ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or

intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with C.R.C.P. 5.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with C.R.C.P. 45, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9

INTERVENTION
(ALL FORMS OF GARNISHMENT)

Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in C.R.C.P. 24 at any time prior to entry of judgment against the garnishee.

SECTION 10

SET-OFF BY GARNISHEE
(ALL FORMS OF GARNISHMENT)

Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings, which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11

GARNISHEE NOT REQUIRED TO DEFEND CLAIMS OF THIRD PERSONS (ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in C.R.C.P. 12 to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to C.R.C.P. 4, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12

RELEASE AND DISCHARGE OF GARNISHEE (ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1(k)(2) or 3(g)(2) of this rule shall release and discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) Release by Judgment Creditor or Plaintiff in Attachment. A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

SECTION 13

GARNISHMENT OF PUBLIC BODY (ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

EFFECTIVE DATE OF THIS RULE AND AMENDMENTS TO THIS RULE

Repealed October 31, 1991, effective November 1, 1991.

Source: Section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; entire section amended and adopted June 28, 2001, effective August 8, 2001; section 3(g) and (h) amended and adopted January 13, 2005, effective February 1, 2005; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012; section 2(g)(1) amended and effective June 7, 2013; section 4(f) amended and adopted January 29, 2016, effective March 1, 2016; section 1(b), (c), (g), (h)(1), (h)(2), (k)(1), (k)(2), (l)(1), and (l)(2), section 2(i), section 6 IP(d), (d)(1), and section 7(a)(2) amended and adopted January 12, 2017, effective March 1, 2017.

Cross references: For the minimum amount upon which garnishment shall issue, see § 13-52-108, C.R.S.; for group life insurance policy being exempt from garnishment, see § 10-7-205, C.R.S.; for provisions concerning service of process, see C.R.C.P. 4(e); for presentation of defenses, see C.R.C.P. 12; for intervention, see C.R.C.P. 24.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Seizure of Person or Property: Rules 101-104'', see 23 Rocky Mt. L. Rev. 603 (1951). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962).

Garnishment is a deprivation of defendant's property, or right to the use of his property. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

The whole object of garnishment is to reach effects or credits in the garnishee's hands, and to subject them to the payment of such judgment as the plaintiff may recover against the defendant. It results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is strictly a statutory remedy. Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898); Black v. Plumb, 94 Colo. 318, 29 P.2d 708, 91 A.L.R. 133 (1934).

The remedy of garnishment was unknown at common law and exists only by reason of statute or rules of procedure enacted pursuant to statutory authority. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

Garnishment proceedings cannot be sustained if they go beyond statute. State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

Garnishment proceedings fall under the equity arm of a court, the purpose being to summarily reach ordinarily nonleviable evidences of debt, to prevent the loss or dissipation of such assets, to determine the ownership of such funds, and to provide for the equitable distribution thereof, such being triable by the court and not by a jury. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970); Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001).

Writ of garnishment must be specific as to debtor. Berns, Clancy & Associates v. Bank of Boulder, 717 P.2d 1022 (Colo. App. 1986).

When garnishment proceeding considered "determined". A garnishment proceeding may not be considered ''determined'' until decisions regarding the rights of parties to the action can be made, and nothing but ministerial functions remain to be done. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978); In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

Until the time for filing an exemption under § 13-54-106 expires, the garnishment proceedings are not determined. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978); In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

This rule has no provision for release of cash. This rule relates to garnishment and has no provision similar to C.R.C.P. 102 for release of cash in the hands of a garnishee. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Attorneys' fees not permitted in garnishment. Neither this rule nor any other section or rule permits award of attorneys' fees for the garnishee in a garnishment. Commercial Claims, Ltd. v. First Nat'l Bank, 649 P.2d 736 (Colo. App. 1982).

This rule creates an exception to the American rule in garnishment actions; hence, the trial court was authorized to make an award of attorney fees. Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028 (Colo. App. 2005), rev'd on other grounds sub nom. Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007).

This rule is not applicable to spendthrift provisions of a will. Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).

Funds under the control of a trustee subject to spendthrift provisions cannot be garnisheed. Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).

The intent of congress that social security benefits be exempt from seizure is not undercut or in any way compromised by this rule. Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).

Amendment of answer. Although this section is silent as to whether answers filed to a writ of garnishment may be amended, the guiding principle is that where the adverse party has not changed his position based on the original answer, the court, in its discretion should freely grant amendments. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

Where the inability to amend would entirely foreclose the requesting party's case, and where the opposing party could show no prejudice to his case from the proposed amendment (other than the ''prejudice'' of having the garnishment determined on its merits), and where no prejudice to the court itself was evident from the record, the trial court abuses its discretion in ignoring the garnishee's amended answer. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

Pending appellate review does not convert a judgment to a contingent liability or to a debt owing in the future. Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

Stay of further garnishment proceedings until garnished judgments were no longer subject to stays of execution is the proper procedure and fully protects the interests of both garnishee and garnishor. Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

A liability is not contingent merely because the garnishee disputes whether it breached its contract with the debtor. Walk-In Med. Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991).

Unless a notice of garnishment properly runs with an accurate and sufficiently specific description against the individual to whom the garnishee may be indebted, a garnishee is totally unaffected by the notice served upon him. Anderson Boneless Beef v. Sunshine Health Care Center, Inc., 852 P.2d 1340 (Colo. App. 1993).

Applied in Stone v. Chapels for Meditation, Inc., 33 Colo. App. 346, 519 P.2d 1233 (1974).

II. PROVISIONS APPLICABLE TO ALL FORMS OF GARNISHMENTS.

A. When Writ Issues.

Annotator's note. Since section (b) of this rule was similar to § 129 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Before the turn of the century it was impossible to seize a debt owed by a nonresident garnishee to a principal defendant where the court had no jurisdiction over the situs of the debt. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Under the present rule for garnishment, a court has jurisdiction for garnishment of a debt upon obtaining jurisdiction over the garnishee. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Writ of garnishment can only be issued after issuance of a writ of attachment. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

However, a proceeding by garnishment, though an independent suit, is auxiliary to the main suit. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

A judgment is hypothetical when taken in advance of a judgment in the main suit, as it is

dependent upon a judgment subsequently obtained. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

The issuance of a post-judgment writ of garnishment without a writ of execution is one alternative authorized by C.R.C.P. 69(a). Warner/Elektra/Atlantic Corp. v. B & R Record & Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).

When the creditor and debtor have already participated in a complete hearing on the merits of the debt, as is the case with post-judgment garnishment, there is no due process advantage to be gained by forcing the garnishor to file an additional writ. Warner/Elektra/Atlantic Corp. v. B & R Record & Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).

When the principal judgment has been obtained, the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Without jurisdiction of the defendant and a judgment against him, a judgment against the garnishee is void, and its payment will not protect the garnishee. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is proper only after a valid judgment has been entered. W. Med. Prop. Corp. v. Denver Opportunity, Inc., 482 F. Supp. 1205 (D. Colo. 1980).

If the debtor could bring an immediate action to recover the debt from the garnishee, then the debt is due and payable within the meaning of the rule. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985); Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

In the absence of statute, if the assessment or demand has not been previously made in accordance with law, the garnishee is not liable. Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).

Garnishee cannot be placed in a worse position than if defendant enforced his own claim. In the absence of fraud between defendant and a garnishee, the latter cannot be placed, through garnishment proceedings, in a worse position than if defendant's claim were enforced by defendant himself. Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).

Writ of garnishment impounds all moneys held by garnishee and owing to the judgment debtor as of the date the writ is served. Graybar Elec. Co. v. Watkins Elec. Co., 626 P.2d 1157 (Colo. App. 1980), rev'd on other grounds, 662 P.2d 1064 (Colo. 1983).

The trial court obtains jurisdiction over all the monies held by garnishee which are owing to the judgment debtor on the date of the service of the writ of garnishment. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985).

A sheriff is not required to make diligent search for other property of defendant before writ may issue. E.I. Du Pont De Nemours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).

An indebtedness only can be made the subject of garnishment, and, in order that a liability may be an indebtedness within the meaning of the law, it must arise out of contract. Lewis v. City & County of Denver, 9 Colo. App. 328, 48 P. 317 (1897).

Garnishment applies only to contracts and not to tort actions. The controlling characteristic of the remedy by garnishment is that the liability of the garnishee must originate in, and be dependent on, contract. A right of action for a tort is not, therefore, the subject of garnishment in most jurisdictions. A claim in tort, not reduced to judgment, is not a debt within the meaning of the statutes in reference to garnishment. And the rule is the same where as between the tortfeasor and the person to whom the wrong was done the latter might at his option either hold the tortfeasor to his liability in tort, or, waiving the tort, treat him as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place and so evade the general rule as to garnishment of claims in tort by substituting therefor a liquidated claim ''quasi ex contractu''. Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

A court should dismiss the action when it appears beyond question that the action sounds in tort. Donald Co. v. Dubinsky, 74 Colo. 128, 219 P. 209 (1923); Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

A tort claim cannot be adjudicated in a garnishment procedure, for to do so compels the garnishee to enter into combat with an adversary other than its own and do battle with one who had never had any contract relation with him. Steen v. Aetna Cas. & Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).

Since there is nothing in an insurance policy, either expressly or impliedly, making a garnisher privity in contract with an insured, a stranger to the insurance policy involved, as a garnisher, can have no claim against the company, as garnishee, unless and until such transpires. Steen v. Aetna Cas. & Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).

Where one, for a valuable consideration, has assumed the obligation of another, he may be held liable as garnishee, and it is not necessary that the garnishee hold tangible real or personal property of the debtor, for the assumption of the debts of another when in proper form is a right, credit, or chose in action required to be reported in garnishment proceedings. Field Family Constr. Co. v. Ryan, 145 Colo. 598, 360 P.2d 110 (1961).

A widow's allowance is subject to garnishment. Isbell-Kent-Oakes Dry Goods Co. v.

Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

A plaintiff in garnishment does not stand in the position of a purchaser in good faith and for value, but is in no better position than a purchaser or assignee with notice. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

A garnishment proceeding cannot displace prior valid and bona fide existing right and claims against the debt or property involved. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

For example, an attorney's lien is prior and superior to any right acquired by a plaintiff in such proceedings. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

Garnishment under executions is properly subordinated to garnishment under writs of attachment theretofore served on the same creditor, although the latter are, as a precautionary measure, again served on the same date as that issued under the writ of execution. Larimer County Bank & Trust Co. v. Colo. Rubber Co., 79 Colo. 4, 243 P. 622 (1926).

A creditor accepting provisions of assignment cannot reach funds of sale through garnishment. If a creditor accepts, and acts under, the provisions of an assignment for the benefit of creditors, he may not thereafter repudiate his acceptance and claim property in the hands of the trustee for the satisfaction of his debt or reach funds derived from the sale thereof by proceedings in garnishment. McMullin v. Keogh-Doyle Meat Co., 96 Colo. 298, 42 P.2d 463 (1935).

Contingent liabilities are not garnishable. Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

B. Service of Writ.

Annotator's note. Since section (c) of the prior version of this rule was similar to § 130 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Creditor must proceed in state where employment services rendered. The state in which services were rendered and in which the employer and employee reside is the situs of a chose and action for wages, and a creditor of the employee, who would reach the fund by garnishment, must proceed in that state. Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

The fact that the employer is a railroad company operating a line through different states does not change this rule. Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

Where an order for a widow's allowance and service of garnishment summons affecting the same are made on the same day, they are presumptively at the same time. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

Content of summons not prescribed. This section contains no provision that the court set forth any particular matters in the summons. Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

Writ of garnishment served upon garnishee is insufficient if it fails to provide due process notice that a judgment could be entered against the garnishee based solely upon amount of judgment previously entered if garnishee fails to respond. Don J. Best Trust v. Cherry Creek Nat. Bank, 792 P.2d 303 (Colo. App. 1990).

A writ of garnishment pursuant to this rule and C.R.C.P. 403 provides a judgment creditor with an efficient mechanism for garnishing property to satisfy a proper judgment, provides the judgment debtor with an expedited procedure to protect his or her exempt property, and affords the judgment debtor significantly more process than is required by the United States and Colorado Constitutions. Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).

C. Jurisdiction.

Garnishment cannot be extended by construction to cases which are not within both its letter and spirit, although it is true that the garnishment statutes of Colorado specifically require that they shall be liberally construed so as to promote their objects. This applies, however, only to the enforcement of the remedy after jurisdiction has attached; it does not permit courts to enlarge or extend by implication the scope of the statutes, so as to bring within their jurisdiction any cases except those to which the statutes manifestly and clearly apply. As to this, the rule of strict construction prevails, the statutes being in derogation of the common law. Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898); Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

Where a garnishee is doing business within Colorado, service of a writ of garnishment upon it at its place of business properly brings it within the jurisdiction of the court in a garnishment proceeding. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Where it is claimed that the court does not have jurisdiction, but there was a judgment and execution in the main cause, regularly obtained, a return of the writ of garnishment, showing due service, gives the court jurisdiction over the garnishee. E.I. Du Pont De

Nemours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927) (decided under § 135 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

A garnishment can reach only such property as belongs to the debtor. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933); People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

This rule shows an intent that every sort of interest of the debtor might be garnished. Bank of Grand Junction v. Bank of Vernal, 81 Colo. 483, 256 P. 660 (1927).

The assertion by a garnishee of a jurisdictional defense to a judgment for which he is sought to be held is not a collateral but a direct attack upon the judgment. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Dormancy of judgment in foreign state does not defeat rights of creditor under this rule. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

Rather than reviving a judgment lien obtained in a foreign state and subsequently recorded in Colorado, garnishments created new and separate liens against the estate of the judgment debtor. Further, the garnishments were not an effort by the judgment creditor to maintain an action in Colorado that could not be maintained in the foreign state, but instead were ancillary to the judgment previously obtained. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

D. Objection of Judgment Debtor — Exemptions.

Law reviews. For note, ''A Discussion of Garnishment and Its Exemptions'', see 27 Dicta 453 (1950).

Absence of a creditor-debtor relationship between judgment debtor and garnishee and the existence of an agreement between such parties which specifically negated garnishee's assumption of any of judgment debtor's liability precluded judgment creditors' proceeding against garnishee. Coin Serv. Investors, Inc. v. Grooms, 743 P.2d 42 (Colo. App. 1987).

Garnishee is entitled to an evidentiary hearing concerning the validity of the garnished debt in order to afford due process to the garnishee. Maddalone v. C.D.C., Inc., 765 P.2d 1047 (Colo. App. 1988).

Failure to comply with a court order does not supercede requirement to set a hearing. The court may not sanction a party for his or her failure to comply with a court order by refusing to set a hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. Borrayo v. Lefever, 159 P.3d 657 (Colo. App. 2006).

Husband in post-dissolution garnishment proceeding received a proper hearing under subsection 6(c)(4) where trial court conducted a timely and thorough hearing at which it heard argument and received evidence in the form of exhibits from the interested parties and at which the husband's counsel neither requested the opportunity to call witnesses nor objected to the proceeding. In re Gedgaudas, 978 P.2d 677 (Colo. App. 1999).

E. Answer.

A garnishee's answer is made with reference to the facts existing at the time of the service of a writ of garnishment. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, the garnishee owes the defendant a debt, or has personal property of the defendant in his possession or under his control, he must so answer and abide the judgment of a court. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, he is not indebted to the defendant, or has not in his possession or under his control, any property of the defendant, he is entitled to a discharge. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Garnishee is not answerable for effects of the defendant coming into his hands, or indebtedness accruing from him to the defendant, after the garnishment. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

It is only where the answer of a garnishee shows that he is indebted to the defendant, has personal property in his possession or under his control belonging to the defendant, or where his answer denying indebtedness to the defendant or possession of his property is successfully controverted that a judgment against him is lawful. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

In order to charge him upon his answer, it must contain a clear admission of a debt due to, or the possession of attachable property of the defendant. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Where his answer is a substantial denial of indebtedness, or possession of attachable property belonging to the defendant, he is entitled to a judgment of discharge, unless the force of the denial is overcome by other statements in the answer or unless the answer is shown to be untrue. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

A delivery by the garnishee to the sheriff can be ordered only where the answer admits possession in the garnishee of property belonging to the defendant or where, upon a trial of issue joined upon the answer, such possession is found. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

"Supplemental answer" held no answer at all where time to answer exhausted. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Note properly turned over to sheriff. Where a note in the hands of a garnishee is held pending the result of litigation on final determination of which the note inures to the benefit of the judgment creditor, it is properly turned over to the sheriff with the order that he make disposition of it in the manner required by law. Union Deposit Co. v. Driscoll, 95 Colo. 140, 33 P.2d 251 (1934).

A contingent liability is not garnishable. When a garnishee alleges a contingent liability in his answer to the writ of garnishment, the proper procedure is to allow the garnishor to traverse the garnishee's answer, followed by a trial on the issues framed. Haselden Langley Constructors, Inc. v. Graybar Elec. Co., 662 P.2d 1064 (Colo. 1983).

Payment to creditor's attorneys is payment to creditor. Where money is deposited in court by the garnishee in garnishment proceedings, payment of the fund to attorneys for the garnisheeing creditor is payment to the creditor, and an order to repay part of the fund is proper. Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).

Default for failure of garnishee "to answer or pay" only applies if guarnishee fails to answer or pay any nonexempt earnings. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

F. Traverse of Answer.

Annotator's note. Since sections (m) and (n) of the prior version of this rule were similar to §§ 144 and 145 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Previously, an order denying a motion to discharge a garnishee for failure of plaintiff to traverse answer of garnishee within required period was not appealable as a "final judgment, decree or order" where no final judgment was entered and garnishee specifically saved right to further challenge court's jurisdiction and nothing in record indicated that court had passed on garnishee's answer. Steel v. Revielle, 102 Colo. 271, 78 P.2d 980 (1938).

Still garnishee cannot take advantage of his own delay. A garnishee, by its own delay having made it impossible for the plaintiff to file the traverse within the time allowed by this section, is in no position to complain, since he cannot take advantage of a situation brought about by his own neglect. Stollins v. Shideler, 91 Colo. 40, 11 P.2d 562 (1932).

A traverse stating only conclusions of law and not facts is insufficient. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

The answer of the garnishee and the traverse of the plaintiffs are the only pleadings provided by this rule, and make up the issues in garnishment proceedings. General Accident Fire & Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).

Any new matter pleaded in the traverse is deemed to be denied or avoided. General Accident Fire & Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).

Where the garnishee has no opportunity to plead to a reply without further pleading, he can avail himself of any defense he might have to the new matter set up in the affidavit. Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).

A partner may set up nonjoinder of copartner as a defense. Where a partner is sued individually for a firm debt he is usually required to plead the nonjoinder of his copartners in order that he may avail himself of this defense, but this general rule has no application to garnishment proceedings under this rule. Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).

Subsection 8(b)(5) provides authority pursuant to § 13-16-122 (1)(h) to make an award of attorney fees making § 13-17-101 et seq. inapplicable. United Bank v. State Treasurer, 797 P.2d 851 (Colo. App. 1990).

An award of attorney fees under this rule is at the trial court's discretion. United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d 638 (Colo. App. 1996).

An award of attorney fees, costs, and expenses under section 8(b)(5) is limited to those fees, costs, and expenses incurred to prepare and file the traverse and prosecute the traverse proceeding. L & R Exploration Venture v. CCG, LLC, 2015 COA 49, 351 P.3d 569.

G. Intervention.

Annotator's note. Since section 9 of this rule is similar to § 146 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section 9 is not mandatory, and thus, one asserting rights to property which is the subject of garnishment proceedings is free to ignore those garnishment proceedings and file an independent action to enforce those rights. El Paso County Bank v. Charles R. Milisen & Co., 622 P.2d 594 (Colo. App. 1980).

In garnishment proceedings, intervention is governed by this rule which provides that a party shall proceed in accordance with C.R.C.P. 24. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Allegations of the petition in intervention held sufficient to make out a prima facie case for intervening assignee. Denver Joint Stock

Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

With denial of right of intervention constituting reversible error. Where, in a garnishment proceeding, a third party files a petition in intervention claiming the property involved, he is entitled to have his claim tried and determined, and a denial of that right constitutes reversible error. Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).

Where in due time. Where the intervention is before the judgment against the garnishee and it cannot be said that the garnishment proceedings have then been determined, the intervention, therefore, is in due time. Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).

It is error for a trial court to quash a garnishment where the writ of garnishment is issued in accordance with this rule and the answer and return of the garnishee are made within the time prescribed by rule when the regularity of the garnishment proceeding is not attacked and a motion to quash is based wholly upon a claimed right to intervene; but the intervenor tacitly recognizes the validity of the proceedings by having filed its motion to intervene therein. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

An intervention by definition involves third parties, and such strangers to the original garnishment proceeding, by asserting ownership of the disputed property, necessarily put their ownership status, and all related questions, at issue. Great Neck Plaza, L.P. v. Le Peep Restaurants, 37 P.3d 485 (Colo. App. 2001).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).

H. Set-off.

Law reviews. For article, ''Setoff and Security Interests In Deposit Accounts'', see 17 Colo. Law. 2108 (1988).

Annotator's note. Since section (p) of the prior version of this rule was similar to § 147 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

By this section a garnishee is allowed to retain or deduct out of the property or credits of the defendant in his hands all demands against the defendant of which he could have availed himself had he not been summoned as garnishee. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Garnishee may plead as a defense or set-off whatever he might have pleaded were the suit directly against him by his own creditor. Sauer v. Town of Nevadaville, 14 Colo. 54, 23 P. 87 (1890); Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Garnishee is not to be placed in a worse position. Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905); Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Bank receiver was entitled to set-off compensation due him. Where an attempt is made in a garnishment proceeding to make a bank receiver liable for a judgment against the bank, such receiver is entitled to plead as a defense or set-off the compensation due him by the bank even though his appointment as such was void. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

A garnisheed bank may apply the amount on deposit to the credit of a debtor to the payment of his note to it although not due. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Agreement after service of writ would be void. An agreement by a garnishee to apply upon or deduct from credits of the defendant in his possession, a loan made by him to the defendant after service of the writ would be void and could not be enforced by any party thereto. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Garnishee bank is entitled to claim set-off against debtor's account for moneys owed to bank even though moneys were not due at time of service of writ of garnishment. Colo. Nat. Bank - Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986).

Landlord's lien. A lease may create a valid landlord's lien, enforceable under section 8 of this rule as a set-off. Beneficial Fin. Co. v. Bach, 665 P.2d 1034 (Colo. App. 1983).

The rights and liabilities of a garnishee are to be determined as of the date of the garnishment and not upon a state of facts that existed theretofore or thereafter. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

It is unreasonable to require a garnishee to claim a set-off immediately upon service of the writ of garnishment; the more reasonable approach allows a garnishee the same time period to claim set-off as allowed to file its answers to the garnishment interrogatories. Colo. Nat. Bank - Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986); Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

It is the responsibility of the trial court to determine the amounts and reasonableness of set-offs, and, absent an abuse of discretion, its decision will not be overturned. Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

Law firm had statutory charging lien on settlement proceeds. State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment can only reach property that belongs to the debtor. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

I. Claims of Third Persons.

Annotator's note. Since section (i) and (j) of the prior version of this rule were similar to §§ 138 and 141 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing these sections have been included in the annotations to this rule.

This section puts burden on claimant not only to assert an interest in the property but also to establish the extent of his interest. Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

When a garnishee in his answer states that a third party claims property in his possession belonging to the debtor, it is the duty of the court to issue a citation or summons to said party requiring him to appear and set up his claim. Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).

However, this rule refers to answers in good faith, so if a garnishee knows the truth he must tell it and if he tells a falsehood, at least if he tells it for a fraudulent purpose, he must pay damages. International State Bank v. Trinidad Bean & Elevator Co., 79 Colo. 286, 245 P. 489 (1926).

Payment to one other than judgment debtor held improper. Where garnishee-defendant, after answering writ of garnishment, discovers that a contract between it and judgment debtor requires that payments be made jointly to debtor and another, the garnishee-defendant then pays the latter part of the sum which it admitted in its answer was due and owing the judgment debtor, and he files an amended answer to that effect, such payment is improper without a release of garnishment or order of court. Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

It is not essential that notice of an assignment be given in advance to a garnishee, although in the absence of knowledge or notice the latter would be protected against double payment. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

If, during the pendency of garnishment proceedings, it is established that an assignment of the subject-matter antedating the garnishment was actually executed, the absence of previous notice to the garnishee would be immaterial, and a judgment creditor would not be entitled to notice as such. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

A creditor is entitled to a fund owing defendant by his employer as against the claims of another creditor of which he had no notice where the claims of which said other creditor are not based on a contract sufficient to bind the fund. This being determined, then the only further action within the jurisdiction of the trial court is, on application, to order a judgment against the employer in favor of the defendant for the use of the plaintiff pursuant to the terms of this section. Meyer v. Delta Market, 98 Colo. 421, 57 P.2d 3 (1936).

Once a third-party claimant has conceded that the disputed property may be garnished by a creditor, the claimant is thereafter estopped from claiming the proceeds of the garnishment unless there is an agreement otherwise. Securities Investor Protection Corp. v. Goldberg, 893 F.2d 1139 (10th Cir. 1990).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).

J. Release and Discharge.

A judgment in the principal proceeding is presumptively valid while lodged in an appellate court for review. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Such judgment when not superseded by virtue of a failure to furnish the required bond leaves a judgment creditor in the position to take usual steps to enforce collection of his judgment, precisely as if supersedeas has not been granted. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

The reversal of a judgment upon which a garnishment is based leaves nothing to sustain the judgment against the garnishee. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

If the original judgment is reversed, a judgment in garnishment is deprived of a basis and falls with it. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

The existence of a valid judgment is a jurisdictional prerequisite to garnishment relief. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Where the judgment in the main case has been reversed, then, if it is made the basis of a garnishment, it must follow that a judgment in the garnishment proceeding cannot stand alone and must be reversed. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Since garnishee's liability is not established. Where the case which found garnishee's liability is reversed and remanded for new trial, the garnishee's liability is not established, and garnishment should be vacated. Mitchell v. Am.

Family Mut. Ins. Co., 179 Colo. 372, 502 P.2d 79 (1972).

Applied in E.I. Du Pont De NeMours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).

K. Disbursement of Funds.

Court approval not required. Subsection 2(h) requires the clerk to disburse funds to the judgment creditor without further application or order. The fact that the judgment debtor had applied for a stay had no effect on the clerk's authority to release the garnished funds. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

III. SPECIFIC FORMS OF GARNISHMENT.

Law reviews. For article, ''The Nuts and Bolts of Collecting Support'', see 19 Colo. Law. 1595 (1990).

Past-due child support payments in themselves constitute debt. Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).

Amount defendant admittedly owed for past-due child support may be garnished by bank which held judgment against former wife. Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).

Foreclosure sale excess proceeds may be garnished. TCF Equip. Fin. v. Pub. Trustee, 2013 COA 8, 297 P.3d 1048.

Law firm had statutory charging lien on settlement proceeds. State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment can only reach property that belongs to the debtor. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

C.R.C.P. 102, this rule, and § 4-8-112 may be harmonized so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).

Rule 104. Replevin

(a) Personal Property. The plaintiff in an action to recover the possession of personal property may, at the time of the commencement of the action, or at any time before trial, claim the delivery of such property to him as provided in this Rule.

(b) Causes, Affidavit. Where a delivery is claimed, the plaintiff, his agent or attorney, or some credible person for him, shall, by verified complaint or by complaint and affidavit under penalty of perjury show to the court as follows:

(1) That the plaintiff is the owner of the property claimed or is entitled to possession thereof and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached;

(2) That the property is being detained by the defendant against the plaintiff's claim of right to possession; the means by which the defendant came into possession thereof, and the specific facts constituting detention against the right of the plaintiff to possession;

(3) A particular description of the property, a statement of its actual value, and a statement to his best knowledge, information and belief concerning the location of the property and of the residence and business address, if any, of the defendant;

(4) That the property has not been taken for a tax assessment or fine pursuant to a statute; or seized under an execution against the property of the plaintiff; or if so seized, that it is by statute exempt from seizure.

(c) Show Cause Order; Hearing within 14 Days. The court shall without delay, examine the complaint and affidavit, and if it is satisfied that they meet the requirements of section (b), it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereof. The hearing date shall be not more than 14 days from the date of the issuance of the order and the order must have been served at least 7 days prior to the hearing date. The plaintiff may request a hearing date beyond 14 days, which request shall constitute a waiver of the right to a hearing not more than 14 days from the date of issuance of the order. Such order shall inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony in his behalf at the time of such hearing, or that he may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of section (j) of this rule, and that, if he fails to appear at the hearing on the order to show cause or to file an undertaking, plaintiff may apply to the court for an order requiring the

sheriff to take immediate possession of the property described in the complaint and deliver same to the plaintiff. The summons and complaint, if not previously served, and the order shall be served on the defendant and the order shall fix the manner in which service shall be made, which shall be by service in accordance with the provisions of Rule 4, C.R.C.P., or in such manner as the court may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the complaint and affidavit.

(d) Order for Possession Prior to Hearing. Subject to the provisions of section 5-5-104, C.R.S. 1973, and upon examination of the complaint and affidavit and such other evidence or testimony as the court may thereupon require, an order of possession may be issued prior to hearing, if probable cause appears that any of the following exist:

(1) The defendant gained possession of the property by theft.

(2) The property consists of one or more negotiable instruments or credit cards.

(3) By reason of specific, competent evidence shown, by testimony with the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or that the defendant may destroy, dismantle, remove parts from, or in any way substantially change the character of the property, or the defendant may conceal or remove the property from the jurisdiction of the court to sell the property to an innocent purchaser.

(4) That the defendant has by contract voluntarily and intelligently and knowingly waived his right to a hearing prior to losing possession of the property by means of a court order.

Where an order of possession has been issued prior to hearing under the provisions of this section, the defendant or other persons from whom possession of said property has been taken, may apply to the court for an order shortening time for hearing on the order to show cause, and the court may, upon such application, shorten the time for hearing, and direct that the matter shall be heard on not less than forty-eight hours' notice to the plaintiff.

(e) Bond. An order of possession shall not issue pursuant to section (d) of this rule until plaintiff has filed with the court in an amount set by the court in its discretion not to exceed double the value of the property a written undertaking executed by plaintiff and such surety as the court may require for the return of the property to the defendant, if return thereof be ordered, and for the payment to the defendant of any sum that may from any cause be recovered against the plaintiff.

(f) Temporary Order to Preserve Property. Under the circumstances described in section (b) of this Rule, or in lieu of the immediate issuance of an order of possession under any circumstances described in section (d) of this Rule, the court may, in addition to the issuance of the order to show cause, issue such temporary orders, directed to the defendant, prohibiting or requiring such acts with respect to the property as may appear to be necessary for the preservation of the rights of the parties and the status of the property.

(g) Order for Possession after Hearing; Bond; Directed to Sheriff. Upon the hearing on the order to show cause, which hearing shall be held as a matter of course by the court, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination of which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties. If the court determines that the action is one in which a pre-judgment order of possession should issue, it shall direct the issuance of such order and may require a bond in such amount and with such surety as the court may determine to protect the rights of the parties. Failure of the defendant to be present or represented at the hearing on the order to show cause shall not constitute a default in the main action. The order of possession shall be directed to the sheriff within whose jurisdiction the property is located.

(h) Contents of Possession Order. The order of possession shall describe the specific property to be seized, and shall specify the location or locations where there is probable cause to believe the property or some part thereof will be found. It shall direct the sheriff to seize the same as it is found, and to retain it in his custody. There shall be attached to such order a copy of the written undertaking filed by the plaintiff, and such order shall inform the defendant that he has the right to except to the sureties or to the amount of the

bond upon the undertaking or to file a written undertaking for the redelivery of such property as provided in section (j).

Upon probable cause shown by further affidavit or declaration by the plaintiff or someone in his behalf, filed with the court, an order of possession may be endorsed by the court, without further notice, to direct the sheriff to search for the property at another specified location or locations and to seize the same if found.

The sheriff shall forthwith take the property if it be in the possession of the defendant or his agent, and retain it in his custody; except that when the personal property is then occupied as a dwelling [such as but not limited to a mobile home], the sheriff shall take constructive possession of the property and shall remove its occupants and take the property into his actual custody at the expiration of 10 days after the issuance of the order of possession, or at such earlier time as the property shall have been vacated.

(i) Sheriff May Break Building; When. If the property or any part thereof is in a building or enclosure, the sheriff shall demand its delivery, announcing his identity, purpose, and the authority under which he acts. If it is not voluntarily delivered, he shall cause the building or enclosure to be broken open in such manner as he reasonably believes will cause the least damage to the building or enclosure, and take the property into his possession. He may call upon the power of the county to aid and protect him, but if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property, and shall forthwith make a return before the court from which the order issued, setting forth the reasons for his belief that such risk exists. The court may make such orders and decrees as may be appropriate.

The sheriff shall, without delay, serve upon the defendant a copy of the order of possession and written undertaking by delivering the same to him personally, if he can be found or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or if neither has any known place of abode, by mailing them to the last known address of either.

(j) When Returned to Defendant; Bond. At any time prior to the hearing on the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking, in an amount set by the court in its discretion not to exceed double the value of the property and executed by the defendant and such surety as the court may direct for the delivery of the property to the plaintiff, if such delivery be ordered, and for the payment to the plaintiff of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided by Rule 5, C.R.C.P., a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing on the order to show cause, proceedings thereunder shall terminate, unless exception is taken to the amount of the bond or the sufficiency of the surety. If, at the time of filing of such undertaking, the property shall be in the custody of the sheriff, such property shall be redelivered to the defendant 7 days after service of notice of filing such undertaking upon the plaintiff or his attorney.

(k) Exception to Sureties. Either party may, within two business days after service of an undertaking or notice of filing and undertaking under the provisions of this Rule, give written notice to the court and the other party that he excepts to the sufficiency of the surety or the amount of the bond. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts the court shall hold a hearing to determine the sufficiency of the bond or surety. If the property be in the custody of the sheriff, he shall retain custody thereof until the hearing is completed or waived. If the excepting party prevails at the hearing, the sheriff shall proceed as if no such undertaking had been filed. If the excepting party does not prevail at the hearing, or the exception is waived, he shall deliver the property to the party filing such undertaking.

(l) Duty of Sheriff in Holding Goods. When the sheriff has taken property as provided in this Rule, he shall keep it in a secure place and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the

same, after expiration of the time for filing of an undertaking for redelivery and for exception to the sufficiency of the bond, unless the court shall by order stay such delivery.

(m) Claim by Third Person. If the property taken is claimed by any other person than the defendant or plaintiff, such person may intervene under the provisions of Rule 24, C.R.C.P., and in the event of a judgment in his favor, he may also recover such damages as he may have suffered by reason of any wrongful detention of the property.

(n) Return; Papers by Sheriff. The sheriff shall return the order of possession and undertakings and affidavits with his proceedings thereon, to the court in which the action is pending, within 21 days after taking the property mentioned therein.

(o) Precedence on Docket. In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

(p) Judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 13, C.R.C.P., shall apply to replevin actions.

Source: Entire rule amended and adopted December 4, 2003, effective January 1, 2004; (c), (j), (k), and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For provisions prohibiting replevin prior to judgment in certain cases under the ''Uniform Consumer Credit Code'', see § 5-5-105, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Seizure of Person or Property: Rules 101-104'', see 23 Rocky Mt. L. Rev. 603 (1951).

Annotator's note. Since this rule is similar to §§ 85 through 96 and § 247 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

At common law replevin lay where there was an unlawful taking, and detinue where there was an unlawful detention. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896).

This rule superseded the common-law action. The remedy provided by this rule supersedes the common-law action of replevin, whether in the cepit or in the detinet, and all the ancient learning relating to these distinctions became obsolete upon the adoption of the rule. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896).

Purpose of prejudgment hearing. This rule clearly contemplates that the conflicting legal and equitable claims of the parties will be fully adjudicated in a trial on the merits. The prejudgment hearing serves the far narrower purpose of ensuring that a replevin defendant's constitutionally guaranteed property rights will not be jeopardized by unduly summary claim and delivery proceedings. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979); Metro Nat. Bank v. District Court, 676 P.2d 19 (Colo. 1984).

Although a district court sits as a court of general jurisdiction in an action to replevy personal property, its powers are more limited where, in a prejudgment hearing on an order to show cause, the only issue to be decided is ''which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties''. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

Order to show cause required for jurisdiction of possessory rights in property. A court conducting a hearing under this rule lacks jurisdiction unilaterally to affect possessory rights in any property not brought within its purview by a duly issued order to show cause. Jack Kent

Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

The only issue to be determined in an action in replevin is ownership and right of possession. Amarillo Auto Auction, Inc. v. Hutchinson, 135 Colo. 320, 310 P.2d 715 (1957).

To maintain action, plaintiff's right to the possession of the property must be exclusive. Hoeffer v. Agee, 9 Colo. App. 189, 47 P. 973 (1897).

The vendee of an automobile under a conditional sales contract executed and valid in another state who has feloniously been deprived of possession of said automobile may recover the same from an innocent Colorado purchaser for value. Avis Rent-A-Car Sys. v. Woelfel, 155 Colo. 207, 393 P.2d 551 (1964).

Replevin for an undivided interest in property cannot be maintained. Hoeffer v. Agee, 9 Colo. App. 189, 47 P. 973 (1897).

Defendant must have actual or constructive possession. Appellant sought to recover from appellee-defendant the physical possession of a stock certificate upon allegation that he had purchased such shares from appellee, that such certificate had been delivered to him, that appellee had later surreptitiously regained possession and had continued to withhold possession of the stock notwithstanding demand. The undisputed evidence indicated that appellee had neither actual nor constructive possession of the subject stock certificate at the time the action was commenced, a prerequisite in an action in the nature of replevin. Brennan v. Sellers, 357 F.2d 150 (10th Cir.), cert. denied, 385 U.S. 828, 87 S. Ct. 61, 17 L. Ed. 2d 64, reh'g denied, 385 U.S. 984, 87 S. Ct. 531, 17 L. Ed. 2d 445 (1966).

Plaintiff may recover damages for taking of property or judgment for its value. Under this rule the action for the recovery of personal property lies, by one entitled to the possession, against one wrongfully holding the possession, whether the possession was acquired in good or bad faith. In the action, the plaintiff may, if he maintained his suit, recover damages for the taking or detention of the property, and, if the property cannot be returned, judgment for its value. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896); Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Adjustment of equities not authorized by jurisdiction over property and parties. Jurisdiction over the parties and the subject matter does not authorize the trial court to enter whatever remedial orders it deems necessary to adjust the equities between the parties. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

Since court had jurisdiction over the subject matter and over the person in a replevin action, and the person did not avail himself of opportunity to contest replevin action in that court but instead filed alternative actions in other courts and such other courts refused to disturb the replevin order, such person waived his right to contest the validity of the order in the replevin action in a subsequent action. Flickinger v. Ninth District Prod. Credit, 824 P.2d 19 (Colo. App. 1991).

Restrictions of Governmental Immunity Act apply to replevin action for car seized by police. Denver v. Desert Truck Sales, Inc., 837 P.2d 759 (Colo. 1992).

II. PLEADING: COMPLAINT AND AFFIDAVIT.

Commencement of action. No writ of replevin may be issued under this rule until an action in claim and delivery is commenced by the filing of a complaint which alleges the right of the plaintiff to the possession of personal property, and claims the delivery thereof. Gentry v. United States, 101 F. 51 (8th Cir. 1900).

Facts alleged in counterclaim and demand for return of all certificates held by plaintiff bank constitute a claim for replevin. Together with a ''verified complaint for replevin'' incorporating the answer, counterclaim, cross-claim, and third-party complaint, and sworn to by the defendant, the requirements of section (e) of this rule are met. Metro Nat. Bank v. District Court, 676 P.2d 19 (Colo. 1984).

The complaint must allege ownership. In an action to recover possession of personal property, the complaint must allege ownership, either general or special, otherwise the complaint will be bad on demurrer. Baker v. Cordwell, 6 Colo. 199 (1882); Reavis v. Stockel, 120 Colo. 82, 208 P.2d 94 (1949).

Plaintiff has the burden of affirmatively establishing his own title and right of immediate possession to the property in question. Bill Dreiling Motor Co. v. St. Paul Fire & Marine Ins., 28 Colo. App. 318, 472 P.2d 153 (1970).

Complaint may be amended to conform to proof concerning ownership of property. In an action in replevin, in the disclosed circumstances, it is held that there was no abuse of discretion on the part of the trial court in permitting the plaintiff to amend its complaint to conform to the proof concerning ownership of certain of the property involved. Thomas v. First Nat'l Bank, 97 Colo. 474, 51 P.2d 589 (1935).

Defective affidavit. If affidavit is defective, the appellant is not in a condition to avail himself of any defects. Conly v. Friedman, 6 Colo. App. 160, 40 P. 348 (1895).

Allegations of value are binding on plaintiff. In a replevin action, allegations of the value of the property in the affidavit and sworn complaint are binding on plaintiffs. Startzell v. Bowers, 88 Colo. 135, 292 P. 601 (1930).

Where the seizure was wrongful, demand prior to the commencement of suit is unnecessary. Bartels v. Arms, 3 Colo. 72 (1876); Smith v. Jensen, 13 Colo. 213, 22 P. 434 (1889); Farncomb v. Stern, 18 Colo. 279, 32 P. 612 (1893).

Demand is only required when it is necessary to terminate the defendants' right of possession or to confer that right on the plaintiff. Lamping v. Keenan, 9 Colo. 390, 12 P. 434 (1884).

The only reason why demand is necessary in any case, is to give the defendant an opportunity to surrender without being put to costs; and while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect by judgment against him for costs, without being compelled to surrender his goods. Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907).

No proof of demand is necessary where the defendant claims ownership and right of possession. Hennessey v. Barnett, 12 Colo. App. 254, 55 P. 197 (1898); Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907); Scott v. Bohe, 81 Colo. 454, 256 P. 315 (1927).

Nor where it is clear that it would have been unavailing. Scott v. Bohe, 81 Colo. 454, 256 P. 315 (1927).

A demand made after the beginning of the action but prior to the execution of the writ is sufficient. Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907).

In replevin, fraud need not be specially pleaded. Sopris v. Truax, 1 Colo. 89 (1868).

Upon a general denial a defendant may show absolute title in himself or a third party but not a special property. Mason Tire Sales Co. v. Mason Tire & Rubber Co., 73 Colo. 42, 213 P. 117 (1923).

A party from whom personal property has been taken pursuant to a replevin order is entitled, upon voluntary dismissal of the action by the opposing party, to return of the property or its value unless the opposing party can establish its right to retain possession of the property. The burden of establishing the right to the property should remain on the party who initially obtained the replevin order. Where no trial is held, a plaintiff should not be permitted simply to retain the property without making a showing to establish its right to possession and without affording the defendant an opportunity to demonstrate that the property was wrongfully taken. Prefer v. PharmNetRx, LLC, 18 P.3d 844 (Colo. App. 2000).

III. BOND.

A defendant in a replevin action can recover from the surety, on the latter's bond, damages he has incurred as a result of the seizing of the property in his possession, without the requirement of showing an original judgment in his favor for the return of the property or in the alternative for damages in the event return is not possible. Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

The property must be returned in like good order and condition as when replevied. Trindle v. Register Printing & Publ'g Co., 58 Colo. 81, 143 P. 282 (1914).

A verdict for the plaintiff fixing the total value of the goods, not valuing any item separately, is conclusive upon the defendant, and his surety in the redelivery bond. Trindle v. Register Printing & Publ'g Co., 58 Colo. 81, 143 P. 282 (1914).

Bond covers only claims of possession and loss thereof. The language in section (e), ''any sum that may from any cause be recovered'', viewed in context, does not apply to claims unrelated to possession or the loss of the property at issue. White v. Jackson, 41 Colo. App. 433, 586 P.2d 243 (1978).

A defendant in a replevin action under this rule is entitled to recover from the surety whatever damages he has incurred as a result of the seizing of property in his possession; however, where he has lost his lien and the owner becomes entitled to possession, he suffers no damages as a result of the replevin. White v. Jackson, 41 Colo. App. 433, 586 P.2d 243 (1978).

IV. JUDGMENT.

Judgment to be for return of entire property when in the hands of the other party. Horn v. Citizens Sav. & Com. Bank, 8 Colo. App. 535, 46 P. 838 (1896); Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

If possession cannot be had, judgment is for full value of property. Tucker v. Parks, 7 Colo. 62, 1 P. 427 (1883); Horn v. Citizens Sav. & Com. Bank, 8 Colo. App. 535, 46 P. 838 (1896); Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

It is unimportant that the thing to be recovered cannot be identified. It is suggested that replevin will not lie for the sheep, because they cannot be identified. That is unimportant under this rule. If replevin will not lie, trover will, and under this rule, action for possession, with the alternative recovery of the property or the value thereof in such a case as this, is equivalent practically to the two together. The plaintiff states the ultimate facts and has such judgment as they justify. If the chattels cannot be delivered, their value must be paid, and the judgments in that respect are right. To hold otherwise would be to revert to the common-

law forms of action now happily abolished. Clay, Robinson & Co. v. Martinez, 74 Colo. 10, 218 P. 903 (1923).

Defendant cannot complain of a judgment for the return of the property only. A judgment for the plaintiff, in an action of replevin should be in the alternative for the possession of the property, or the value thereof in case a delivery cannot be had; but, since this is for the protection of the plaintiff, the defendant cannot complain of a judgment for the return of the property only. Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906).

A judgment must be for the possession of the entire property to be operative. Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

Value of property is basis for judgment. Only on evidence as to the value of property taken in replevin is there basis for judgment. Viles v. Jackson, 105 Colo. 68, 94 P.2d 1085 (1939).

Rule is satisfied by a finding of the total aggregate value of all the chattels wrongfully withheld. Stevenson v. Lord, 15 Colo. 131, 25 P. 313 (1890); Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906).

There is no need that the judgment should declare the separate value of each item of the recovery. Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

A judgment in the alternative is not required where it would be useless. Where the goods in question have been consumed by defendant and therefore cannot possibly be delivered, it is proper to accept a finding of guilty, assessing the value. To require an alternative judgment would be a useless formality. Barnard v. Corlett, 62 Colo. 226, 161 P. 156 (1916); Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

Proof of facts under allegations determines relief. In a proper case the court may award a money judgment, without its being in the alternative, even though technically it was designated an action in replevin. Melnick v. Bowman, 102 Colo. 384, 79 P.2d 368 (1938).

Return and damages must be claimed in the answer. To authorize a judgment in a replevin suit, for the return of the property to the defendant or for its value, or for damage for its detention, the return and the damages must be claimed in the answer. And where the answer did not claim a return of the property or damage for its detention a judgment for its return and for damages for its detention was unwarranted and must be regarded as void. Gallup v. Wortmann, 11 Colo. App. 308, 53 P. 247 (1898).

Measure of damages. When neither fraud, malice, or wilful wrong in the taking or detention of the goods is alleged, the measure of damages is the value of the goods at the time of the taking or illegal detention. Barnard v. Corlett, 62 Colo. 226, 161 P. 156 (1916).

Damages for unlawful taking and detention. A party to a replevin action who is ultimately adjudged to have the right to possession is also entitled to damages for the unlawful taking and detention of the chattel. Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Damages cannot be defeated by mere misnomer or bad form. While defendant's demands (other than for return of the property) are denominated ''further answer'', ''cross complaint'', and ''separate and further cause of action'', all are in fact for damages for wrongful taking and detention, recoverable under this section. They are not to be defeated by mere misnomer or bad form. Ellison v. Young, 71 Colo. 385, 206 P. 802 (1922).

Part of judgment awarding damages for indebtedness and attorney fees held void. In an action in replevin to secure possession of mortgaged property because of default in payment of the secured indebtedness, a judgment, insofar as it awards the property to plaintiff and for costs, may be valid, but void as to that part purporting to award damages for the indebtedness and for attorney fees. French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

Judgment must be limited to ascertainment of whether there was any indebtedness. In an action in replevin by the holder of a chattel mortgage to obtain possession of the mortgaged property because the debtor was in default in payment of the secured note, the court has no jurisdiction to try the issue of indebtedness except to the point of ascertaining whether there was any indebtedness at all, and its judgment must be so limited. French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

The amount of the judgment recovered by defendant is conclusive in a subsequent suit upon the replevin bond. Cantril v. Babcock, 11 Colo. 143, 17 P. 296 (1887); Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

Unauthorized use by bailee gives bailor the right of immediate possession. A use of the chattel of the bailee in a manner unauthorized by the contract of bailment gives the bailor the right of immediate possession, and he may maintain trover or replevin. Clay, Robinson & Co. v. Martinez, 74 Colo. 10, 218 P. 903 (1923).

CHAPTER 14

Real Estate

ANALYSIS BY RULE

CHAPTER 14

REAL ESTATE

Rule 105. Actions Concerning Real Estate

(a) Complete Adjudication of Rights. An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties. The court may at any time after the entry of the decree make such additional orders as may be required in aid of such decree.

(b) Record Interest; Actual Possession Requires Occupant Be Party. No person claiming any interest under or through a person named as a defendant need be made a party unless his interest is shown of record in the office of the recorder of the county where the real property is situated, and the decree shall be as conclusive against him as if he had been made a party; provided, however, if such action be for the recovery of actual possession of the property, the party in actual possession shall be made a party.

(c) Disclaimer Saves Costs. If any defendant in such action disclaims in his answer any interest in the property or allows judgment to be taken against him without answer, the plaintiff shall not recover costs against him, unless the court shall otherwise direct, provided that this section shall not apply to a defendant primarily liable on any indebtedness sought to be foreclosed or established as a lien.

(d) Execution of Quitclaim Deed Saves Costs. If a party, 21 days or more before bringing an action for obtaining an adjudication of the rights of another person with respect to any real property, shall request of such person the execution of a quitclaim deed to such property and shall also tender to such person $20.00 to cover the expense of the execution and delivery of a deed and if such person shall refuse or neglect to execute and deliver such deed, the filing by such person of a disclaimer shall not avoid the imposition upon such person of the costs in the action afterwards brought.

(e) Set-off for Improvements. Where a party or those under whom he claims, holding under color of title adversely to the claims of another party, shall in good faith have made permanent improvements upon real property (other than mining property) the value of such improvements shall be allowed as a set-off or as a counterclaim in favor of such party, in the event that judgment is entered against such party for possession or for damages for withholding of possession.

(f) Lis Pendens.

(1) **Filing and Notice.** A notice of lis pendens may be recorded as provided by statute.

(2) **Determination of Effect on Real Property.** Any interested person may petition the court in the action identified in the notice of lis pendens for a determination that a judgment on the issues raised by the pleadings in the pending action will not affect all, or a designated part, of the real property described in the notice of lis pendens, or a specifically described interest therein. After a hearing on such petition, the court shall make findings of fact and enter an order setting forth the description of the property as contained in the recorded notice of lis pendens and the description of the portion thereof or the interest therein, if any, the title to which will not be affected by judgment on the issues then pending in the action. Such order shall be a final judgment as to the matters set forth therein and if the order includes the determination required by Rule 54(b) as to its finality apart from remaining issues, it shall be appealable only as a separate judgment of that date.

(3) **Disclaimer.** Nothing in this Rule 105(f) shall be construed so as to preclude any party litigant from disclaiming an interest in all or any part of the real property affected by such notice of lis pendens, by filing with the court an instrument so indicating, containing a reference to the notice of lis pendens by its recording data sufficient to locate it in the

records of the clerk and recorder. The filing of such instrument with the court then having jurisdiction shall bar any further claims of said party to such real property in said action.

(4) Repealed, effective April 1, 1993.

(g) Description of Real Property. In any proceeding for the recovery of real property or an interest therein, such property shall be designated by legal description.

COMMITTEE COMMENT

The previous provisions of Rule 105(f)(1) and (4) have been superseded by the passage of House Bill 92-1038, now C.R.S. § 38-35-110 (1992). The statute sets out the circumstances under which a lis pendens may be recorded, states the legal effect of the recording as a matter of substantive law, and provides for the release of the effect of a lis pendens in certain circumstances. The statute clarifies certain issues that had arisen in interpreting the former rule. Subsections (2) and (3) have been retained, as they provide procedures for the removal of the effect of a lis pendens during the course of litigation, an area of concern which is not addressed by the statute, and which is strictly procedural in nature.

Source: (f)(1) amended, (f)(4) repealed, and committee comment added and effective April 1, 1993; committee comment approved for publication March 17, 1994, effective July 1, 1994; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For boundary proceedings and surveys, see articles 44 and 50 to 53 of title 38, C.R.S.; for parties to be named in actions concerning real property, see § 38-35-114, C.R.S.; for lis pendens as notice, see § 38-35-110, C.R.S.; for certificate staying judgment on issuance of bond and its effect on lis pendens, see C.A.R. 8(d).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Must Colorado Real Property Installment Sale Contracts Be Foreclosed as Mortgages?'', see 9 Dicta 320 (1932). For note, ''Vendor's Remedies Under Colorado Executory Land Contracts'', see 22 Rocky Mt. L. Rev. 296 (1950). For article, ''A Decade of Colorado Law: Conflict of Laws, Security Contracts and Equity'', see 23 Rocky Mt. L. Rev. 247 (1951). For article, ''Actions Concerning Real Estate Including Service of Process: Rule 105 and Rule 4'', see 23 Rocky Mt. L. Rev. 614 (1951). For article, ''Enforcement of Security Interests in Colorado'', see 25 Rocky Mt. L. Rev. 1 (1952). For article, ''Standard Pleading Samples to Be Used in Quiet Title Litigation'', see 30 Dicta 39 (1953). For article, ''Attorneys, Courts, Equity'', see 31 Dicta 477 (1954). For article, ''Property Law'', see 32 Dicta 420 (1955). For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For article, ''One Year Review of Property'', see 37 Dicta 89 (1960). For note, ''Holdover Tenants in Colorado'', see 34 Rocky Mt. L. Rev. 320 (1962). For article, ''Land Description Problems'', see 35 U. Colo. L. Rev. 12 (1962). For article, ''Survey of Title Irregularities, Curative Statutes and Title Standards in Colorado'', see 35 U. Colo. L. Rev. 21 (1962). For article, ''Court Proceedings Relating to Real Estate Titles'', see 35 U. Colo. L. Rev. 65 (1962). For article, ''Winning the Rezoning'', see 11 Colo. Law. 634 (1982). For article, ''Foreclosure by Private Trustee: Now Is the Time for Colorado'', see 65 Den. U. L. Rev. 41 (1988).

Purpose of this rule is to provide for a complete adjudication of the rights of all parties so that the controversy may be ended. Maitland v. Bd. of County Comm'rs, 701 P.2d 617 (Colo. App. 1984).

It is clear from the language of this rule that a C.R.C.P. 105 proceeding should completely adjudicate the rights of all parties to the action claiming interests in the property. Even if a counterclaim is not pled, or an issue is not raised in the pleadings but is apparent from the evidence, the court should reach the issue to give full relief. Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997).

This rule does not change the substantive law, which is firmly established in all actions regarding possession of real property. Fastenau

v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954); Martini v. Smith, 42 P.3d 629 (Colo. 2002).

This rule was not intended to permit courts to quiet title in defaulting defendants. Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978).

Substance and not form determines the nature of an action relating to real estate, since the adoption of section (a). Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950).

Whether or not an action was one for possession of land depends on the fact of possession, and not on the form of the action. Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950).

Plaintiffs must rely on the strength of their own title in suits to quiet title, and not on the weakness or supposed weakness of their adversaries. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954); Morrissey v. Achziger, 147 Colo. 510, 364 P.2d 187 (1961); Sch. Dist. No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964).

A plaintiff, in an action to quiet title to lands, must rely on the strength of his own title thereto; and when it affirmatively appears that such plaintiff's rights have terminated, he is in no position to question the legality of the title claimed by others. Sch. Dist. No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964).

Plaintiff in an action to quiet title must show title in himself. Buell v. Redding Miller, Inc., 163 Colo. 286, 430 P.2d 471 (1967).

No necessity for either party to show possession. In an action brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto with respect to real property it is not necessary for the plaintiff to allege and prove that he had possession of the real estate in question. Possession of the property in controversy in either party is wholly immaterial under this rule. Siler v. Inv. Sec. Co., 125 Colo. 438, 244 P.2d 877 (1952).

In actions brought under this rule, possession is not essential to maintain or defend such an action. An adjudication of the rights of the parties, whether of ownership or possession, may be made by the court. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Plaintiff does not have to prove possession of the property involved in order to prevail. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

When party in possession must be joined. Section (b) of this rule requires that a party in possession must be joined if the plaintiff seeks to recover actual possession of the subject property. Ginsberg v. Stanley Aviation Corp., 193 Colo. 454, 568 P.2d 35 (1977).

If the subject property is a public road that has been used as such, a disclaimer filed under the provisions of this rule by the county in control of the road cannot operate to vacate the road. Rather, the county must follow the mandates of the vacation statute. Martini v. Smith, 42 P.3d 629 (Colo. 2002).

A plaintiff not in possession must show superior title. Under this rule a plaintiff who is not in possession of real estate cannot challenge the title of a defendant in possession thereof without establishing in himself a title superior to that under which defendant occupies the land. Likewise, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title, since if the plaintiff has no title he cannot complain that someone else, also without title, asserts an interest in the land. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

In a case where defendant is in possession, plaintiff must rely on the strength of his own title, not upon the weakness of defendant's title in order to recover. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Rights of parties considered in filing of complaint. In an action to quiet title the pertinent date fixing the rights of the parties is the date upon which the complaint is filed. No muniment of title acquired thereafter is admissible in evidence and a plaintiff cannot bolster a claim to title by acquisition of title papers subsequent to the institution of an action, unless, by supplemental pleadings, issues are framed based upon the subsequently acquired instrument. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Ejectment cannot be supported by a title acquired after action commenced nor can a defective title be aided by conveyances made pending suit. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Burden of proof. Monetary reparation cannot be based upon mere speculation, but on the other hand such need not be proven with mathematical certainty. It is sufficient if the plaintiff establishes by a preponderance of the evidence that he has in fact suffered damage or that his rights have been infringed and that his evidence in this regard provides a reasonable basis for a computation of the damage so sustained. Difficulty in proof of damages does not in and of itself destroy the right of recovery. Riggs v. McMurtry, 157 Colo. 33, 400 P.2d 916 (1965).

Plaintiff's burden of proof was to establish title to the property in question by the presentation of competent evidence. The evidence presented by plaintiff was primarily in the form of a stipulated set of facts establishing the chain of title. Under these circumstances, the trial court correctly concluded that plaintiff had established a prima facie case establishing his right to ownership of the property in question. Plaintiff was entitled to relief under this section, unless defendant could come forward with evidence to rebut plaintiff's title to the property.

Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

The defense of laches is not available in a quiet title action. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

Where defendant acquired a defective treasurer's deed in 1956 to the property in question, but never made use of, nor improved the property in any manner during the intervening period of time, nor expended any sums of money on it, delay, if any, has not worked to defendant's detriment in any manner, and hence dependant is not in a position to complain of delay in the bringing of this action. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Effect of failure to raise issue of damages in quiet title action. Under this rule providing for a complete adjudication of rights of the parties litigant, together with damages, if any, it was essential that any damage claims be asserted in the quiet title action and upon failure to do so, damages could not be an issue in a condemnation action. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 95, 308 P.2d 606 (1957).

When evidence should be submitted to jury. In an action for the adjudication of the right to possession of real estate and for damages for alleged wrongful trespass brought under this rule, it was held that, where there are a number of fact issues and the evidence is in conflict, the evidence should be submitted to the jury for determination. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

Finding supported by evidence upheld on review. The controverted issue as to the nature of gypsiferous deposits was an issue of fact and there being competent evidence to support the trial court's finding that this is a placer deposit, its determination of the matter must be upheld on review. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Applied in Ginsberg v. Stanley Aviation Corp., 37 Colo. App. 240, 551 P.2d 1086 (1975); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); Atchison, T & S.F. Ry. v. North Colo. Springs Land & Imp. Co., 659 P.2d 702 (Colo. App. 1982).

II. SCOPE OF RELIEF.

The manifest intent of section (a) of this rule is to provide "a complete adjudication of the rights of all parties". Hopkins v. Bd. of County Comm'rs, 193 Colo. 230, 564 P.2d 415 (1977).

This rule provides for a complete adjudication of all the rights of the parties in interest. Merth v. Hobart, 129 Colo. 546, 272 P.2d 273 (1954).

This rule has reference to a judgment finally determining the rights of all parties. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959).

Where neither party has satisfactorily established title, equity and this rule direct that a complete adjudication of right be made. Hanson v. Dilley, 160 Colo. 371, 418 P.2d 38 (1966).

Equitable relief for improvements. Where the powers of the court were invoked to settle a boundary dispute and the rights of the parties with respect to improvements mistakenly built upon the land, there being no bad faith on the part of any of the parties, it was the duty of the court to grant such equitable relief as the situation required. Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960).

Where an adjoining owner had in good faith erected improvements on adjoining land, believing it to be his own, he should be granted the right to remove same if feasible and if not, then given an equitable lien on the property for the value thereof. Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960).

Courts will not enforce racial restrictive covenants. The trial court's refusal to recognize the vested interest in defendant and to enforce forfeiture of the property for failure to comply with a racial restrictive covenant did not deprive defendant of property without just compensation and without due process of law. Courts will not enforce such covenants and an action for damages will not lie for violations thereof. Capitol Fed. Sav. & Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957).

Removal of restrictive covenants. Sitting as a court of equity the trial court has the power to remove or cancel restrictive covenants as clouds on the title. Such power may be exercised when it is shown that the restrictive covenants no longer serve the purpose for which they were imposed and are no longer beneficial to those claiming under them. Zavislak v. Shipman, 147 Colo. 184, 362 P.2d 1053 (1961); Cole v. Colo. Springs Co., 152 Colo. 162, 381 P.2d 13 (1963).

Documents that reasonably designate land burdened by easements were not, as a matter of law, invalid because of vagueness. If, on remand, the easements are not determined to be otherwise unenforceable or invalid, their location will need to be fixed by the agreement of the parties or, if necessary, by the court. Stevens v. Mannix, 77 P.3d 931 (Colo. App. 2003).

Due-on-sale clause is not unreasonable restraint on alienation and does not require a case-by-case factual determination by trial courts whenever an effort is made to enforce a due-on-sale clause. Bakker v. Empire Sav.,

Bldg. & Loan Ass'n, 634 P.2d 1021 (Colo. App. 1981).

Enforcement of restrictions in lease. The law gives the lessor the right to impose restrictions in the lease on the right to assign or sublet the leased premises, and these restrictions may be enforced by forfeiture of the lease and reentry. Union Oil Co. v. Lindauer, 131 Colo. 138, 280 P.2d 444 (1955).

An action to terminate a lease of real property may be instituted under this rule. Union Oil Co. v. Lindauer, 131 Colo. 138, 280 P.2d 444 (1955).

Determination of adverse possession. In making a determination of the boundaries of the property to which the defendants have acquired title by actual occupancy and adverse possession, and quieting defendants' title thereto, the trial court is to determine the land necessarily appurtenant to the cabin, taking into consideration the location and nature of the property, and the uses to which the property lends itself, the uses made of the property by the defendants, and the evidence of visible occupation of the property by the defendants which would give notice of their exclusive and adverse claim to the owner and the public. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

The possession necessary to establish title to property by adverse possession need not always be personal possession by the adverse claimant but, in some circumstances, may be established by the conduct of another whom the adverse claimant has authorized. Holland v. Sutherland, 635 P.2d 926 (Colo. App. 1981).

Court cannot quiet title in favor of defaulting party even when evidence presented by an appearing party supports the defaulting party's title interests. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

Legal title to disputed parcel in foreclosure of deed of trust action not acquired since the documents showed parties' intent to extinguish prior deed of trust on disputed parcel. Colo. Nat'l Bank-Exch. v. Hammar, 764 P.2d 359 (Colo. App. 1988).

Court may not amplify deed by construction of contract. A decree adjudging the defendants to be the owners of the lake, together with incidental rights thereto, is tantamount to a conveyance of the lake. It is an amplification of the deed by decree, something a court may not do under the guise of construing a contract. A court cannot rewrite a contract and thereby change its terms when it is plain, clear, and unambiguous. Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 P.2d 599 (1964).

Effect of decree following old terminology for quieting title. In an action for reformation of a mortgage and a sheriff's deed issued on its foreclosure, so as to include a parcel inadvertently omitted, the decree in form followed the old terminology for quieting title, and it was urged that the court could not quiet title in the plaintiff, since he held no title thereto. However, it was held that this contention was without merit, since the action was specifically an action for reformation, setting out properly the basis of the claim and complying sufficiently with this rule, as an action to obtain an adjudication of the rights of the parties with respect to real estate. Stubbs v. Standard Life Ass'n, 125 Colo. 278, 242 P.2d 819 (1952).

Minor improvements deemed not "taking". The placing of a few minor improvements on property does not necessarily constitute a ''taking'' of possessions. Holland v. Sutherland, 635 P.2d 926 (Colo. App. 1981).

Vendor's action under this rule involved the same subject matter as vendor's prior boundary line action. Therefore the subsequent action was barred by res judicata. Agee Revocable Trust v. Mang, 919 P.2d 908 (Colo. App. 1996).

Because license for recreational use of property is not an interest in the land, trial court did not err in not defining the scope of the license in quiet title action brought under this rule. Bolinger v. Neal, 259 P.3d 1259 (Colo. App. 2010).

III. COSTS.

Partial disclaimer ineffective. In an action where defendant disclaimed as to part of the premises and claimed title and right of possession as to the remainder, in case of judgment for plaintiff, defendant is not entitled to have part of the cost assessed against plaintiff. Relender v. Riggs, 20 Colo. App. 423, 79 P. 328 (1905) (decided under § 276 of the former Code of Civil Procedure).

Defendant with claim for taxes may save costs. Where a defendant disclaims title and sets up its outlays on account of taxes legally assessed, which should have been paid by the plaintiff, and asks for judgment accordingly, the cost is properly a charge against the plaintiff under this section. Empire Ranch & Cattle Co. v. Lanning, 49 Colo. 458, 113 P. 491 (1911) (decided under § 276 of the former Code of Civil Procedure).

Attorneys' fees are proper measure of damages in action for slander of title. Sussex Real Estate Corp. v. Sbrocca, 634 P.2d 999 (Colo. App. 1981).

Defendant who successfully opposed plaintiff's motion to amend quiet title decree to delete portion pertaining to title interests of defaulting defendants was not entitled to award of attorney fees. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

IV. LIS PENDENS.

Annotator's note. Since section (f) of this rule is similar to § 38 of the former Code of

Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of recording lis pendens notice is to give notice of the pendency of an action to persons who may subsequently acquire or seek to acquire rights in the property. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Expired lis pendens did not provide constructive notice of the terms of the judgment of underlying lawsuit. This rule is designed to give party to suit sufficient time to file notice of appeal or to record transcript of judgment in county where property is situated, but is not intended not to extend constructive notice period beyond thirty days. Maddalone v. Wilson, 764 P.2d 403 (Colo. App. 1988) (decided under rule in effect prior to 1981 amendment).

Lis pendens brings the subject matter of the litigation within the control of the court, and renders the parties powerless to place it beyond the power of the final judgment. Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

Third parties cannot thereafter interfere with the property. In an action involving the title to real property, the effect of filing a lis pendens is to prevent interference by third parties with the property during the pendency of the action. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

Purchaser from one litigant takes subject to rights of other parties in the action. The general rule as to lis pendens is that a person who acquires an interest in property involved in litigation, pendente lite and from a party litigant, takes subject to the rights of the other parties to the suit as finally adjudicated. Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

Proper subject of lis pendens. Where a complaint clearly shows that an action relates to the possession, use, or enjoyment of real property, it is, therefore, the proper subject of the filing of a lis pendens. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

The filing of a notice of lis pendens is proper if claimant shows that the underlying action relates to a right to possession, use, or enjoyment of real property. Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983).

Notice of lis pendens is properly filed in any case in which affirmative relief is claimed affecting the title to real property. Central Allied Profit Sharing v. Bailey, 759 P.2d 849 (Colo. App. 1988).

The notice of lis pendens and not the pleadings gives constructive notice of pending litigation affecting interests in realty. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959), overruling Central Sav. Bank v. Smith, 43 Colo. 90, 95 P. 307 (1908).

Constructive notice as of day notice is recorded. A notice of lis pendens which refers to a complaint seeking divorce and a division of property, or seeking separate maintenance and an equitable interest in property, is constructive notice as of the day notice of lis pendens is recorded. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

No notice to grantee under prior recorded deed. Notice of the pendency of a suit involving title to land, filed after the recording of a conveyance, is no notice to the grantee in such conveyance. Dalander v. Howell, 22 Colo. App. 386, 124 P. 744 (1912).

"Affecting the title to real property" to be expansively interpreted. An expansive interpretation of the language ''affecting the title to real property'', as found in section (f), serves to further the policy that successful completion of suits involving rights in real property should not be thwarted by permitting transfers of such property before such suits are resolved. Cooper v. Flagstaff Realty, 634 P.2d 1013 (Colo. App. 1981).

A proceeding by a creditor to set aside a conveyance as fraudulent pursuant to § 38-10-117 clearly falls within actions affecting the title to real property. Crown Life Ins. Co. v. April Corp., 855 P.2d 12 (Colo. App. 1993).

Litigation of promise to grant deed of trust affects title. Insofar as a case involves litigation of a promise to grant a deed of trust applying to a specific parcel of real property, it is one ''affecting'' title to that real property within the meaning of section (f). Cooper v. Flagstaff Realty, 634 P.2d 1013 (Colo. App. 1981).

Description of property allowing proper indexing is sufficient. The lis pendens notice contains a brief description of the property affected thereby. It is sufficient in this respect if it enables proper indexing against the proper section and block numbers. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Failing to file lis pendens notice does not relieve persons who have actual notice of the pendency of the action. Buckhorn Plaster Co. v. Consol. Plaster Co., 47 Colo. 516, 108 P. 27 (1910).

Lis pendens will give notice of wife's claim against property of husband. A wife has an equitable interest in the property of her husband. In an action for separate maintenance, praying that she be awarded specific property, lis pendens duly filed is notice of her claim against that property. Tinglof v. Askerlund, 96 Colo. 27, 39 P.2d 1039 (1934); Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Summary judgment as to certain defendants does not release lis pendens. Under C.R.C.P. 54(b), this rule, and § 38-40-110, a lis pendens remains in full force and effect until

final judgment or until final disposition of a case, and where a summary judgment dismissing the action and releasing lis pendens as to certain defendants is granted, with no determination that there is no just reason for delay in disposing of the action as to such defendants, such summary judgment is not final for any purpose and the lis pendens is not released. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959).

Release of property from notices of lis pendens held valid. Peoples Bank & Trust Co. v. Packard, 642 P.2d 57 (Colo. App. 1982).

Disclaimer of interest under section (f)(3) is an absolute bar to future claims to interests in property pursuant to the terms of the disclaimer, regardless of the precise legal theory or reasons that led to making the disclaimer, absent fraud or duress. Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998).

An action need not be brought under this rule as a precondition to making an effective disclaimer of interest under section (f)(3). Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998).

Adequate remedy to contest release of lis pendens on appeal. Meaker v. District Court, 134 Colo. 151, 300 P.2d 805 (1956).

Continuation of lis pendens pending appeal conditioned on posting bond held valid in Wellman v. Travelers Ins. Co., 689 P.2d 1151 (Colo. App. 1984).

Motion to quash lis pendens denied since Colorado law makes no provision for the cancellation of a notice of lis pendens by any court at any time, but instead provides by section (f) of this rule that the notice shall expire automatically. McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951), aff'd, 201 F.2d 528 (10th Cir. 1953).

Damages for filing in suit maliciously brought. If a suit is brought maliciously and without probable cause, and notice of lis pendens filed therein, liability would attach for such filing, for any damages occasioned thereby. Johnston v. Deidesheimer, 76 Colo. 559, 232 P. 1113 (1926); Westfield Dev. v. Rifle Inv. Assoc., 786 P.2d 1112 (Colo. 1990).

Proceeding to enforce adherence to criteria with respect to construction of improvements is one wherein affirmative relief is claimed affecting the title to real property within the meaning of this rule. Hammersley v. District Court, 199 Colo. 442, 610 P.2d 94 (1980).

Filing of notice of lis pendens provides only a qualified privilege with respect to a claim based on intentional interference with a contract and applies only when the one who interferes has, or honestly believes he has, a legally protected interest and, in good faith, asserts or threatens to assert such claim through proper means. Westfield Dev. v. Rifle Inv. Assoc., 786 P.2d 1112 (Colo. 1990).

Lis pendens expired with the dismissal of plaintiff's appeal. A subsequent settlement between the parties did not resurrect the lis pendens and thus was not binding on the interests of a third party which had filed an interest on the property during the pendency of the lis pendens. Perry Park Country Club, Inc. v. Manhattan Savings Bank, 813 P.2d 841 (Colo. App. 1991).

Neither filing a foreclosure action nor recording a lis pendens prevented the United States from releasing its own tax lien, thereby losing its priority over the owners' interests. U.S. v. Winchell, 793 F. Supp. 994 (D. Colo. 1992).

V. DESCRIPTION OF REAL PROPERTY.

A divorce action no longer has to describe the property affected. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Judgment must fix boundary lines with certainty. A judgment decree involving the right to possession of real property must definitely and sufficiently describe it in order that an officer charged with the duty of executing a writ of possession may go upon the premises, and, without exercising any judicial functions whatever, ascertain with certainty the boundary lines fixed by the judgment. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954); Thompson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967).

The judgment and decree must be so definite and specific in defining the proper location of the boundary lines that all the parties affected thereby may comply with the judgment in every respect. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954); Thompson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967).

Court may adopt most definite of two repugnant descriptions. Where there are two repugnant descriptions in a deed, the trial court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties. Wallace v. Hirsch, 142 Colo. 264, 350 P.2d 560 (1960).

Monuments control over monument calls. In a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land be fixed by ascertainable monuments and by courses and distances, the well-settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls. Wallace v. Hirsch, 142 Colo. 264, 350 P.2d 560 (1960).

Where a conveyance is made with reference to an official map or plat, the map or plat

becomes a part of the grant. Radio San Juan, Inc. v. Baker, 31 Colo. App. 151, 498 P.2d 957 (1972).

Rule 105.1. Spurious Lien or Document

(a) Petition; Contents, Order to Show Cause. Any person whose real or personal property is affected by a spurious lien or spurious document, as defined by law, may file a petition in the district court in the county in which the lien or document was recorded or filed, or in the district court for the county in which affected real property is located, for an order to show cause why the lien or document should not be declared invalid. The petition, which may also be brought as a counterclaim or a cross-claim in a pending action, shall set forth a concise statement of the facts upon which the petition is based, shall be supported by the affidavit of the petitioner or the petitioner's attorney, and shall be accompanied by a copy of the lien or document as recorded or filed in the public records. The order to show cause may be granted ex parte and shall:

(1) Direct any lien claimant and any person who recorded or filed the lien or document to appear as respondent before the court at a time and place certain not less than 14 days nor more than 21 days after service of the order to show cause why the lien or document should not be declared invalid and why such other relief provided for by statute should not be granted;

(2) State that if the respondent fails to appear at the time and place specified, the lien or document, if found by the court to be spurious, will be declared invalid and released; and

(3) State that the court shall award costs, including reasonable attorney fees, to the prevailing party.

(b) Notice; Service. The petitioner shall issue a notice to respondent setting forth the time and place for the hearing on the show cause order, which hearing shall be set not less than 14 days nor more than 21 days from service of the show cause order, and shall advise respondent of the right to file and serve a response as provided in section (c), including a reference to the last day for filing a response and the addresses at which such response must be filed and served. The notice shall contain the return address of the petitioner or the petitioner's attorney. The notice and a copy of the petition and order to show cause shall be served by the petitioner on the respondent not less than 14 days prior to the date set for the hearing, by (1) mailing a true copy thereof by first class mail to each respondent at the address or addresses stated in the lien or document and (2) filing a copy with the clerk of the district court and delivering a second copy to the clerk of the district court for posting in the clerk's office, which shall be evidenced by the certificate of the petitioner or petitioner's agent or attorney. Alternatively, the petitioner may serve the petition, notice, and show cause order upon each respondent in accordance with Rule 4, or, in the event the claim is brought as a counterclaim or cross-claim in a pending action in which the parties have appeared, in accordance with Rule 5.

(c) Response; Contents; Filing and Service. Not less than 7 days prior to the date set for the hearing, the respondent shall file and serve a verified response to the petition, setting forth the facts supporting the validity of the lien or document and attaching copies of all documents which support the validity of the lien or document. Service of such response shall be made in accordance with Rule 5(b).

(d) Hearing; Decree; Hearing Dispensed With If No Response Filed. If, following a hearing on the order to show cause, the court determines that the lien or document is a spurious lien or a spurious document, the court shall make findings of fact and enter an order and decree declaring the spurious lien or document and any related notices of lis pendens invalid, releasing the recorded or filed spurious lien or spurious document, and entering a monetary judgment in the amount of the petitioner's costs, including reasonable attorney fees, against the respondent and in favor of the petitioner. If, following the hearing on the order to show cause, the court determines that the lien or document is not a spurious lien or document, the court shall issue an order so finding and enter a monetary judgment against the petitioner and in favor of the respondent in the amount of the respondent's

costs, including reasonable attorney fees. If necessary, the court may in its discretion continue the hearing on the show cause order for further proceedings and trial. If no response is filed and served by the respondent within the time permitted by section (c), the court shall examine the petition and, if satisfied that venue is proper and that the lien or document is spurious, the court shall dispense with the hearing and forthwith enter the order, which shall be a final judgment for purposes of appeal. If the petition has been personally served upon the respondent in accordance with Rule 4(e) or (g), the court shall enter judgment in favor of petitioner and against the respondent for the petitioner's costs, including reasonable attorney fees.

(e) Docket Fee. A docket fee in the amount specified by law shall be paid by the petitioner. The respondent shall pay, at the time of the filing of the response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

Source: Entire rule added and adopted December 18, 1997, effective January 1, 1998; (b) and (d) corrected December 30, 1997, effective January 1, 1998; (b) amended and effective June 28, 2007; (a)(1), (b), and (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Because a lis pendens can be a spurious document, trial court may award attorney fees and costs for a spurious lis pendens. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Defendants' petition for removal of a lis pendens as a spurious document constituted a counterclaim, even though it was not denominated as such, because defendants filed the petition in a pending action and not in a separate proceeding. Therefore, defendants were not required to pay a docket fee and properly served their petition under C.R.C.P. 5 using an electronic filing system. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Trial court had jurisdiction to award attorney fees and costs to defendants for a spurious lis pendens. Because plaintiff did not refute that the lis pendens was spurious at the show cause hearing, trial court had jurisdiction to enter judgment in favor of defendants and against plaintiff for defendants' costs and attorney fees. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Trial court abused its discretion in awarding attorney fees without holding an evidentiary hearing on the reasonableness and necessity of the attorney fees requested by defendants. If a party requests a hearing concerning an award of fees, the trial court must hold a hearing. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Rule creates an exception to the priority rule, which requires the second of two actions with the same parties and subject matter to be stayed until the first action is finally determined. Under the express language of the rule, a party challenging the validity of a recorded document may file the petition as a counterclaim or cross-claim, or the party may institute a separate proceeding. Battle N., LLC v. Sensible Hous. Co., 2015 COA 83, 370 P.3d 238.

This rule and § 38-35-204, both governing spurious lien proceedings, conflict with, and thus control over, the more general rules of pleading. Therefore, the trial court did not err when it concluded that banks could not raise their counterclaims and third-party claim in the spurious lien action and dismissed them without prejudice. Fiscus v. Liberty Mort. Corp., 2014 COA 79, 373 P.3d 644, aff'd on other grounds, 2016 CO 31, 379 P.3d 278.

CHAPTER 15

Remedial Writs and Contempt

ANALYSIS BY RULE

CHAPTER 15

REMEDIAL WRITS AND CONTEMPT

Rule 106. Forms of Writs Abolished

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within 21 days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the court. The cost of preparing the record shall be advanced by the plaintiff, except that the court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order,

the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.

(VIII) The court may accelerate or continue any action which, in the discretion of the court, requires acceleration or continuance.

(IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

Source: (a)(4)(IV), (a)(4)(VII), and (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For original jurisdiction of the supreme court, see C.A.R. 21; for original jurisdiction of supreme court on certiorari, see C.A.R. 49 and 50; for effect of judgment against a partnership, see C.R.C.P. 54(e); for petition for writ of habeas corpus in criminal cases, see § 13-45-101, C.R.S.; for writ of habeas corpus in civil cases, see § 13-45-102, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Mandamus and Other Writs", see 18 Dicta 333 (1941). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21

(1960). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''One Year Review of Civil Procedure and Appeals'', see 40 Den. L. Ctr. J. 66 (1963). For article, ''One Year Review of Criminal Law and Procedure'', see 40 Den. L. Ctr. J. 89 (1963). For note on current developments, ''Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado'', see 46 U. Colo. L. Rev. 609 (1974-75). For note, ''Referendum and Rezoning: Margolis v. District Court'', see 53 U. Colo. L. Rev. 745 (1982). For article, ''Original Proceedings in the Colorado Supreme Court'', see 12 Colo. Law. 413 (1983). For article, ''Asserting Vested Rights in Colorado'', see 12 Colo. Law. 1199 (1983). For article, ''Judicial Review, Referral and Initiation of Zoning Decisions'', see 13 Colo. Law. 387 (1984). For article, ''C.R.C.P. Rule 106: Amendments Governing Appeals from Local Governmental Decisions'', see 15 Colo. Law. 1643 (1986). For article, ''Local Government Exactions from Developers after Beaver Meadows'', see 16 Colo. Law. 42 (1987). For article, ''Prosecuting an Appeal from a Decision of the Colorado Public Utilities Commission'', see 16 Colo. Law. 2163 (1987).

Purpose of rule. Under the former Code of Civil Procedure complaints apparently setting out facts sufficient for relief were held demurrable because the actions sought special writs. It was because of this result that this rule was adopted abolishing forms of writs and the special forms of pleadings formerly required. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

The rationale behind section (b) requires that the challenging party have had notice and an opportunity to be heard in a proceeding, subject to certiorari review, which is judicial or quasi-judicial in character. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

The substantive aspects of remedial writs are preserved, and relief in the same nature as was formerly provided in such proceedings may be granted under the Rules of Civil Procedure in accordance with precedents established under the former practice. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Rule operates only on procedure. The present Rules of Civil Procedure, and particularly this rule, operate on or with respect to matters of procedure. Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951).

Section (a) does not preclude a court from initiating a proceeding by means other than institution of a civil action. Pena v. District Court, 681 P.2d 953 (Colo. 1984).

This rule preempts municipal provisions for review. Local ordinance provisions may not control the filing of a petition seeking review under section (a)(4). Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

The 30-day time limit in section (b) preempts a municipal code's 20-day time limit for seeking review. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

Despite a municipal code's requirement of verification, a proceeding for review under this rule may be initiated without a verified petition because this rule does not so require. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982).

A municipal requirement that a bond be posted before a proceeding under this rule may be commenced is invalid. Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

This rule and C.A.R. 21 are to be construed together. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Certiorari complaint not amendable under C.R.C.P. 15(c). Because invoking the relation-back doctrine of C.R.C.P. 15(c) to amend a certiorari complaint filed pursuant to this rule would undermine the important public policies of expediting resolution of challenges to zoning and annexation proceedings and of removing municipal planning and individual properties from a cloud of uncertainty, when the original complaint fails to state a claim for relief, said rule 15(c) has no application to the proceedings or to any further pleadings which may be filed. Richter v. City of Greenwood Vill., 40 Colo. App. 310, 577 P.2d 776 (1978).

"District court" refers to state and not federal courts. City of Colo. Springs v. Blanche, 761 P.2d 212 (Colo. 1988).

This rule applies only to relief sought in the district courts against inferior courts, administrative boards, and officials. Gen. Aluminum Corp. v. Arapahoe County Dist. Court, 165 Colo. 445, 439 P.2d 340 (1968).

It does not apply to original proceedings. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

This rule does not apply to original proceedings in the supreme court. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978).

Rule to show cause limited to exceptional cases. A superior tribunal should exercise great caution and circumspection before issuing a rule to show cause to an inferior tribunal, and then only when such court is satisfied that the ordinary remedies provided by law are not applicable or are inadequate. Only in exceptional cases or classes of cases should applications of

this character be allowed. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Party must exhaust available administrative remedies before seeking judicial review pursuant to this rule or district court lacks jurisdiction to hear the case. This doctrine cannot be circumvented by seeking declaratory relief. City & County of Denver v. United Air Lines, Inc., 8 P.3d 1206 (Colo. 2000).

"Quasi-judicial action" defined. A quasi-judicial action, reviewable under section (a)(4), is generally characterized by the following factors: (1) A local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring that a hearing be conducted before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Administrative segregation actions by department of corrections are quasi-judicial actions reviewable under section (a)(4) of this rule. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Action by the department of corrections that affects a protected liberty interest of an inmate falls within the realm of reviewable quasi-judicial activity, and review is appropriate. Fisher v. Colo. Dept. of Corr., 56 P.3d 1210 (Colo. App. 2002).

Department of corrections' (DOC) classification of inmate as sex offender is a quasi-judicial action subject to review under this rule. Vondra v. Colo. Dept. of Corr., 226 P.3d 1165 (Colo. App. 2009).

Prison officials engage in quasi-judicial action when they decide to limit an inmate's ability to file future grievances. Brooks v. Raemisch, 2016 COA 32, 371 P.3d 738.

Section (a)(4) review is sufficient for purposes of assuring that university's and regents' actions were functionally equivalent to the judicial process and therefore merited quasi-judicial immunity. Churchill v. Univ. of Colo. at Boulder, 293 P.3d 16 (Colo. App. 2010), aff'd, 2012 CO 54, 285 P.3d 986, cert. denied 569 U.S. 904, 133 S. Ct. 1724, 185 L. Ed. 2d 785 (2013).

District attorney can appeal district court's order under section (a)(4) based on court's alleged abuse of discretion. Hotsenpiller v. Morris, 2017 COA 95, __ P.3d __.

Reviewing court must apply abuse of discretion or made without justification or jurisdiction standard when reviewing DOC classification of inmate as sex offender. If the evidence is conflicting, the hearing panel's findings are binding on appeal. Vondra v. Colo. Dept. of Corr., 226 P.3d 1165 (Colo. App. 2009).

Review pursuant to C.R.C.P. 57 is more appropriate than review pursuant to this rule in the context of a quasi-judicial proceeding where a declaratory judgment is requested and this rule does not provide an adequate remedy. Constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under C.R.C.P. 57. Native Am. Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004).

District attorney may appear on his or her own behalf or on behalf of a county court and a county court judge who are named defendants in an action brought under section (a)(4) of this rule. It would make little sense to prohibit the district attorney from appearing or representing the county court or its judge when the people of the state are, in practice, the real parties in interest as to the county court's ruling, nor is there any basis to disqualify the district attorney. Huang v. County Court of Douglas County, 98 P.3d 924 (Colo. App. 2004).

Constitutional violation is not a prerequisite to review. Section (a)(4) did not require that inmate allege a protected liberty interest or a violation of due process to challenge an administrative segregation action by the department of corrections. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Where no statute provides a different limitations period, a claim seeking review under section (a)(4) that is filed more than 28 days after the governmental body or officer's final decision must be dismissed. Auxier v. McDonald, 2015 COA 50, 363 P.3d 747.

Plaintiff did not give adequate notice in the original complaint that he sought relief against municipal commission under section (a)(4). As a result, the court properly treated plaintiff's section (a)(4) claim against the planning commission in the amended complaint as a new claim. Absent an exception allowing such a claim to be brought for the first time more than 28 days after the planning commission's final decision, the court properly dismissed the claim. Auxier v. McDonald, 2015 COA 50, 363 P.3d 747.

Review under section (a)(4) must be taken within 30 days of the date of the action for which review is sought and failure to comply with the 30-day limitations period divests the district court of subject matter jurisdiction to hear the action. Crawford v. State Dept. of Corr., 895 P.2d 1156 (Colo. App. 1995); Baker v. City of Dacono, 928 P.2d 826 (Colo. App. 1996).

A litigant invokes district court jurisdiction and commences section (a)(4) review by e-filing a section (a)(4) complaint with the district court by the 28-day jurisdictional deadline; a section (a)(4) complaint is deemed to have been filed on the date it is transmitted to the e-system provider; and a section (a)(4) complaint that is not filed in the district court by the

28-day jurisdictional deadline must be dismissed for lack of subject matter jurisdiction. Maslak v. Town of Vail, 2015 COA 2, 345 P.3d 972.

The fact that litigants e-filed their section (a)(4) complaint with a district court other than the one they intended did not deprive the intended county district court of its subject matter jurisdiction over the action. This rule does not state that district court jurisdiction over a section (a)(4) action is limited to the district court where a section (a)(4) complaint is originally filed, nor does it state that district court jurisdiction over a section (a)(4) action is limited to the district court where venue is proper. Maslak v. Town of Vail, 2015 COA 2, 345 P.3d 972.

A clerk's rejection of a section (a)(4) complaint does not, and cannot, alter the fact that the complaint had been "filed" in the district court on the date that it was transmitted to the e-system provider. The rejection also does not, and cannot, alter the fact that the litigants had invoked district court jurisdiction — including that of the intended county district court — on the date that they e-filed their complaint with the other district court. A clerk's rejection of a complaint under a chief justice directive rejection list cannot deprive a court of jurisdiction because the rejection list is administrative and is not a jurisdictional rule. Granting district court clerks discretionary authority under a chief justice directive to determine the district court's subject matter jurisdiction over an e-filed section (a)(4) action would render the filing rules set forth in C.R.C.P. 121 § 1-26(4) and (5) and section (a)(4) of this rule meaningless. Maslak v. Town of Vail, 2015 COA 2, 345 P.3d 972.

Submitting a section (a)(4) complaint to the correct court pursuant to another district court clerk's e-filing rejection notice instructions did not constitute the filing of an entirely new and entirely separate action for purposes of invoking district court jurisdiction within section (b)'s 28-day jurisdictional window. Maslak v. Town of Vail, 2015 COA 2, 345 P.3d 972.

Since defendant did not appeal his sex offender classification in a timely manner, the parole board had the authority to impose sex offender conditions and treatment as part of defendant's parole. Similarly, the trial court lacked jurisdiction to consider defendant's claims regarding his parole conditions since the claims were based upon his classification as a sex offender. People v. Jones, 222 P.3d 377 (Colo. App. 2009).

Trial court properly determined that it lacked jurisdiction to hear claims for review of planning commission's June 8, 2005 final decision to issue a building permit. Section (a)(4) of this rule provides for district court review of final, quasi-judicial decisions of a governmental entity; however, such claims must be filed within 30 days after the challenged decision was rendered. If the claims are not timely filed, the district court lacks jurisdiction to hear them under section (b) of this rule. Here, because plaintiffs did not file their complaint until August 23, 2005, they exceeded the 30-day deadline. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Plaintiffs' claim for declaratory relief asserting that planning commission did not provide sufficient notice to them of a permit review meeting was also properly dismissed under rule. Because section (a)(4) of this rule is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively seek such review (whether framed as claims under section (a)(4) of this rule or not) are subject to the 30-day deadline under section (b). Thus, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 30 days. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Although plaintiffs' claim against town for monetary damages under 42 U.S.C. § 1983 seeks review of quasi-judicial decisions, it also requests a "uniquely federal remedy" and, therefore, is not subject to the filing deadline of section (b). Because facial challenges seek review of quasi-legislative actions rather than quasi-judicial actions, they are also not subject to the filing deadline of section (b). JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Since action pursuant to section (a)(4) can only be commenced pursuant to C.R.C.P. 4, C.R.C.P. 6(e) cannot apply to extend the time. Cadnetix Corp. v. City of Boulder, 807 P.2d 1253 (Colo. App. 1991).

The time restriction in section (b) deals only with certiorari or other writs taken from quasi-judicial proceedings. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

Section (b) of this rule has to be read together with the balance of the rule. Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

When so examined in connection with section (a)(2) and section (4), it is clear that section (b) must be so interpreted as not to defeat the limitations in section (a)(2) and section (4). Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

Strict adherence to section (b) required. Strict adherence to the deadline imposed by section (b) of this rule is required. Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Twenty-eight-day filing deadline in subsection (b) is constitutionally applied in the municipal ballot initiative context. Because proponents of a municipal initiative failed to challenge the city clerk's finding that they had not collected sufficient valid signatures for placement of the initiative on the ballot within 28 days, the district court lacked subject matter jurisdiction to hear the challenge. The state may impose reasonable limits on the exercise of a constitutional right, and pro se parties must comply with procedural rules to the same extent as parties represented by attorneys. Adams v. Sagee, 2017 COA 133, 410 P.3d 800.

A claim for relief pursuant to section (a)(4) does not prevent the complaint from being amended as to other claims. Krupp v. Breckenridge Sanitation Dist., 1 P.3d 178 (Colo. App. 1999).

Failure to join indispensable parties within 30 days not fatal. As a result of the 1981 amendment to section (b), the failure to join indispensable parties within the 30-day time limit established by section (b) need no longer result in dismissal. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982).

Failure to file a claim for judicial review within thirty days is not jurisdictionally fatal when such claim is combined with a claim for declaratory judgment. Section (b) does not prevent the district court from considering a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review is barred for failure to file a timely claim. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance. The district court may not raise the constitutional issue on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Section (b) of this rule is controlling on actions to review rezoning divisions of county commissioners. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

Where the concerned parties in a rezoning determination have notice of a public hearing in which they may participate, it is not unfair to require that they litigate their challenge, be it constitutional or statutory, within the time limits established in section (b). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Under section (b), a county's final decision in a subdivision approval process took place when the board of county commissioners voted publicly to approve the subdivisions, even though the approval was subject to conditions. 3 Bar J Homeowners Ass'n, Inc. v. McMurry, 967 P.2d 633 (Colo. App. 1998).

When a written resolution is revised, it is the date of adoption of the revised version that constitutes the point of administrative finality for purposes of section (b). Here, the ''point of administrative finality'' was May 15, 1997, the date the revised resolution was signed. Thus, the 30-day period under section (b) did not begin to run until that date, and plaintiffs' complaint was thus timely filed on Monday, June 16, 1997. Wilson v. Bd. of County Comm'rs of Weld County, 992 P.2d 668 (Colo. App. 1999).

Section (b) may prevent town board from reconsidering own action. Where the town board permitted its grant of the variance to stand long after the 30-day review period under section (b) had expired, plaintiffs were entitled to, and did, rely on the variance, and, absent a change of circumstances, the board was without authority to reconsider. Andreatta v. Kuhlman, 43 Colo. App. 200, 600 P.2d 119 (1979).

Ordinances that contemplated later legislative action for purposes of meeting the conditions precedent required by the city charter were not final action under section (b). Therefore, judicial review was premature. Pub. Serv. Co. v. City of Boulder, 2016 COA 138, 410 P.3d 680.

A planning board's recommendation on a proposed rezoning application is not appealable because it is not a final decision reviewable under section (a)(4). The planning board's recommendation is only an intermediate step in the city's review process, which concludes with the city council's decision to approve or deny the proposed rezoning amendment. Under the city zoning code, the planning board does not sit as a quasi-judicial decision-maker nor are its recommendations an exercise of quasi-judicial function. Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

Unilateral action taken by a school board in refusing to grant teachers longevity increments in salary for one school for year fell outside the scope of section (b) of this rule. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

Petition stating grounds for relief not limited to remedy under this rule. A plaintiff who has misconceived his remedy and is seeking relief to which he is not entitled under the law should not have his petition dismissed. The remedy provided by this rule is not exclusive, and, if under the allegations of the petitions he is entitled to any relief, the court upon a hearing may grant him the relief to which he is entitled regardless of the prayer in the petition. The question, therefore, is not whether a plaintiff in a case at bar is asking for the proper remedy, but whether under his pleadings he is entitled to any remedy. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

Where a review of the record made by the board of adjustment would be wholly inadequate to provide a remedy for plaintiff, the remedy provided by this rule is not exclusive. If a plaintiff elects so to do, an action should proceed upon the issues made by the pleadings as in other cases independent of this rule. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955); Morris v. Bd. of County Comm'rs, 150 Colo. 33, 370 P.2d 438 (1962).

No deprivation of due process. Standard of review provided by this rule did not deny due process to owner of building challenging safety code application. Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990).

The determinative date for review under this rule was when the final decision was rendered and not the date upon which the decision was received. Crawford v. State Dept. of Corr., 895 P.2d 1156 (Colo. App. 1995).

Thirty-day limitations period under section (b) is jurisdictional and begins to run at the point of administrative finality, which occurs when the action complained of is complete, leaving nothing further for the agency to decide. Cadnetix Corp. v. Boulder, 807 P.2d 1253 (Colo. App. 1991); Baker v. Dacono, 928 P.2d 826 (Colo. App. 1996); 3 Bar J Homeowners Ass'n., Inc. v. McMurry, 967 P.2d 633 (Colo. App. 1998); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Because plaintiff's original complaint did not seek review under section (a)(4), his amended complaint seeking such relief did not relate back to the original complaint. The district court, therefore, correctly dismissed as untimely the section (a)(4) claim set forth in the amended complaint. Section (b) permits a plaintiff to add, dismiss, or substitute parties in order to correct or complete a claim previously asserted under section (a)(4), but the plaintiff may not amend the complaint to seek review under section (a)(4) if such relief was not timely requested in the original complaint. If the complaint does not satisfy the criteria specified in section (a)(4), it is not a timely complaint within the meaning of section (b). Auxier v. McDonald, 2015 COA 50, 363 P.3d 747.

For purposes of judicial review of actions of the civil service commission pursuant to section (a)(4), the final decision of the commission was rendered on the date of certification and publication of the eligibility register, not on the date the commission announced that the promotional examination would contain a personnel record evaluation (PRE) component. The injury of which plaintiffs complain was not complete until the examination results were published and certified, which was the point of administrative finality. Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Action filed by nonexistent corporation is a nullity. A nonprofit corporation's lawsuit is void ab initio when it was filed after expiration of the 30-day period but before the secretary of state accepted and filed amended articles of incorporation. Therefore, no good cause can be shown to allow substitution of parties. Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm'rs of Montrose County, 80 P.3d 932 (Colo. App. 2003).

Court's review under section (a)(4) is on a de novo basis, based on the record made before the lower tribunal. Feldewerth v. Joint Sch. Dist. 28-J, 3 P.3d 467 (Colo. App. 1999); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Court's scope of review regarding sentence imposed by county court judge is strictly limited to whether the judge exceeded his jurisdiction or abused his discretion. Held that where the county judge immediately imposed sentence based on representations that defendant met the criteria for immediate sentencing under § 42-4-1301 and discovered later that defendant did not meet those criteria, county judge did not exceed his jurisdiction or abuse his discretion in resentencing the defendant. Walker v. Arries, 908 P.2d 1180 (Colo. App. 1995).

Notwithstanding C.R.C.P. 54(d), § 13-16-111 allows a prevailing plaintiff in an action under section (a)(4) of this rule to recover costs against the state, its officers, or agencies. Branch v. Colo. Dept. of Corr., 89 P.3d 496 (Colo. App. 2003).

Applied in Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956); Larson v. City & County of Denver, 33 Colo. App. 153, 516 P.2d 448 (1973); Precision Heating & Plumbing, Inc. v. Bd. of Review, 184 Colo. 346, 520 P.2d 109 (1974); Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977); Hernandez v. District Court, 194 Colo. 25, 568 P.2d 1168 (1977); Harris v. Owen, 39 Colo. App. 494, 570 P.2d 26 (1977); Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978); Tihonovich v. Williams, 196 Colo. 144, 582 P.2d 1051 (1978); Bedford v. Bd. of County Comm'rs, 41 Colo. App. 125, 584 P.2d 90 (1978); Bachicha v. Municipal Court, 41 Colo. App. 198, 581 P.2d 746 (1978); Crittenden v. Hasser, 41 Colo. App. 235, 585 P.2d 928 (1978); Schlager v. Greenwood, 41 Colo. App. 449, 586 P.2d 248 (1978); Frankmore v. Bd. of Educ., 41 Colo. App. 416, 589 P.2d 1375 (1978); Associated Dry Goods Corp. v. City of Arvada, 197 Colo. 491, 593 P.2d 1375 (1979); Thomas v. County Court, 198 Colo. 87, 596 P.2d 768 (1979); Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm'rs, 198 Colo. 175, 597 P.2d 564 (1979); Spiker v. City of Lakewood, 198 Colo. 528, 603 P.2d 130

(1979); Johnson v. City Council, 42 Colo. App. 188, 595 P.2d 701 (1979); Info. Please, Inc. v. Bd. of County Comm'rs, 42 Colo. App. 392, 600 P.2d 86 (1979); Tri-State Generation & Transmission Ass'n v. Bd. of County Comm'rs, 42 Colo. App. 479, 600 P.2d 103 (1979); DuHamel v. People ex rel. City of Arvada, 42 Colo. App. 491, 601 P.2d 639 (1979); Fitz Motors, Inc. v. City of Northglenn, 43 Colo. App. 137, 602 P.2d 890 (1979); Romero v. Rossmiller, 43 Colo. App. 215, 603 P.2d 964 (1979); Einarsen v. City of Wheat Ridge, 43 Colo. App. 232, 604 P.2d 691 (1979); Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979); People ex rel. Losavio v. Gentry, 199 Colo. 153, 606 P.2d 57 (1980); Bd. of County Comm'rs v. District Court, 199 Colo. 338, 607 P.2d 999 (1980); Barnes v. District Court, 199 Colo. 310, 607 P.2d 1008 (1980); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 270, 610 P.2d 85 (1980); Douglass v. Kelton, 199 Colo. 446, 610 P.2d 1067 (1980); Trinen v. Diamond, 44 Colo. App. 325, 616 P.2d 986 (1980); Ambassador Bldg. Corp. v. Bd. of Review, 623 P.2d 79 (Colo. App. 1980); State Pers. Bd. v. District Court, 637 P.2d 333 (Colo. 1981); Bernstein v. Livingston, 633 P.2d 519 (Colo. App. 1981); People v. Clerkin, 638 P.2d 808 (Colo. App. 1981); Franco v. District Court, 641 P.2d 922 (Colo. 1982); Harris v. District Court, 655 P.2d 398 (Colo. 1982); DiManna v. Kalbin, 646 P.2d 403 (Colo. App. 1982); Hallmark Bldrs. & Realty v. City of Gunnison, 650 P.2d 556 (Colo. App. 1982); Homa v. Civil Serv. Comm'n, 650 P.2d 1322 (Colo. App. 1982); Crandall v. Municipal Court ex rel. City of Sterling, 650 P.2d 1324 (Colo. App. 1982); Honeywell Info. Sys. v. Bd. of Assmt. Appeals, 654 P.2d 337 (Colo. App. 1982); Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983); Hoffer v. Town of Carbondale, 662 P.2d 495 (Colo. App. 1983); Hudspeth v. Bd. of County Comm'rs, 667 P.2d 775 (Colo. App. 1983); Anchorage Joint Venture v. Anchorage Condo. Ass'n, 670 P.2d 1249 (Colo. App. 1983); Lombardi v. Bd. of Adjustment, 675 P.2d 21 (Colo. App. 1983); Sandoval v. Farish, 675 P.2d 300 (Colo. 1984); Lamb v. County Court, 697 P.2d 802 (Colo. App. 1984); Barnes v. City of Westminster, 723 P.2d 164 (Colo. App. 1986); Wilkinson v. Bd. of County Comm'rs, 872 P.2d 1269 (Colo. App. 1993); Droste v. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003); Buenabenta v. Neet, 160 P.3d 290 (Colo. App. 2007); Dolores Huerta Prep. High v. Colo. State Bd. of Educ., 215 P.3d 1229 (Colo. App. 2009); Expedia, Inc. v. City & County of Denver, 2014 COA 87, 405 P.3d 251, rev'd on other grounds, 2017 CO 32, 405 P.3d 1128; Moss v. Bd. of County Comm'rs for Boulder County, 2015 COA 35, 411 P.3d 918; Dolan v. Fire & Police Pension Ass'n, 2017 COA 55, 413 P.3d 279; Adams v. Sagee, 2017 COA 133, 410 P.3d 800; Colo. Health v. City & County of Denver, 2018 COA 135, 429 P.3d 115.

II. HABEAS CORPUS.

This rule abolishes the special forms previously considered necessary and peculiar to the writ of habeas corpus, and relief may now be obtained either by an action or by a motion under the new practice set up in the Rules of Civil Procedure. Rogers v. Best, 115 Colo. 245, 171 P.2d 769 (1946).

Habeas corpus is a civil action, and the proceedings are governed by the rules of civil procedure. Schauer v. Smeltzer, 175 Colo. 364, 488 P.2d 899 (1971).

The application of this rule is limited to affording relief where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty. Wright v. Tinsley, 148 Colo. 258, 365 P.2d 691 (1961).

Person denied parole can seek judicial review only as provided by section (a)(2) of this rule. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Acts of parole board are not reviewable. Administrative acts of the parole board, being definitely a matter of grace, and not a matter of right, are not such a function as is reviewable by the courts by habeas corpus, certiorari, or mandamus. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

Decision of state board of parole to grant or deny parole is clearly discretionary since parole is a privilege, and no prisoner is entitled to it as a matter of right. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Actions reviewable only when board failed to exercise its statutory duties. It is only when the Colorado state board of parole has failed to exercise its statutory duties that the courts of Colorado have the power to review the board's actions. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Certification of sanity unavailable through habeas corpus. For a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient, the remedy available to obtain a judicial determination of a claimed restoration to sanity and present mental condition is formerly prescribed by statute and provided that the superintendent of the state hospital must first certify to the committing court that the defendant is sane. Habeas corpus was an inappropriate form of

relief to obtain this certification. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

III. MANDAMUS.

Annotator's note. Since section (a)(2) of this rule is similar to § 342 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A. In General.

The substantive aspects of mandamus proceedings are preserved even though this rule "abolishes the special form of pleading", writ and name of the remedy theretofore known as mandamus, and relief of the same nature as was formerly provided in mandamus actions may be granted in accordance with precedents established under the old practice. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948); Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Mandamus lies to compel performance of official act. Under section (a)(2) of this rule, when a board or person charged with performing an official duty fails or refuses to act, mandamus will lie to compel performance. Sheeley v. Bd. of County Comm'rs, 137 Colo. 350, 325 P.2d 275 (1958).

Section (a)(2) permits the granting of relief to compel an "inferior tribunal, corporation, board, officer or person" to perform some required duty or act. Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

It is not an ordinary action or proceeding available as matter of right, and the courts are invested with a sound discretion as to its issuance. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Relief is narrowly interpreted. Relief in the nature of mandamus to compel a public official to perform an act is narrowly interpreted. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Three-part test for mandamus. There is a three-part test which must be satisfied by a plaintiff before mandamus will be issued by the court: (1) The plaintiff must have a clear right to the relief sought; (2) the defendant must have a clear duty to perform the act requested; and (3) there must be no other available remedy. Gramiger v. Crowley, 660 P.2d 1279 (Colo. 1983).

Test applied in White v. Rickets, 684 P.2d 239 (Colo. 1984); Mahon v. Harst, 738 P.2d 1190 (Colo. App. 1987); Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009); Gandy v. Raemisch, 2017 COA 110, 405 P.3d 480.

It is maintainable only when there is no other adequate legal remedy. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948); Julesburg Sch. Dist. No. Re-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

In cases where adequate relief may be had by an action for damages, an action under section (a)(2) will not lie as a general rule. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Mandamus will not lie where there is another specific and adequate mode of relief available to the parties. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Since mandamus is available only when no other adequate remedy is available, in a case where a developer's plan met the requirements of the city zoning ordinance, and the city was acting in a quasi-judicial capacity in approving or denying the developer's plan, the proper remedy available to the developer was certiorari under section (a)(4) and not mandamus under section (a)(2), and the developer was not entitled to damages. Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

Mandamus is not appropriate unless all alternative forms of relief have been exhausted. When administrative remedies are provided by statute or ordinance, the procedure outlined in the statute must be followed if the contested matter is within the jurisdiction of the administrative authority. Egle v. City & County of Denver, 93 P.3d 609 (Colo. App. 2004).

If a plaintiff fails to exhaust administrative remedies or to establish that an exception to the exhaustion requirement excuses the failure to do so, the district court may lack subject matter jurisdiction over the action. Exhaustion is unnecessary when: (1) It is clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested; or (2) the agency lacks the authority or capacity to determine the matters in controversy. Here, trial court correctly held plaintiffs had complete, adequate, and speedy administrative remedies to challenge zoning department's decision to approve issuance of certificate of occupancy and building department's issuance of that certificate, and the trial court did not err in dismissing complaint. Egle v. City & County of Denver, 93 P.3d 609 (Colo. App. 2004).

Where an action is based on a breach of contract, mandamus is not the exclusive remedy. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

In the case of ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law, even though the party has another

remedy against them. An action will lie, although the party may have also a remedy upon the official bond of the ministerial officer. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910).

Mandamus will not lie to enforce duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Unless a party has a clear legal right to compel the action sought, he cannot maintain an action. Civil Serv. Comm'n v. People ex rel. Beates, 88 Colo. 319, 295 P. 920 (1931); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934).

No one is entitled to mandamus whose right is not clear and unquestionable. Sturner v. James A. McCandless Inv. Co., 87 Colo. 23, 284 P. 778 (1930); Barghler v. Farmers' Irrigation Co., 87 Colo. 605, 290 P. 288 (1930).

When the right claimed is doubtful, action will not lie. People ex rel. Foley v. Stapleton, 98 Colo. 354, 56 P.2d 931 (1936).

An action lies only where the petitioner has a clear legal right to have the respondent perform a clear legal duty. Heimbecher v. City & County of Denver, 97 Colo. 465, 50 P.2d 785 (1935).

The general rule is that a writ of mandamus will not be issued with respect to the making or enforcement of police regulations except to enforce a clear legal right or to compel the performance of a clear legal duty. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Mandamus will not issue in doubtful cases. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Action lies to compel clear legal duty. Where a petition shows that there is neither a clear legal right in the petitioner nor a clear legal duty corresponding thereto, relief is properly denied. Roper v. Indus. Comm'n, 93 Colo. 250, 25 P.2d 725 (1933).

An action lies only when on the one side there is a clear legal right to demand the doing of a certain thing, and on the other side a clear legal duty to do it. Schneider v. People ex rel. Grant, 95 Colo. 300, 35 P.2d 498 (1934).

An action lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Bd. of Trustees v. Endner, 18 Colo. App. 65, 70 P. 152 (1902); Statton v. People ex rel. Burr, 18 Colo. App. 85, 70 P. 157 (1902); Colo. Pub. Welfare Bd. v. Viles, 105 Colo. 62, 94 P.2d 713 (1939).

Mandamus is only justified when a state agency has failed to perform a statutory duty or to adhere to its statutory responsibility. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

The one bringing the action must show a clear legal right to demand the performance of a certain act as well as a clear legal duty on the part of the officer to do the thing demanded. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

An action compelling an officer to act will lie only when that officer fails to perform an official duty. Where there is no duty to act, an action in the nature of mandamus cannot be sustained. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

Mandamus will not issue to coerce an official to perform acts which it is not his official duty to perform. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Mandamus is an extraordinary remedy. It may be used to compel the performance by a public officer of a plain legal duty devolving upon him by virtue of his office or which the law enjoins as a duty resulting from the office. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Relief in the nature of mandamus will be granted only in cases where the act is administrative in nature and a clear legal duty exists under a statute to perform this act. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Mandamus is appropriate if the decision-maker has grossly abused its discretion and if the damage suffered by the petitioner cannot be cured by means of an appeal, while matters relating to the discovery of evidence are usually reviewable only on an appeal. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Action for the performance of a purely ministerial duty involving no discretionary right or the exercise of judgment is proper. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Mandamus does not lie to compel the performance of a trust sought which is discretionary or involves the exercise of judgment. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Mandamus has its function in those cases where the duty of the public officer or board is purely ministerial and not discretionary. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

If the act sought to be compelled is one involving the exercise of discretion on the part of the official, or requiring a choice between alternative courses of action, then relief in the nature of mandamus will be denied. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Mandamus only to compel officer to perform ministerial function. Relief in the nature of mandamus will be granted only in cases where a clear legal duty exists for an administrative officer to perform a ministerial act. Menchetti v. Wilson, 43 Colo. App. 19, 597 P.2d 1054 (1979); Sherman v. City of Colo. Springs Planning Comm'n, 680 P.2d 1302

(Colo. App. 1983); Reynolds v. City Council of Longmont, 680 P.2d 1350 (Colo. App. 1984).

Mandamus is improper if the court must give directions about the manner in which administrative discretion is to be exercised. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Mandamus will not lie to compel a quasi-judicial tribunal to exercise its discretion in a particular way. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Approval of requests for money from county general fund is discretionary function of boards of county commissioners, not a ministerial act. Tisdel v. Bd. of County Comm'rs, 621 P.2d 1357 (Colo. 1980).

Adoption of budgetary items is legislative, not judicial, in character. Tisdel v. Bd. of County Comm'rs, 621 P.2d 1357 (Colo. 1980).

Mandamus will be allowed where a statute prescribes no remedy for the refusal to perform a duty made imperative thereby, or in case of doubt whether there be another effectual remedy. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910).

Where there is a conflict between a statute and a rule, the former must govern; rules of court can neither abridge, enlarge, nor modify substantive rights of a litigant. Sherman v. Colo. Springs Planning Comm'n, 729 P.2d 1014 (Colo. App. 1986), aff'd, 763 P.2d 292 (Colo. 1988).

Where rule provides that the ''judgment shall include any damages sustained'' but a statute makes available the doctrine of sovereign immunity as a defense to such damage award, the statute governs, and damages are not recoverable. Sherman v. Colo. Springs Planning Comm'n, 729 P.2d 1014 (Colo. App. 1986), aff'd, 763 P.2d 292 (Colo. 1988).

Action cannot usurp the functions of an appeal. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie from the district court to compel the county court to enter a judgment in a divorce proceeding different from the judgment which had been rendered, this being an attempt to review, annul, and modify such judgment, and to usurp the functions of an appeal to such judgment, and also an attempt to control the discretion and judgment of the county court. Linsdey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie against a court unless it be clearly shown that such court has refused to perform some manifest duty. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie when the interests of third parties who are not before the court are involved. Sturner v. James A. McCandless Inv. Co., 87 Colo. 23, 284 P. 778 (1930); Barghler v. Farmers' Irrigation Co., 87 Colo. 605, 290 P. 288 (1930); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934).

Action will not lie to compel the commission on judicial discipline or its executive director to investigate a complaint alleging judicial misconduct or to compel the governor to investigate a complaint of alleged judicial misconduct. The district court lacks subject matter jurisdiction to compel such investigations. Higgins v. Owens, 13 P.3d 837 (Colo. App. 2000).

Failure to join indispensable parties jurisdictional error. Failure to join indispensable parties within 30 days after the final action of a tribunal is a jurisdictional defect requiring dismissal of the entire action. Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979).

Failure to join all indispensable parties in action under this rule within the 30-day time limit prescribed by the rule is a jurisdictional defect which requires dismissal of the action. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

Failure to join nonindispensable parties not error. Permissive joinder and permissive intervention can only be effected within 30 days after the final action taken by the tribunal; however, failure to join parties who are not indispensable is not a jurisdictional error, and therefore does not require dismissal of the suit. Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979).

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

Naming municipality is not substitute for naming city council in an action seeking review of denial of rezoning petition. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

Relief inappropriate where board does act. Where a board does act, denying a license, as opposed to failing to act, mandamus is not appropriate. Sheeley v. Bd. of County Comm'rs, 137 Colo. 350, 325 P.2d 275 (1958).

A proceeding cannot be maintained in anticipation of an omission to perform a duty or because the relator fears there will be an omission, but there must be shown an actual failure or refusal to perform the duty before an action can be maintained to compel its performance. Orman v. People, 18 Colo. App. 302, 71 P. 430 (1903).

Proceeding not appropriate to compel a ministerial officer not to act. Judgment in an action may be that a ministerial officer — where there is a clear legal duty — shall perform, or where the duty does not appear, that he need not perform, but never that he shall not perform. If

the latter judicial direction is given it must be by a judgment entered in an equitable action for injunction. Brownlow v. Wunch, 102 Colo. 447, 80 P.2d 444 (1938).

Petition insufficient. The use of such words as ''compel'', and the prayer that the trial court ''order'' the secretary of state ''to perform'' in a specified manner in the enforcement of the liquor code ''as a duty resulting from his office'' in a complaint to bring action under this rule is not sufficient to invoke the issuance of a writ of mandamus. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Trial court was justified in drawing a distinction between the writ of mandamus and proceedings under section (a)(4) of this rule. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

POME standard for consideration of motion to dismiss claim for abuse of process based on first amendment right to petition. Trial court should consider whether the petitioning activities on the part of the party being sued for abuse of process were not immunized from liability by the first amendment because: (1) Those activities are devoid of factual support or, if supportable in fact, have no cognizable basis in law; (2) the primary purpose of the petitioning activities is to harass the other party or to effectuate some other improper objective; and (3) those petitioning activities have the capacity to have an adverse effect on a legal interest of the other party. Protect Our Mountain Environment (POME) v. District Court, 677 P.2d 1361 (Colo. 1984) (decided prior to 1981 amendment).

Standard extended to case under section (a)(2) in Concerned Members v. District Court, 713 P.2d 923 (Colo. 1986); Ware v. McCutchen, 784 P.2d 846 (Colo. App. 1989).

Relief in the nature of mandamus may be appropriate when it is alleged that a sheriff or chief of police has refused to accept applications for concealed weapons permits from private investigators who are not current or retired law enforcement officers and the sheriff or police chief has thereby breached a statutory duty to conduct a background check on each applicant. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

A request for extraordinary relief in the form of mandamus under this rule is improper to challenge arbitrary action by the department of revenue in revoking a person's driver's license, even though petition was filed on the basis that the department refused to conduct a revocation hearing. The State Administrative Procedure Act provides the proper mechanism for seeking relief based on arbitrary action by an executive agency. Dept. of Rev. v. District Court, 802 P.2d 473 (Colo. 1990).

Money damages are not available in a proceeding under this rule. Accordingly, plaintiffs could not seek such damages in an action brought under rule and did not have a remedy at law. Sundheim v. Bd. of County Comm'rs, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996); Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Applied in Local 1 v. Metro Wastewater Reclamation, 876 P.2d 82 (Colo. App. 1994).

B. Illustrative Cases.

Action lies to compel the performance of a single act. People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927).

Action may also be invoked to require the execution of a series of acts. People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927).

To compel the issuance of a building permit which has been denied on the ground that the construction of the proposed building would infringe the zoning ordinances of the city would be improper. Hedgcock v. People ex rel. Arden Realty & Inv. Co., 98 Colo. 522, 57 P.2d 891 (1936).

An action in the nature of mandamus is a proper remedy to require a building inspector to issue a building permit. Mahnke v. Coughenour, 170 Colo. 61, 458 P.2d 747 (1969).

To compel ousted officer to deliver papers to appointee. Where an ousted secretary of an irrigation district refused to turn over the books and papers to the regular appointee, an action to compel delivery is proper. Kepley v. People ex rel. Everson, 76 Colo. 233, 230 P. 804 (1924).

To compel justice of peace to issue writ of commitment. Where a justice of the peace tried and convicted a defendant and sentenced him to imprisonment in the county jail, his duty to issue a writ of commitment was mandatory, and upon his refusal to issue such writ when demanded, action would lie to compel him to issue the writ. It was immaterial that time had elapsed since the sentence and before the writ was demanded which exceeded the length of the term of sentence. Mann v. People, 16 Colo. App. 475, 66 P. 452 (1901).

To compel revocation of unlawful order of suspension. An action under section (a)(2) lies to enforce the revocation of an order of suspension unlawfully entered against a police officer who was holding his position under civil service. Bratton v. Dice, 93 Colo. 593, 27 P.2d 1028 (1933).

Mandamus would be proper if an effort were being made to compel the civil service commission to reinstate an aggrieved employee. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

To compel audit for services. An acting public official is entitled to an audit of his claim for services rendered in his official capacity, and

an action will lie to compel such audit. McNichols v. People ex rel. Hershey, 92 Colo. 469, 22 P.2d 131 (1933).

Courts will direct an officer to proceed and exercise the discretion vested in him by law. Refusal of a city auditor to approve a demand, because of claimed want of authority, amounts to a refusal to act, and an action will lie to compel action where he is vested with authority. People ex rel. Hershey v. McNichols, 91 Colo. 141, 13 P.2d 266 (1932).

To compel determination of tax. When a tax assessor refuses to perform a purely ministerial function which the law imposes, performance may be enforced by mandamus. Bohen v. Bd. of County Comm'rs, 109 Colo. 283, 124 P.2d 606 (1942).

The statute is mandatory as to the requirement that a gift tax shall be determined upon proper application. The inheritance tax commissioner has no discretion in that ministerial duty and mandamus was the proper course to compel him as a public official to act. Tasher v. Trentaz, 165 Colo. 97, 437 P.2d 529 (1968).

To compel filling of vacancies. Where city charter provides for the appointment of at least two justices of the peace, any vacancy in such offices to be filled by the mayor, mandamus would lie to compel the mayor to fill any vacancy, at least to the number of two, as a mandatory public duty required by the charter. McNichols v. City & County of Denver, 109 Colo. 269, 124 P.2d 601 (1942).

To compel approval of home care application. The plaintiff completed those things required of her under the statute and under the rules, but the affirmative action by the state board of education requiring that it give its approval and make its recommendation was not done. Absent the rule which the board had no authority to promulgate, the plaintiff's application could be processed. The trial court should have directed that the board complete plaintiff's application for home care. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

To grant prisoner a free transcript. Defendant is caught in a vicious circle — unable to put into a petition the matters and things which are required, and being denied a transcript because he has not asserted any of those grounds. The district court is ordered to grant the prisoner's petition for a free transcript of the proceedings at the time of the court acceptance of his plea of guilty as well as of the trial in which the determination of the degree of the offense was made. Sherbondy v. District Court, 170 Colo. 114, 459 P.2d 133 (1969).

Right of school board to demand performance of school district. Section 27-11-103 clearly requires that the ''school district shall provide to the community incorporated board'' a sum of money determined by a stated formula; therefore, the clear right of a school board to demand performance, and the clear legal duty on a school district to act, makes this a proper case for disposition by mandamus. Denver Ass'n for Retarded Children v. Sch. Dist. No. 1, 188 Colo. 310, 535 P.2d 200 (1975).

Mandamus was the appropriate remedy, rather than a motion under section (a)(4) of this rule, to address a school district board of education's action in not renewing a probationary teacher's employment contract. Although the school board has broad discretion in determining whether to renew employment contracts for probationary teachers, that discretion is limited by § 22-32-110 (4)(c), which prohibits the board from using as grounds for nonrenewal any actions taken by the probationary teacher in good faith and in compliance with the school district's discipline policy. Since there is no remedy provided if the school board violates this prohibition, the probationary teacher's action in seeking mandamus was appropriate. McIntosh v. Bd. of Educ. of Sch. Dist. No. 1, 999 P.2d 224 (Colo. App. 2000).

Court erred when it dismissed plaintiff's claim for mandamus relief where the executive director of the department of corrections failed to perform his duty, prescribed by § 24-60-2301, to perform the final review and determination of plaintiff's application for transfer to the Canadian penal system. Gandy v. Raemisch, 2017 COA 110, 405 P.3d 480.

Action will not lie to test rule of procedure in workmen's compensation case. This remedy may not be invoked in a workmen's compensation case for the purpose of testing the meaning or validity of a mere rule of procedure when the commission which framed it has seen fit to disregard it. Roper v. Indus. Comm'n, 93 Colo. 250, 25 P.2d 725 (1933).

Nor to compel appointment by civil service commission. A person who stands second on a civil service eligible list for appointment to a clerical position cannot compel his appointment in the absence of a showing that the person standing first had been tendered and refused the appointment or had failed to make demand therefor upon request of relator. Civil Serv. Comm'n v. People ex rel. Beates, 88 Colo. 319, 295 P. 920 (1931).

Nor to control discretion of mayor as to appointments. Under city charter, authorizing mayor to appoint justices of the peace, the discretion of the mayor as to whom he appoints, except as it may be limited by the charter, cannot be controlled by mandamus. McNichols v. City & County of Denver, 109 Colo. 269, 124 P.2d 601 (1942).

Nor to compel appropriations. Action does not lie to compel a city council to make an appropriation for civil service commission ex-

pense. Schneider v. People ex rel. Grant, 95 Colo. 300, 35 P.2d 498 (1934).

Nor to compel school board to allow claims. It is the duty of a school board to disallow invalid claims, according to its judgment, and courts cannot control that judgment by proceedings under section (a)(2). Sorensen v. Echternacht, 74 Colo. 91, 218 P. 1046 (1923).

Nor to test title to office. When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested under section (a)(2). Henderson v. Glynn, 2 Colo. App. 303, 30 P. 265 (1892); City Council v. People ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1903).

Nor to compel admission of claimant to occupied office. When an office is already filled by an actual incumbent, exercising the functions of the office de facto, and under color of right, an action will not lie to compel the admission of another claimant. City Council v. People ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1903).

Nor to compel discretionary hearing. The effect of a mandamus to determine the scope of insurance coverage would be to require the commissioner to find that the filing is defective, and that the public interest requires hearings on this matter. These are matters within the discretionary function of the commissioner and therefore cannot be compelled under section (a)(2) of this rule. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Nor to compel hearing where none is provided by statute. The statutes providing for the procedures that must be followed prior to the issuance of a liquor license do not require a hearing, no hearing; after issuance is in any manner provided for in the statutes and, therefore, mandamus may not issue. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Nor to compel enforcement of police or criminal laws by police officers generally, such as the keeping of places of business open for the sale of liquors on Sundays or holidays. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

A public officer will not be compelled by mandamus to enforce liquor laws, since it would entail the ordering of a discretionary authority. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Nor to compel municipal board empowered with discretionary procedures. Where an advisory board is given discretion in preparing recommendations of salaries for certain municipal employees to a city council, section (a)(2) cannot be invoked to compel the board to revise its procedures for preparing those recommendations. Reeve v. Career Serv. Bd., 636 P.2d 1307 (Colo. App. 1981).

Action does not lie to compel the department of corrections to place an inmate in community corrections if the inmate is under a detainer. Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

Relief unavailable where certiorari remedy was not utilized. Where there is other adequate relief available to the parties by review of the action of the local licensing authority by certiorari under section (a)(4), providing therein for stay of execution of the issuing of the license pending review, but that remedy was not sought, and the license issued, mandamus will not lie. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Mandamus is an inappropriate form of relief to obtain certification of sanity for a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient. The remedy available to obtain a judicial determination of a claimed restoration to the superintendent's good faith and discretion in sanity and present mental condition is prescribed by a statute. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

Allegations sufficient to state a claim of relief. Assertion by petitioner that parole board had acted pursuant to § 16-13-203 when it ordered petitioner transferred to a different facility and that the department of corrections was required to comply with that order alleged both a right and a duty owed to him by the department of corrections. Therefore, petition contained sufficient allegations to state a claim for relief in mandamus under this rule. White v. Rickets, 684 P.2d 239 (Colo. 1984).

Mandamus relief under section (a)(2) is available to challenge the parole board's actions if it has failed to exercise its statutory duties. Although plaintiff did not expressly seek mandamus relief pursuant to section (a)(2), the gravamen of his complaint was that the parole board's failure to consider any events or circumstances prior to plaintiff's incarceration was in direct violation of statutory guidelines for parole. Under these circumstances, the trial court had jurisdiction to address the merits of the complaint. Fraser v. Colo. Bd. of Parole, 931 P.2d 560 (Colo. App. 1996).

Mandamus relief under section (a)(2) is available to compel a school district and the school district board of education to perform a state statutory duty. Denver Classroom v. City & County of Denver, 2015 COA 71, 412 P.3d 721, rev'd on other grounds, 2017 CO 30, 407 P.3d 1220.

Court applied three-part test to determine whether petitioners have established the elements of their claim for mandamus against the school district and school district board of education. The court considered whether petitioners had a clear right to relief, whether the

school district and school district board of education had a clear duty under the statute, and whether the petitioners had another available remedy under the statute. Denver Classroom v. City & County of Denver, 2015 COA 71, 412 P.3d 721, rev'd on other grounds, 2017 CO 30, 407 P.3d 1220.

IV. QUO WARRANTO.

A. In General.

Law reviews. For article, ''The Misuse of Judicial Flexibility in Quo Warranto Cases'', see 10 Rocky Mt. L. Rev. 239 (1938).

Annotator's note. Since section (a)(3) of this rule is similar to § 321 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Common-law writ. The writ of quo warranto was originally a prerogative writ of the crown against one who usurped any office, franchise, or liberty of the crown and was also used in the case of nonuse or long neglect of a franchise or misuse or abuse thereof. At common law it served the function of testing title to public and corporate offices. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

Rule substituted for common law and code. Former provisions of the Code of Civil Procedure were a substitute for the original common-law quo warranto remedy and retained the purpose and scope of that which it supplanted. These code provisions were superseded by this rule. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Purpose of relief. Traditionally, quo warranto was directed against one charged with usurping an office, to inquire by what authority he claims to hold such office, in order to adjudge his right thereto. Its purpose was to protect the interest of the public and not to protect or promote private rights. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The various procedural changes do not affect the basic purposes for which the writ of quo warranto was originally designed. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The traditional concept of quo warranto relief is prevailing under this rule. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Section (a)(3) does not enlarge or abridge substantive rights. This section is not a statute and does not, and cannot, have the force and effect of a statute, and cannot enlarge or abridge substantive rights. Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951).

If section (a)(3) enlarges the scope of quo warranto by making relief thereunder obtainable by persons who had no access to such accommodation before, the supreme court would bestow jurisdiction upon trial courts which they did not have in the past. This would constitute a legislative act beyond its authority. The supreme court will not so encroach upon the legislative domain. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Substantial elements of relief remain the same. While the procedural pattern has been simplified, the substance of what constitutes the basis of quo warranto relief remains the same. In order to prevail, proof of the substantive elements authorizing such relief should be of the same kind, quality, and quantity as would have warranted a favorable judgment under the older forms. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The substance of the relief determines the character of the action; the name given an extraordinary writ such as quo warranto is unimportant. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

"Any person" in the first sentence is characterized by the following words ''such person'' and the context thereof. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

A proceeding under section (a)(3) is the exclusive method by which to try title to public office. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764, 6 L.R.A. 444 (1889); Bd. of Comm'rs v. Gould, 6 Colo. App. 44, 39 P. 895 (1895); Wason v. Major, 10 Colo. App. 181, 50 P. 741 (1897); State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908); Roberts v. People ex rel. Duncan, 81 Colo. 338, 255 P. 461 (1927); Bd. of Comm'rs v. Wharton, 82 Colo. 466, 261 P. 4 (1927).

It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. Atchison, T. & S. F. R. R. v. People, 5 Colo. 60 (1879).

Thus, title to office cannot be tested by section (a)(2). Where a party is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested by a proceeding under section (a)(2). City Council v. People ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1904).

Title to office cannot be tested in a suit brought to recover a salary. Bd. of Comm'rs v. Wharton, 82 Colo. 466, 261 P. 4 (1927).

Title to an office cannot be tried in a collateral proceeding. Bd. of Comm'rs v. Gould, 6 Colo. App. 44, 39 P. 895 (1895).

Distinction between proceeding under this section and election contest. A proceeding by the people for the purpose of trying the incumbent's title to office, regardless of the claimant's

right, is not an ''election contest'' within the meaning of this phrase as employed in § 12 of art. VII, Colo. Const. Statutes passed by the general assembly in obedience to the constitutional mandate relating to contested elections do not deprive the courts of jurisdiction to inquire into usurpations and unlawful holdings of office or petitioners of a remedy in quo warranto. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889).

A proceeding to oust a party from an office cannot be converted into a statutory election contest. People ex rel. Stidger v. Horan, 34 Colo. 304, 86 P. 252 (1905).

The right to the official salary is not to be determined in a proceeding under section (a)(3), but is to be determined in other proceedings. Capp v. People ex rel. Walker, 64 Colo. 58, 170 P. 399 (1918).

General assembly may limit time to challenge recreation district. The general assembly may validly limit the period within which the constitutionally guaranteed remedy of quo warranto is available to challenge the validity of a recreation district, unless the time is so unreasonably short as to destroy the substance of the remedy. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

Cause of action limited to parties named and served. Where relators did not bring the quo warranto action as a class action, nor did they name and serve as parties the other numerous school districts in the state, their cause of action must be limited to action against the captioned respondents who were named and served. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

Corporation, not stockholder, is indispensable party. The requirements of this rule do not set forth the parties who are indispensable to a quo warranto proceeding, but provide a framework under which the state, or a shareholder if the state refuses to act, may review the propriety of a challenged election. While the legality of an issuance of stock could not be adjudicated adversely to the absent holder, yet his right to vote could be passed upon notwithstanding his absence insofar as was necessary to determine the result of the particular election that was under review. The corporation, however, is an indispensable party. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

B. Franchises and Offices.

Law reviews. For comment on People ex rel. Mijares v. Kniss (cited below), see 38 Dicta 361 (1961).

Office defined. An office is an employment on behalf of the government in any station or public trust, not transient, occasional, or incidental. People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

Franchise defined. A franchise is defined as a particular privilege conferred upon individuals by grant from the government. Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. Franchises are vested in the corporate entity. Londoner v. People ex rel. Barton, 15 Colo. 246, 25 P. 183 (1890); Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

Where it is alleged that the purpose of the challenged group is to render services to the public and that its operations are so permeated with the public interest as to be such that everyone may not engage therein as a matter of right, and that the exercise of such authority requires, or may require, a specific grant of privilege from the general assembly, a franchise is involved. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A franchise is involved in a situation where public high school districts voluntarily join together to perform jointly a public function through a public or quasi-public body that is operating independently of statutory authority. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

An "office or franchise" can be deemed to exist where there has been no legislative act or constitutional provision authorizing the creation of one. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Unless an existing statute is inconsistent with an amendment to the state constitution, then the statute continues in force subsequent to the adoption and effective date of the amendment. People ex rel. Union Trust Co. v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971).

The statute which established the superior court was never inconsistent with the constitutional provisions that judicial power shall be vested in a supreme court, district courts, and others. Therefore, the statute was not automatically repealed by enactment of new constitutional provision. People ex rel. Union Trust Co. v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971) (decided prior to abolition of superior courts).

The right of a county judge to hold office is dependent upon the validity of the proceedings by which he was appointed, but such right cannot be determined in an injunctive proceeding, because the exclusive means of determining whether a person unlawfully holds any office is by a writ in the nature of quo warranto. McCamant v. City & County of Denver, 31 Colo. App. 287, 501 P.2d 142 (1972).

This rule relates to public offices. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

It does not authorize a contest over private office in a quo warranto action. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

It was not in contemplation of this remedy that the district attorney, either on his own motion or at the behest of the governor or the request of the individual, should intervene in the governance of an unincorporated society. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The provisions of this rule may not be utilized by members of a labor union to dislodge other members from offices which they hold in the organization, the application of the rule and the remedy being limited to public officers. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Section (a)(3) was not intended to give private person right to redress his own wrongs. Section (a)(3) was not intended to give a private person the right to question the corporate existence of another, in order to protect his own rights or redress his own wrongs, unless it may be in that class of cases where the title to an office is involved, or some similar question is presented. If the law officer should refuse, the private relator could proceed and institute an action to remedy a public wrong. In the latter case, however, it must appear that the object aimed at is a public one, and is the protection of the interests and the maintenance of the welfare of the people. People ex rel. Union Pac. Ry. v. Colo. E. Ry., 8 Colo. App. 301, 46 P. 219 (1896); State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908); People ex rel. Weisbrod v. Lockhard, 26 Colo. App. 439, 143 P. 273 (1914), aff'd, 65 Colo. 558, 178 P. 565 (1919).

When the action is brought to protect private rights, it should not be maintained. This remedy is for the protection of the interests of the public as contradistinguished from private rights, and when the object of a proceeding is the protection of the latter, the action should not be maintained. State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1930).

An action lies to try right of those lawfully elected directors of private corporations. The phrase ''any franchise'' in section (a)(3) includes the powers and rights conferred upon a private corporation, and an action lies to try the right of those lawfully elected directors of a private corporation and wrongfully prevented from acting. Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

An action in quo warranto is authorized with respect to corporations, which are creatures of statute. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

An action lies to test the title of the office of a director of an irrigation district. Lockhard v. People ex rel. Hasselbush, 80 Colo. 31, 250 P. 152 (1926).

Action to determine the validity of a high school activities association. In a proper case quo warranto is a suitable method to test the validity of the Colorado high school activities association activities. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A club organized in violation of law may be dissolved under section (a)(3). A club organized ostensibly as a social club, but in fact with the sole purpose to dispense intoxicating liquors, in violation of law and local ordinances, may be dissolved by a proceeding under section (a)(3). Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Action may not be used to test the regularity of the appointment of commissioners to hold an incorporation election for a town, as such commissioners are not public officers. Commissioners appointed under the statute to hold an election upon the question whether a town shall become incorporated are not public officers. People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

However, when the town is declared formed the validity of the proceeding may be tested under section (a)(3). People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

The writ of quo warranto is a proper proceeding to attack the legal existence of a quasi-municipal corporation. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

This section provides a proper remedy in cases involving incorporations of towns and cities. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

C. Who May Bring Action.

As a general rule, prosecutions for public wrongs must be instituted by the state through properly authorized agents, while the individual can only sue for injuries peculiarly affecting him. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

If the defendant corporation has violated the law, either by doing some forbidden act or by neglecting to do some act enjoined upon it, it is not every person who may call it to account for such violation. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Exception where agent neglects or refuses to bring action. The provision permitting an action to be brought by a purely private party, upon the neglect or refusal of the district attorney to bring such action, must be construed with reference to this general rule. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Where by statute authority is given to a particular officer, its exercise by any other officer is forbidden by implication. Atchison, T. & S. F. R. R. v. People, 5 Colo. 60 (1879).

Under § 32-6-107 providing for the election and organization of metropolitan recreation districts, quo warranto is available only to the people on relation of the attorney general. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

District attorney is proper officer to determine whether public interest is involved. Under section (a)(3), the district attorney is the proper officer to determine in the first instance whether the public interest is involved, and whether or not a franchise, as contemplated by that provision, is properly an issue. People v. Painless Parker Dentist, 85 Colo. 304, 275 P. 928, cert. denied, 280 U.S. 566, 50 S. Ct. 25, 74 L. Ed. 620 (1929).

Refusal of district attorney to bring action is sufficient to authorize action by private parties. It was alleged and proven that the district attorney upon request made by relators and their attorneys and upon complaint being submitted to him, refused to prosecute the proceedings, and under the circumstances in this case such refusal was sufficient to authorize the court to permit the prosecution upon the relation of such private parties without the aid or sanction of the district attorney. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Where there is no allegation in the complaint that the district attorney has declined to institute an action under this rule, nothing in the complaint discloses that the claimant has any special interest separate and apart from that held by the general public, and the complaint fails to allege the violation of any of claimant's rights which the law recognizes and for which a remedy is provided, such an action may not be maintained by a private citizen. McCamant v. City & County of Denver, 31 Colo. App. 287, 501 P.2d 142 (1972).

In order to support an action by the people for redress of a wrong, that wrong must appear to have been done to the people. People ex rel. Union Pac. Ry. v. Colo. E. Ry., 8 Colo. App. 301, 46 P. 219 (1896).

The provisions which give permission to a private party to bring the action and also to have the right of one other than the incumbent adjudicated, do not turn the proceeding from one to protect the public interests into one to safeguard the purely private rights of the relator. State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908).

Person is not disqualified because of having been opposing candidate for office in question. One possessing the qualifications of "freeholder, resident and elector" is not disqualified from acting as plaintiff in the proceedings by reason of having been the opposing candidate for the office in question. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889).

A certain degree of interest on the part of plaintiffs in the proceedings is generally deemed requisite; and the officious intermeddling by parties having absolutely no interest, either as taxpayers or voters, is disfavored. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889); Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

A plaintiff must have some interest in the matter before he would be entitled to institute such proceedings. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1899); People ex rel. Weisbrod v. Lockhard, 26 Colo. App. 439, 143 P. 273 (1914), aff'd, 65 Colo. 558, 178 P. 565 (1919).

Any person making a sufficient showing of a special interest in the business of the corporation and its property is a proper party. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Resident electors and taxpayers of a city are competent plaintiffs in such case. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

A taxpayer may act as relator in quo warranto proceedings against one claiming to exercise a public office. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A private citizen and taxpayer is undoubtedly interested in the duties required of public officials authorized to levy taxes or to expend the proceeds of taxation, and has a standing to maintain quo warranto proceedings in a matter of public interest in which he has a special interest by reason of being a contributor to the public funds. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

Stockholders, officers, and corporations are suitable plaintiffs. In the absence of express provisions, proceedings to determine the title to office and to oust persons who are illegally in possession may be instituted by the corporation, by officers who have the legal title to the office, or by stockholders. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Where the proceedings involve the entire control of the corporation, the grievance alleged

is not just that accruing to an individual, but one common to the entire corporate body, and suit may be brought by one or more stockholders affected. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Claim for damages is not sufficient interest to authorize suit to dissolve corporation. The fact that the plaintiff owns land which the defendant corporation has appropriated without compensation does not give him such an interest as enables him to maintain the action to dissolve the corporation. His interest is not one in which the public is concerned, being merely a right to sue for damages. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Private persons may maintain proceedings to dissolve corporation organized for illegal purpose. If private persons may institute and maintain proceedings to oust the mayor of a great city, to prohibit the regents of the state university from exercising certain powers claimed by them, there is no good reason why such private persons may not, by like permission of the court, institute and maintain proceedings to dissolve a corporation alleged to have been organized mala fide for the sole purpose of carrying on some business in defiance of the laws of the state and the ordinances of the city, and to the detriment of the public welfare. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Action to try the validity of contested corporate elections. Where the validity of a corporate election is in dispute, and it involves nothing but the title to the board of directors, in the absence of a statute created specially for the specific purpose of trying the validity of contested corporate elections, a proceeding under section (a)(3) is an appropriate remedy, and private individuals elected, but wrongfully prevented from acting upon the board by the intruders, may apply to the district attorney, and, if he fails to act, may bring an action themselves in the name of the people to oust the usurpers from exercising the franchises and to install the relators. Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

A private person is not entitled to maintain an action to oust a corporation of its franchise. Under license from the city the defendant corporation had, at great expense, constructed a line of telephone occupying with its structures the public streets. Since the city had accepted and was still accepting valuable services from defendant and had taken no step to revoke the license, a private citizen was not entitled to maintain an action to oust defendant of the franchise, especially as the municipality had the power of revocation, and the like power was vested in the inhabitants through the initiative. Mountain States Tel. & Tel. Co. v. People ex rel. Wilson, 68 Colo. 487, 190 P. 513 (1920).

V. CERTIORARI OR PROHIBITION.

A. In General.

Law reviews. For article, ''One Year Review of Civil Procedure'', see 34 Dicta 69 (1957). For article, ''One Year Review of Civil Procedure and Appeals'', see 36 Dicta 5 (1959). For note, ''Writ of Prohibition as Applied in Colorado'', see 33 Rocky Mt. L. Rev. 553 (1961). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For article, ''Land Use Decisionmaking: Legislative or Quasi-judicial Action'', see 18 Colo. Law. 241 (1989).

Annotator's note. Since section (a)(4) of this rule is similar to §§ 331 through 341 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule provides for writs in the nature of certiorari or prohibition. Eveready Freight Serv., Inc. v. Pub. Utils. Comm'n, 131 Colo. 172, 280 P.2d 442 (1955); Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

The adoption of this rule altered procedural aspects only of the remedy previously known as certiorari. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

The substantive aspects remain the same. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Proceedings authorized by section (a)(4) of this rule are extraordinary in nature, and may not be employed as a substitute for prescribed appellate procedures. Kirbens v. Martinez, 742 P.2d 330 (Colo. 1987).

Section (a)(4) does not confer any legally protected interest for purposes of establishing standing. Rather, the rule establishes procedures for seeking review when standing otherwise independently exists. Reeves v. City of Fort Collins, 170 P.3d 850 (Colo. App. 2008).

An order of the district court refusing to issue a citation to show cause directed to the county court is proper under section (a)(4) and does not imply any determination by the court of the merits of the case. Since there is nothing in the record to establish any final judgment in favor of either party, appellate review is unavailable. Milburn v. El Paso County Ct., 859 P.2d 909 (Colo. App. 1993).

Purpose of action is to review the action of an inferior tribunal, board, or officer who, in exercising judicial functions, has exceeded the jurisdictional or grossly abused the discretion which the law reposes in such tribunal or officer, and no review is allowed, nor, in the judgment of the court, any plain, speedy, and adequate remedy. Union Pac. Ry. v. Bowler, 4

Colo. App. 25, 34 P. 940 (1893); Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914); Nisbet v. Frincke, 66 Colo. 1, 179 P. 867 (1919).

The function of a proceeding under this rule is to review the action of an inferior tribunal which has allegedly exceeded its jurisdiction or abused its discretion. Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977).

The purpose of an action brought under section (a)(4) is to determine if an inferior tribunal, exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion. Garland v. Bd. of County Comm'rs, 660 P.2d 20 (Colo. App. 1982).

Standard for challenging inferior tribunal. A superior court should exercise great caution and circumspection before issuing a rule to show cause to an inferior tribunal, and then only when such court is satisfied that the ordinary remedies provided by law are not applicable or are inadequate. Only in exceptional cases or classes of cases should applications of this character be allowed. Kirbens v. Martinez, 742 P.2d 330 (Colo. 1987).

The purpose of prohibition is to prevent usurpation or unwarranted assumption of jurisdiction on the part of an inferior tribunal. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

A writ of prohibition is a proper method of challenging the jurisdiction of a trial court. County Court v. Ruth, 194 Colo. 352, 575 P.2d 1 (1977); Empiregas, Inc. of Pueblo v. Pueblo County Court, 713 P.2d 937 (Colo. App. 1985).

Relief under section (a)(4) is appropriate to contest a lower court's order of criminal contempt. Jordan v. County Court, 722 P.2d 450 (Colo. App. 1986).

Prohibition defined. Prohibition is commonly defined as a writ to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Relief in the nature of prohibition is discretionary. There is a wide discretion vested in a district court to which a petition is addressed seeking relief in the nature of prohibition. Justice Court v. Coleman, 137 Colo. 12, 320 P.2d 336 (1958).

Grant of prohibition should not be reversed except for abuse of discretion. In a proceeding in a district court seeking relief in the nature of prohibition against enforcement of a judgment of a justice of the peace, where the complaint alleges facts sufficient to authorize the court, in the exercise of a sound discretion, to grant the relief sought, the judgment of the district court will not be disturbed in the absence of a showing of an abuse of such discretion. Justice Court v. Coleman, 137 Colo. 12, 320 P.2d 336 (1958).

A writ of certiorari will not issue as a matter of right, but only upon good cause shown, as for an abuse of discretion. People ex rel. Kimball v. Crystal River Corp., 131 Colo. 163, 280 P.2d 429 (1955).

Although an order to show cause is usually granted on an ex parte application for a writ of certiorari to the trial court or judge, it is not allowed as a matter of right or as a matter of course, but is a matter within the discretion of that court. The very right to issue a rule to show cause legally presupposes a judicial discretionary authority. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

Certiorari is the continuing of a prior action, a form of appellate review. North Glenn Sub. Co. v. District Court, 187 Colo. 409, 532 P.2d 332 (1975).

Relief available for exceeding jurisdiction or abuse of discretion. This rule limits the issuance of certiorari and prohibition to cases where an inferior tribunal exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and where there is no plain, speedy, and adequate remedy. Eveready Freight Serv., Inc. v. Pub. Utils. Comm'n, 131 Colo. 172, 280 P.2d 442 (1955); Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

The license authority rulings are subject to certiorari review by the courts, and, if its action in refusing a license is found to be arbitrary or capricious, a court has the authority, and the duty, to order the license to issue. Bd. of County Comm'rs v. Salardino, 136 Colo. 421, 318 P.2d 596 (1957); Morris-Schindler, LLC v. City & County of Denver, 251 P.3d 1076 (Colo. App. 2010).

Prohibition lies to prevent an inferior tribunal, whether it has judicial or quasi-judicial powers, from usurping a jurisdiction with which it is not legally vested. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Prohibition may issue to prevent a court from proceeding against the express prohibition of a statute or where an adequate and exclusive remedy to obtain certain relief is provided by statute and the inferior court proceeds by another remedy. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

A writ of prohibition is proper, not only in cases where the lower tribunal has no legal authority to act at all, but also in cases wherein such inferior tribunal, although having general

jurisdiction over a particular class of cases, has exceeded such jurisdiction in the particular case. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Whenever the question is whether a public board or commission has exceeded its jurisdiction or abused its discretion, certiorari is the proper remedy to secure a review of its action. Holly Dev., Inc. v. Bd. of County Comm'rs, 140 Colo. 95, 342 P.2d 1032 (1959).

The various licensing authorities have discretionary power in granting or denying licenses and their actions will not be disturbed on review unless arbitrary or capricious. Quedens v. J. S. Dillon Co., 146 Colo. 161, 360 P.2d 984 (1961).

When a trial court exceeds its jurisdiction in a statutory proceeding, a writ of prohibition is the appropriate remedy. Evans v. District Court, 182 Colo. 93, 511 P.2d 471 (1973).

Misinterpretation or misapplication of governing law by an agency is an alternative ground for finding an abuse of discretion under section (a)(4). District properly determined that correctional hearing officer abused discretion by failing to document that inmate had knowingly and voluntarily waived right to remain silent during administrative hearing as required by agency regulation. Gallegos v. Garcia, 155 P.3d 405 (Colo. App. 2006).

Proper remedy under this rule for abuse of discretion by prison hearing officer is to remand the case for a new hearing, rather than to expunge the inmate's disciplinary conviction. Gallegos v. Garcia, 155 P.3d 405 (Colo. App. 2006).

No abuse of discretion. There is no evidence that the department of corrections officer violated any of the department's regulations related to the inmate grievance, and the inmate failed to show how he was prejudiced by any of the actions by the department of corrections officer. Alward v. Golder, 148 P.3d 424 (Colo. App. 2006).

No authority to consider constitutional issues. Procedures afforded by this rule are available to review the decision of a local licensing authority in suspending a license, but does not provide authority for consideration of constitutional issues. Two G's, Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983).

Constitutional challenges are not within scope of review under section (a)(4). Price Haskel v. Denver Dept. of Excise & Licenses, 694 P.2d 364 (Colo. App. 1984).

Stay of proceedings only against inferior tribunals. The provisions of section (a)(4) do not provide for a stay order against any party which is not "an inferior tribunal". PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

Relief granted only against tribunal. Since a proceeding under this rule is properly brought against the inferior tribunal and the rule to show cause issues only against the tribunal, the relief may be granted, if at all, against the tribunal only. Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977).

Discretionary powers of district court. The issuance of a citation to show cause under this rule lies within the district court's broad discretionary powers. The district court may dismiss a complaint filed pursuant to this rule if the complaint is defective on its face or if no relief can be granted. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Where district court failed to issue the required citation to show cause to the county court, the court of appeals exceeded its jurisdiction by reaching the issue and ordering that a writ of prohibition issue. County Court v. Ruth, 194 Colo. 352, 575 P.2d 1 (1977).

For purpose of standing for district court review, no relief can be afforded if person suffers injury in fact, but not from violation of a legally protected right. Brown v. Bd. of County Comm'rs, 720 P.2d 579 (Colo. App. 1985).

If there is illegal search and seizure, a defendant has plain, speedy, and adequate remedy by motion to suppress and for return of property, and prohibition will not lie in district court to bar further related proceedings in county court. Seccombe v. District Court, 180 Colo. 420, 506 P.2d 153 (1973).

This rule provides a plain, speedy, and adequate remedy of review of a decision of the conservation board as to the sufficiency of a petition, by virtue of which rule the district court is authorized to determine whether or not the board had jurisdiction or abused its discretion. Friesen v. People ex rel. Fletcher, 118 Colo. 1, 192 P.2d 430 (1948).

Where it is contended that the county court was without or exceeded its jurisdiction, or abused its discretion, section (a)(4) provides a plain, speedy, and adequate remedy. People ex rel. Wilson v. Blake, 128 Colo. 111, 260 P.2d 592 (1953).

Although the Denver city charter does not spell out a procedure for judicial review of the orders of the civil service commission of Denver, a remedy nevertheless exists through the extraordinary writs, provision for which is found in § 9 of art. VI, Colo. Const. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

This rule's relief is not an exclusive remedy, declaratory judgment being available to obtain review of matters not reviewable by certiorari. Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), aff'd, 191 Colo. 252, 552 P.2d 13 (1976).

The validity of zoning ordinances has been challenged by certiorari review under section (a)(4), and declaratory relief under C.R.C.P. 57, and on occasion, these forms of relief have been

pursued simultaneously. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Declaratory judgment may be proper remedy. As a general rule, judicial review by way of section (a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property. Where persons have not had prior notice of a rezoning hearing and have not participated in it, certiorari review is not always an effective remedy and a hearing de novo under a declaratory judgment is a proper and effective remedy. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

The district court may consider a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review claim is barred for failure to file a timely claim in accordance with section (b). Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance and the district court may not raise the constitutional issue on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Where no hearing was held by the board before it made its decision, section (a)(4) of this rule is clearly not plaintiffs' exclusive remedy. Ebke v. Julesburg Sch. Dist. No. RE-1, 37 Colo. App. 349, 550 P.2d 355 (1976), aff'd on other grounds, 193 Colo. 40, 562 P.2d 419 (1977).

Requirements of C.R.C.P. 65 not applicable. While C.R.C.P. 65 provides that no restraining order or preliminary injunction shall issue except upon giving security by the applicant, that no order or injunction shall issue without notice, except under certain situations, and that an early hearing shall be provided, no such conditions appear in section (a)(4) of this rule. PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

This rule does not require the submission of an affidavit or verification of the complaint in order to perfect an action for review. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

A complaint neither verified nor accompanied by an affidavit suffices to initiate a proceeding for review, and a citation to show cause need not thereafter issue as such orders presuppose a judicial discretional authority. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

The request for an order to certify the record was not necessary to the perfection of plaintiff's action. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Orders to certify the record are not issued under section (a)(4) of this rule merely as a matter of course. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Neither section (a)(4) of this rule nor any other pertinent rule of procedure requires a plaintiff to request certification of the record. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Plaintiff's failure to request an order certifying the record within 30 days of the city council's decision denying his beverage license application did not require dismissal of the complaint, since plaintiff was only required to ''apply for review'' within the prescribed 30-day period. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Distinction between judicial and administrative acts. The test for distinguishing judicial and quasi-judicial acts from administrative acts is to determine whether the function under consideration involves the exercise of discretion and requires notice and hearing. If these elements are present the ''finding'' is generally a quasi-judicial act; if any of them are absent, it is generally an administrative act. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971); Van Pelt v. State Bd. for Cmty. Colls. & Occupational Educ., 195 Colo. 316, 577 P.2d 765 (1978).

Act of dismissing probationary firefighters is administrative where the only limitation on dismissal is approval by the civil service commission, the civil service commission's approval is not based on preexisting legal standards or policy considerations, and there is no right to appeal dismissal. Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992).

Quasi-judicial action decides rights and liabilities based upon past or present facts. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

The action of an agency will be deemed quasi-judicial for section (a)(4) purposes if: (1) A state or local law requires that the body give adequate notice to the community before acting; (2) a state or local law requires that the body conduct a public hearing pursuant to notice at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requires the body to make a determination by applying the facts of a specific case to certain criteria established by law. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

Quasi-judicial action generally involves a determination of rights, duties, or obligations of specific individuals by applying legal standards or policy considerations to facts developed at a hearing conducted for purpose of resolving interests in question. State Farm v. City of

Lakewood, 788 P.2d 808 (Colo. 1990); Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Quasi-legislative action reflects public policy relating to matters of permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature. In addition, such action requires the balancing of questions of judgment and discretion, is of general application, and concerns an area usually governed by legislation. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

Absence of notice and public hearing requirement is not determinative of the nature of the action. The nature of the decision and the process by which it is reached is the predominant consideration in determining whether an action is quasi-judicial. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Although the board of county commissioners of Boulder county provided notice and public hearings, the board's actions in adopting a rezoning resolution were quasi-legislative in nature based on the prospective nature and broad impact of the resolution. Therefore, landowner is not entitled to relief under section (a)(4). Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892 (Colo. 1993).

Where city council was acting in a legislative capacity when it approved an ordinance requiring relocation underground of overhead electricity and communications facilities by owners and operators at their own cost, telecommunications provider was not entitled to certiorari review under section (a)(4). US West Commc'ns v. City of Longmont, 924 P.2d 1071 (Colo. App. 1995), aff'd on other grounds, 948 P.2d 509 (Colo. 1997).

The fixing of the time and manner of payment of restitution for all prisoners by the director of the department of corrections pursuant to statute is not a judicial or quasi-judicial action on the part of the department or the correctional facility, therefore, the district court lacked jurisdiction to hear prisoner's complaint and did not err in dismissing the complaint on that basis. Jones v. Colo. Dept. of Corr., 53 P.3d 1187 (Colo. App. 2002).

Test applied in Stuart v. Bd. of County Comm'rs, 699 P.2d 978 (Colo. App. 1985).

Commission's denial of applicant's appeal of disqualification from employment was quasi-judicial action even though regulations did not require a formal hearing on the appeal. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Act must be judicial to be reviewable. Where the state board of land commissioners wrongfully canceled a lease of state school lands on the ground that the rent was delinquent, when in fact it was not, and executed a lease thereof to another party, the act was not judicial in its nature and is not subject to review under section (a)(4). State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901).

When the civil service commission of Denver is acting in a quasi-judicial capacity, certiorari is the proper remedy for review of its decision. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Incorporation proceedings are judicial in nature and the district court could entertain an action enforcing priority of jurisdiction with respect to dual actions involving the same subject matter and substantially the same parties. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

Under this rule, certiorari is available only upon exercise of a "judicial or quasi-judicial" function. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Where the charter of a city establishes a civil service commission and provides for hearing and review of dismissals by the manager of safety, these charter provisions clearly place the commission in a quasi-judicial position and bring its decisions within the purview of this rule. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Although the supreme court has repeatedly stated that zoning and rezoning are legislative matters, an ordinance prescribing standards and procedures for obtaining a rezoning establishes a quasi-judicial, rather than a legislative, procedure by: (1) Providing for notice and hearing; and (2) setting forth the criteria to be taken into account by the planning commission in arriving at its decision, and therefore, an alleged abuse of discretion by the commission is reviewable under this rule. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

It cannot be legislative or executive. The court does not review an order, action, or proceeding, unless it be judicial in its nature, and not legislative or merely ministerial. State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901); Colo.-Ute Elec. Ass'n v. Air Pollution Control Comm'n, 41 Colo. App. 393, 591 P.2d 1323 (1978), rev'd on other grounds sub nom. CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 463, 610 P.2d 85 (1980).

Sections (a)(2) and (a)(4) of this rule are inapplicable to challenges of legislative actions. Cherokee Water & Sanitation v. El Paso, 770 P.2d 1339 (Colo. App. 1988).

The fact-finding function of the board of county commissioners' proceeding under the county housing authority act was the exercise of a legislative directive and not a quasi-judicial proceeding reviewable under this rule. The board finds the facts but passes no judgment thereon; it is given no judicial power. Smith v.

Waymire, 29 Colo. App. 544, 487 P.2d 599 (1971).

If the act of removal is executive, not judicial or quasi-judicial, it is not reviewable by certiorari. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Where the subject of a declaratory judgment action is the review of an executive or administrative decision, section (a)(4) is neither the appropriate nor the exclusive remedy by which a declaration of rights could be obtained. Bonacci v. City of Aurora, 642 P.2d 4 (Colo. 1982).

If the law makes no provisions for hearing, but gives power to remove and only requires that reasons therefor be stated in writing and filed, and if the officer desires, he may be given an opportunity to explain, the removal act is "executive" so far as the right to review by certiorari is concerned. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

From the explicit wording of this rule, certiorari will not apply for review of the propriety of legislative action. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

A challenge to legislation and the governmental legislative conduct is not available in proceedings to review quasi-judicial governmental acts pursuant to section (a)(4). Liquor & Beer Licensing Ad. Bd. v. Cinco, 771 P.2d 482 (Colo. 1989).

City's decision to exterminate prairie dogs in a city park was administrative, not quasi-judicial, and was not subject to judicial review under section (a)(4). Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203 (Colo. App. 2000).

The career service board's decision to demote an employee because she did not have the level of education required by the city's personnel policy was administrative rather than quasi-judicial in nature. The employee, therefore, was not entitled to judicial review of the board's action under section (a)(4). Bourgeron v. City & County of Denver, 159 P.3d 701 (Colo. App. 2006).

Quasi-legislative action is prospective in nature, is of general application, and requires the balancing of questions of judgment and discretion. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

A master plan that established land use policies, was prospective in nature and general in character, and had not been applied against plaintiff's property is legislative in nature. Condiotti v. Bd. of County Comm'rs, 983 P.2d 184 (Colo. App. 1999).

Judicial review of quasi-legislative action is more limited than that of quasi-judicial action; thus, a court may not substitute its opinion for that of a school board. Bruce v. Sch. Dist. No. 60, 687 P.2d 509 (Colo. App. 1984).

It may be maintained if remedy is not plain and adequate. People ex rel. L'Abbe v. District Court, 26 Colo. 386, 58 P. 604 (1899); Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914); State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

Whenever there is no direct remedy provided for review, the writ of certiorari lies, even though some other remedy can be conceived as possible in the future. Holly Dev., Inc. v. Bd. of County Comm'rs, 140 Colo. 95, 342 P.2d 1032 (1959).

Whether the amendment could operate retrospectively was at least doubtful even to a prudent lawyer making a realistic evaluation of possible remedies. Considering the presence of this dilemma it cannot be said that a plain, speedy, and adequate legal remedy existed. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

If the remedy is inadequate, it is no remedy, and gives to a court of record in a proceeding under this rule the same right, and imposes upon it the same duty, to grant relief as if no right of review existed. Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914).

Expense of trial may not be used as grounds for prohibition. Seccombe v. District Court, 180 Colo. 421, 506 P.2d 153 (1973).

The fact that proceedings may be expensive and may result in ultimate reversal of the trial court for error, affords insufficient basis for resort to proceedings in the nature of prohibition. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Delay and expense do not ordinarily render appeal inadequate. The delay and expense of an appeal or other available remedy ordinarily furnish no sufficient reasons for holding that the remedy by appeal is not adequate or speedy, although there are many instances in which the expense and delay of an appeal have, in part at least, impelled the superior court to grant prohibition. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

The court may quash or refuse to quash the proceeding complained of. No rights growing out of such proceeding can be enforced. State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

It has no power to correct a mistake of fact or erroneous conclusion from the facts, made by the inferior tribunal. State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563 (1926).

Court will not restrain mere error. A writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Although "good cause" was not specifically alleged as the basis for amending the complaint, the district court did not abuse its discretion when it granted motion to avoid

piece-meal litigation. Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. App. 1989).

Restraint from final adjudication within court's jurisdiction not appropriate. Prohibition may never be used to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Prohibition of statutory functions of executive department. A district court does not have jurisdiction to prohibit a branch of the executive department from carrying out its statutory functions. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); Chonoski v. State Dept. of Rev., 699 P.2d 416 (Colo. App. 1985).

A claim that the statute under which an executive department is proceeding is unconstitutional will not clothe the judiciary with power to interfere with or control such department in advance of its taking final action. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); Colo. Dept. of Rev. v. District Court, 172 Colo. 144, 470 P.2d 864 (1970).

Power to stay orders is modifiable by statute. While the courts have power to issue stay orders in certiorari proceedings, statutes may modify or abrogate that power. In the annexation statutes it is clear that the general assembly intended to preclude the issuance of a stay order pending appeal of the annexation proceedings. In this respect they were not legislating on procedure but declaring by substantive law a legal status. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

Where the general assembly, in the interest of public safety, has provided a reasonable limitation upon the right to secure postponement of the effective date of suspension of a driver's license by the director of revenue, requiring a showing of irreparable injury, the courts have no power to nullify by procedural rule the limitations so imposed, the function of the courts being limited to a review of the acts of the director. Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

Review of denial of license does not stay new application. Where a party applied for a liquor license which was denied, a proceeding to review such denial under this rule does not operate to stay the hand of the licensing officer in receiving and acting upon the application of another party for a license to operate at the same location. Cronin v. Ward, 144 Colo. 192, 355 P.2d 655 (1960).

When (1) a statute, rule, or regulation requires that an individual or entity obtain a license to perform a certain activity, (2) the requirement of the license is valid, and (3) there are judicial remedies to challenge an alleged wrongful refusal of that license, the person or entity may not disregard the licensing requirements, but instead must suspend engaging in the activity for which the license is required pending judicial resolution of the alleged wrongful denial. Here, plaintiffs knew that the city council had affirmed the city's denial of their renewal application and, aware that a preliminary injunction had not been granted, chose to continue to operate their business without the proper license. Because the ordinance was valid, plaintiffs cannot assert wrongful denial as a defense to operating their business without a valid license. Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Determination by trial court that plaintiff's license had been wrongfully denied was not the equivalent of granting plaintiffs a license. Therefore, trial court properly determined that plaintiffs were not licensed for the period between the city council's denial of their license and trial court's reversal in their favor on procedural grounds. Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Section provides for civil action. Section (a)(4) clearly contemplates the application of C.R.C.P. 2 providing for one form of civil action since it requires a complaint which must be filed and summons issued and served as in other actions. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Other rules of civil procedure, when pertinent, apply to proceedings under this rule. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

The time limit for a section (a)(4) action is that specified by applicable statute or, if there is none, then not later than 30 days from the final decision complained of. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978); Sullivan v. Bd. of County Comm'rs, 692 P.2d 1106 (Colo. 1984).

Pleading requirements of section (a)(4) must yield to conflicting statutory procedures codified in § 40-6-115 of the Public Utilities Law. Silver Eagle Servs. v. P.U.C., 768 P.2d 208 (Colo. 1989).

Compliance with time limitation of section (b) required. Any challenge to an agency action under section (a)(4) must be perfected within the 30-day limitation of section (b) of this rule. Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977); Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

The failure to bring a section (a)(4) proceeding within 30 days of the enactment of the city

rezoning ordinance is a jurisdictional defect under section (b). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Failure to bring the requisite certiorari action within 30 days as provided by section (b) of this rule is a jurisdictional defect. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976); Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sullivan v. Bd. of County Comm'rs, 692 P.2d 1106 (Colo. 1984).

Where the time for perfecting the review of a rezoning decision, pursuant to section (a)(4) had expired at the time indispensable parties were added as parties defendant, the failure of the plaintiffs to perfect their petition for certiorari review within 30 days constituted a fatal defect which required that the complaint be dismissed, since the requirements of section (b) must be construed as a statute of limitation. Westlund v. Carter, 193 Colo. 129, 565 P.2d 920 (1977).

Failure to pursue timely remedies bars declaratory judgment action. Plaintiff's failure to pursue remedies provided in § 24-4-106, judicial review under the administrative procedure act, and section (a)(4) of this rule in a timely manner bars a declaratory judgment action. Greyhound Racing Ass'n v. Colo. Racing Comm'n, 41 Colo. App. 319, 589 P.2d 70 (1978).

Failure to file a claim for judicial review within 30 days is not jurisdictionally fatal when such claim is combined with a declaratory claim. Section (b) does not prevent the district court from considering a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review is barred for failure to file a timely claim. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance. The district court may not raise the constitutional issue on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Plaintiff need not cause district court to issue citation in 30 days. Perfection of an appeal under this rule does not require that the plaintiff cause the district court to issue a citation within the same 30-day period. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Necessity for calling attention to lack of jurisdiction. Order in the nature of a writ of prohibition will not be issued to an inferior court unless the attention of the court whose proceedings it is sought to arrest first has been called to the lack of jurisdiction alleged, unless extraordinary circumstances are present. Justice Court of Precinct No. 1 v. People ex rel. Harvey, 109 Colo. 287, 124 P.2d 934 (1942).

Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction, since one summoned can appear specially in the court or quasi-judicial agency to move that process be quashed as to him. The court in such cases is vested with power to determine whether it has jurisdiction. City of Thornton v. Pub. Utils. Comm'n, 154 Colo. 431, 391 P.2d 374 (1964).

Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction. Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967).

Joinder of all of petitioner's claims in one action required. When an action is timely filed under section (a)(4), public policy requires the joinder of all of the petitioner's claims in one action. Powers v. Bd. of County Comm'rs, 651 P.2d 463 (Colo. App. 1982).

This includes constitutional claims. Bd. of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996).

Lack of jurisdiction for failure to join parties. This rule provides a 30-day limitation for filing an action for certiorari. Because an appeal must be perfected—as well as commenced—within the time period established, and part of the perfection of an appeal requires the joinder of indispensable parties, an amendment to a complaint seeking to add a party as indispensible to the action, filed after the time limitation for filing, was too late. City & County of Denver v. District Court, 189 Colo. 342, 540 P.2d 1088 (1975).

Standard for determining whether party must be joined. The correct standard for determining whether a party must be joined in a section (a)(4) action is that the appropriate municipal body to be joined is the inferior tribunal which made the decision being contested, and not some other municipal body. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982).

Failure to join all indispensable parties in a C.R.C.P. 106 action within the time limit prescribed by the rule is a jurisdictional defect which requires dismissal of the action. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

An action brought under section (a)(4) must be ''perfected'' as well as filed within the 30-day limit. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982).

Indispensable parties must be correctly joined. Perfection of a challenge to an agency action includes the correct joinder of indispensable parties as required by C.R.C.P. 19. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Failure to join party in petition for review is not jurisdictionally fatal. Since a section (a)(4) petition may be amended to add parties, where the defendant does not protest or show prejudice, the failure to join a party as a named party defendant in the petition for review is not jurisdictionally fatal. Soon Yee Scott v. City of Englewood, 672 P.2d 225 (Colo. App. 1983).

The person whose rezoning application is challenged is an indispensable party to that proceeding. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Motion for new trial necessary before review. Proceedings under this rule are subject to C.R.C.P. 59 requiring a motion for new trial or an order dispensing therewith and such requirements apply whether the reviewing court acts as a trial court or as an appellate tribunal in reviewing the actions of a quasi-judicial tribunal. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Under this rule it is necessary in actions in the nature of certiorari to move for a new trial. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957).

Lack of adequate appeal must be alleged. Carlton v. Carlton, 44 Colo. 27, 96 P. 995 (1908).

Taxpayers have standing to question scope of board powers. As taxpayers it is clear the relators have standing to question the legality of expenditures of public funds and to enjoin such expenditures if they are proved to be unconstitutional or without legal authority; they also have the right to question other acts of the school district that are alleged to be beyond the scope of its powers. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

This section makes no distinction between an aggrieved individual and a municipal corporation which seeks review in the interest of the public as a whole. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Section (a)(4) provides a taxpayer a right of review in a state court from a proceeding in an inferior tribunal. Local 1497, Nat'l Fed'n of Fed. Employees v. City & County of Denver, 301 F. Supp. 1108 (D. Colo. 1969), appeal dismissed, 396 U.S. 273, 90 S. Ct. 561, 24 L. Ed. 2d 464 (1970).

Trial court's dismissal of petition for prohibition or mandamus was affirmed where plaintiffs, who brought the action in their official capacities as members of the board of county commissioners to protest state-ordered reappraisals of properties in the county, have neither standing nor legal authority to maintain this action; taxpayers who are adversely affected may have judicial review. Bd. of County Comm'rs v. Love, 172 Colo. 121, 470 P.2d 861 (1970).

A competitor is not a person substantially aggrieved by the district court action, which would give him a right to seek review under section (a)(4) of this rule. Woda v. City of Colo. Springs, 40 Colo. App. 173, 570 P.2d 1318 (1977).

The certification of the record is an official act of the inferior tribunal and is not necessarily contingent upon certification of the transcript of the proceedings by a certified shorthand reporter. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

In certain circumstances, a court, even in a certiorari proceeding, should order a remand to an administrative agency on clear-cut issues involving documentary evidence. Johnston v. City Council, 177 Colo. 223, 493 P.2d 651 (1972).

Action of municipal legislative body quasi-judicial. In order to support a finding that the action of a municipal legislative body is quasi-judicial and thus subject to review by certiorari, all of the following factors must exist: (1) A state or local law requiring that the body give adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Rezoning quasi-judicial. Enactment of a rezoning ordinance by the legislative body of a city, governed by both state zoning statutes as well as the municipal code, pursuant to statutory criteria, after notice and a public hearing, constitutes a quasi-judicial function subject to certiorari review. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Although early decisions viewed the enactment of rezoning ordinances as a legislative function, more recent decisions have held such activity to be a quasi-judicial function and reviewable under section (a)(4). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Rezoning procedures are reviewed under section (a)(4) of this rule as quasi-judicial activities. Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), aff'd, 189 Colo. 421, 552 P.2d 13 (1976).

The amendment of a general zoning ordinance is a quasi-judicial act reviewable under this rule. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976).

Exclusive when entire zoning ordinance not challenged. Section (a)(4) is now an exclusive remedy to challenge a rezoning determination where the entire general zoning ordinance is not challenged and where a review of the

record would be an adequate remedy. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Higby v. Bd. of County Comm'rs, 689 P.2d 635 (Colo. App. 1984).

Certiorari relief is the exclusive remedy for allegedly invalid rezoning. Gold Run, Ltd. v. Bd. of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976).

Section (a) of this rule is the exclusive process to challenge a rezoning determination as to specific property. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Section (a)(4) of this rule provides the exclusive remedy for challenging a rezoning determination of specific land. Westlund v. Carter, 193 Colo. 129, 565 P.2d 920 (1977).

This rule provides the exclusive remedy for challenging a rezoning determination and the time limitations for certiorari review. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Exclusive where specific amendatory zoning ordinance challenged. Where plaintiff was challenging a specific amendatory ordinance as applied to the property of the defendants and not the general zoning ordinance of the city, his exclusive remedy was to bring an action for certiorari review under section (a)(4), and, thus, his initial complaint seeking a declaratory judgment and injunctive relief was properly dismissed. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976).

Where denial of variance challenged. Where denial of a variance from a county building code requirement was challenged, then a section (a)(4) proceeding was the exclusive remedy. Van Huysen v. Bd. of Adjustment, 38 Colo. App. 9, 550 P.2d 874 (1976).

Property owners can maintain claim under 42 U.S.C. § 1983 against planning board for violations of federal constitutional rights even though this rule purports to be the exclusive remedy for challenging zoning decisions since the owners are seeking monetary damages under that claim and not declaratory or injunctive relief. Sclavenitis v. Cherry Hills Bd. of Adjustment, 751 P.2d 661 (Colo. App. 1988).

A § 1983 damage claim exists separately from an action for reviewing a quasi-judicial decision made by a government entity and, accordingly, the § 1983 claim is not required to be filed within the 30-day rule set forth in this rule. Bd. of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996).

Plaintiff's claim for permanent injunction moot and judgment dismissing action proper when plaintiff failed to seek temporary or preliminary injunctive relief in connection with challenge to zoning ordinance which authorized construction of facility, coupled with actual completion of facility during pending litigation. Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

City and zoning administrators are proper parties to bring decision of board of adjustment before district court and ultimately appeal to court of appeals. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Judicial review of denial of rezoning of land is properly limited to review of record of proceedings before county planning commission and county commissioners. Famularo v. Bd. of County Comm'rs, 180 Colo. 333, 505 P.2d 958 (1973).

Where the zoning body has established requirements governing a particular use and the developer has met those requirements, the zoning body exceeded its jurisdiction when, using its discretion, it rejected the developer's plan. Sherman v. City of Colo. Springs Planning Comm'n, 680 P.2d 1302 (Colo. App. 1983); Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

And where developer's plan met the requirements of the city zoning ordinance, and the city's action in approving or denying the developer's plan was quasi-judicial in nature, the proper remedy available to the developer was certiorari under section (a)(4) and not mandamus under section (a)(2), and the developer was not entitled to damages. Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

The weighing of evidence and the determination of fact are functions of the rezoning board and are not matters for consideration upon appellate review. Coleman v. Gormley, 748 P.2d 361 (Colo. App. 1987).

Approval by city council of initial petition for formation of special district within boundaries of city was legislative in nature and action not reviewable pursuant to this rule. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

Zoning board's approval of rezoning application was final only when board executed and approved development plan and filing deadline commenced on that date. Luck v. Bd. of County Comm'rs, 789 P.2d 475 (Colo. App. 1990).

A zoning ordinance amendment is not subject to review pursuant to this rule where the amendment is of general application, may be enacted by initiative, and is subject to referendum. Russell v. City of Central, 892 P. 2d 432 (Colo. App. 1995).

Board exceeded its jurisdiction and acted arbitrarily and capriciously where it approved a special review land use that was dependent on the validity of an ordinance. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

Whatever form a final decision may take in any given context, a party whose property

interests are adversely affected by it may not, in the absence of timely notice of the decision, be deprived of review for failing to seek it in a timely manner. Citizens for Resp. Growth v. RCI Dev. Ptr., 252 P.3d 1104 (Colo. 2011).

The loss of a right to judicial review for failure to timely file in the absence of adequate notice would clearly violate due process of law. By including the disposition of two related applications in the written resolution it was required to formally adopt to approve land developer's 1041 application, the board of county commissioners made clear its intent to supersede, or finalize, the earlier oral adoption of all three applications. Where the ripeness of neither the planned unit development application nor the preliminary subdivision plat application was disputed, the complaint seeking judicial review of both was timely filed. Citizens for Resp. Growth v. RCI Dev. Ptr., 252 P.3d 1104 (Colo. 2011).

Section (a)(4) held improperly applied in wrongful discharge, outrageous conduct, and civil rights action against town. Wilson v. Town of Avon, 749 P.2d 990 (Colo. App. 1987).

District court does not have jurisdiction under this rule to review an interlocutory order of a state administrative agency, absent a showing of irreparable harm from such order. T & S Leasing v. District Court, 728 P.2d 729 (Colo. 1986).

Since municipal court rules became effective on April 1, 1970, the argument that there is no established procedure in the municipal courts is therefore moot. Municipal Court v. Brown, 175 Colo. 433, 488 P.2d 61 (1971).

Motion for new trial not required. A motion for new trial to secure appellate review of a district court's judgment in a proceeding under this rule is not required where the hearing in the district court did not involve controverted issues of fact. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

The administrative and judicial review provisions of the Workmen's Compensation Act of Colorado are complete, definitive, and organic, without the need of supplementation from other legislative acts or the procedural relief afforded by C.R.C.P. 16. Gardner v. Friend, 849 P.2d 817 (Colo. App. 1992).

Denial of a non-conforming use application and denial of a variation application were final decisions for purposes of this rule and judicial review was the exclusive remedy for review of such decisions. A petition for review was, therefore, subject to the 30-day filing deadline. Buck v. Park, 839 P.2d 498 (Colo. App. 1992).

But, where the decision of the commission was merely a recommendation to the city council and the city council had responsibility for the final decision, the decision of the commission was not final agency action and was not appealable. Buck v. Park, 839 P.2d 498 (Colo. App. 1992).

A temporary civil protection order issued by a county under § 13-14-104.5 (1)(a) is not a final decision for purposes of review under section (a)(4) of this rule. Martin v. Arapahoe County Court, 2016 COA 154, 405 P.3d 356.

Absent a showing of prejudice, the premature filing of an appeal does not preclude the court from addressing the case on its merits. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App. 1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

Certiorari review is not appropriate to review the decision of a sheriff or a chief of police denying an application for a concealed weapons permit. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

The scope of this rule includes prison disciplinary proceedings. Mariani v. Colo. Dept. of Corr., 956 P.2d 625 (Colo. App. 1997).

Applied in Shearer v. Bd. of Trustees of Firemen's Pension Fund, 121 Colo. 592, 218 P.2d 753 (1950); Rothwell v. Coffin, 122 Colo. 140, 220 P.2d 1063 (1950); Bacon v. Steigman, 123 Colo. 62, 225 P.2d 1046 (1950); Berger v. People, 123 Colo. 403, 231 P.2d 799, cert. denied, 342 U.S. 837, 72 S. Ct. 62, 96 L. Ed. 633 (1951); Mardi, Inc. v. City & County of Denver, 151 Colo. 28, 375 P.2d 682 (1962); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971); North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 313, 505 P.2d 377 (1973); City of Lakewood v. District Court, 181 Colo. 69, 506 P.2d 1228 (1973); Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304 (Colo. 1986); Gallagher v. County Court, 759 P.2d 859 (Colo. App. 1988).

B. Extent of Review.

Scope of review strictly limited. The scope of review granted to the district court in a proceeding under section (a)(4) of this rule is strictly limited. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

It is beyond the scope of this rule to challenge administrative regulations on the grounds that such rules are vague and overbroad. Mariani v. Colo. Dept. of Corr., 956 P.2d 625 (Colo. App. 1997).

In an appeal from a judgment entered in a proceeding under this rule, the court of appeals is in the same position as the district court concerning the review of the county court proceeding. Empiregas, Inc. of Pueblo v. County Court, 713 P.2d 937 (Colo. App. 1985).

In reviewing a local board of adjustment's decision pursuant to section (a)(4) of this rule, the court of appeals calls into question the decision of the board itself, not the district

court's determination on review. The review is based solely on the record that was before the board, and the decision must be affirmed unless there is no competent evidence in the record to support it such that it was arbitrary or capricious. The court considers whether the board abused its discretion or exceeded its jurisdiction, as well as whether it applied an erroneous legal standard. City & County of Denver v. Bd. of Adjustment, 55 P.3d 252 (Colo. App. 2002); Lieb v. Trimble, 183 P.3d 702 (Colo. App. 2008).

This rule limits the issuance of orders in the nature of prohibition to cases where an inferior tribunal has exceeded its jurisdiction or abused its discretion in exercising judicial or quasi-judicial functions, and where there is no plain, speedy, or adequate remedy. Banking Bd. v. District Court, 177 Colo. 77, 492 P.2d 837 (1972).

In other words the scope of review is limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused, or authority regularly pursued. City Council v. Hanley, 19 Colo. App. 390, 75 P. 600 (1904); Graeb v. State Bd. of Med. Exam'rs, 55 Colo. 523, 139 P. 1099 (1913); Chenoweth v. State Bd. of Med. Exam'rs, 57 Colo. 74, 141 P. 132 (1914); Thompson v. State Bd. of Med. Exam'rs, 59 Colo. 549, 151 P. 436 (1915); State Bd. of Med. Exam'rs v. Noble, 65 Colo. 410, 177 P. 141 (1918); State Bd. of Med. Exam'rs v. Boulls, 69 Colo. 361, 195 P. 325 (1920); State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921); White v. Andrew, 70 Colo. 50, 197 P. 564 (1921); Dilliard v. State Bd. of Med. Exam'rs, 69 Colo. 575, 196 P. 866 (1921); Doran v. State Bd. of Med. Exam'rs, 78 Colo. 153, 240 P. 335 (1925); State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563 (1926); Bd. of Comm'rs v. Dunlap, 83 Colo. 360, 265 P. 94 (1928); Pub. Utils. Comm'n v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930); State Bd. of Dental Exam'rs v. Savelle, 90 Colo. 177, 8 P.2d 693 (1932); Pub. Utils. Comm'n v. Erie, 92 Colo. 151, 18 P.2d 906 (1933); City & County of Denver v. People ex rel. Pub. Utils. Comm'n, 129 Colo. 41, 266 P.2d 1105 (1954).

The court can review the action of the state board of medical examiners only upon the question of jurisdiction or great abuse of discretion. White v. Andrew, 70 Colo. 50, 197 P. 564 (1921).

The remedy is restricted in its inquiry to jurisdictional questions and to a manifest abuse of discretion. State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

Under section (a)(4) the court is limited to a determination of questions of jurisdiction and abuse of discretion. Hawkins v. Hunt, 113 Colo. 468, 160 P.2d 357 (1945); Shupe v. Boulder County, 230 P.3d 1269 (Colo. App. 2010).

A review of the action of the state board of health in revoking a license for the operation of a chiropractic sanitarium was held to be limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused, or authority regularly pursued. Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health, 122 Colo. 147, 220 P.2d 872 (1950).

The sole matter before a trial court under the record is governed by this rule and limits the inquiry to a determination of whether the licensing authority has exceeded its jurisdiction or abused its discretion. Bacher v. Bd. of County Comm'rs, 136 Colo. 67, 314 P.2d 607 (1957).

Under this rule the function of the district court is to determine whether the respondent authorities have exceeded their jurisdiction or abused their discretion. La Junta Easy Shops, Inc. v. Hendren, 164 Colo. 55, 432 P.2d 754 (1967).

The breadth of the district court's review does not extend further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

An appellate court's review under section (a)(4) is limited to a determination of whether the governmental body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer. Since the question is whether there is adequate support for the decision reached by the administrative tribunal, the appellate court is in the same position as the district court in reviewing an administrative decision under section (a)(4). Ad Two, Inc. v. City & County of Denver, 9 P.3d 373 (Colo. 2000); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

Review of a prison disciplinary decision is limited to whether the prison officials exceeded their jurisdiction or abused their discretion. Under this standard, the decision of the prison officials must be upheld if there is "some evidence" to support it. Washington v. Atherton, 6 P.3d 346 (Colo. App. 2000).

Consideration of evidence relevant to jurisdiction proper. In determining whether the board had exceeded its jurisdiction or abused its discretion, the trial court properly gave consideration to evidence of material facts which could not escape notice, and did not substitute the decision of the board. Bd. of Adjustment v. Abe Perlmutter Constr. Co., 131 Colo. 230, 280 P.2d 1107 (1955).

The merits of the case are not involved. On proceedings to review an order of an administrative body the only questions presented are: Did the board exceed its jurisdiction, or abuse its discretion? The merits of the controversy are

not involved. State Bd. of Med. Exam'rs v. Noble, 65 Colo. 410, 177 P. 141 (1918).

It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question except the mere question of power, the action of the inferior tribunal is final and conclusive. State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921).

Whether a decision on the merits is right or wrong is not within the issue. State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921); State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563, 54 A.L.R. 1498 (1926).

It does not settle disputed facts. The object of the proceeding is not to settle or determine disputed facts, but to investigate and correct errors of law of a jurisdictional nature, and abuses of discretion. Doran v. State Bd. of Med. Exam'rs, 78 Colo. 153, 240 P. 335 (1925).

A district court could not, in proceedings to determine whether a justice of the peace exceeded his jurisdiction, determine disputed questions of fact. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

Mere irregularities are not reviewable. Phillips County Court v. People ex rel. Chicago, B. & Q. R. R., 55 Colo. 258, 133 P. 752 (1913).

Mere disagreement with a ruling is not sufficient showing of abuse of discretion to require issuance of a writ of prohibition. Bristol v. County Court, 143 Colo. 306, 352 P.2d 785 (1960).

Judgment of lower court will not be rejudged on merits. While power is vested in the courts to review the proceedings of all inferior jurisdictions to correct jurisdictional errors, they will not rejudge their judgments on the merits. The correctional power extends no further than to keep them within the limits of their jurisdiction, and to compel them to exercise it with regularity. Bd. of Aldermen v. Darrow, 13 Colo. 460, 22 P. 784 (1889); State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901).

The district court has no jurisdiction to review the action of a city council in a matter of contest of election of its members, and to determine whether the action of the council in such contested election was justified by the evidence. City Council v. Hanley, 19 Colo. App. 390, 75 P. 600 (1904).

Section (a)(4) not substitute for available statutory review. A party cannot substitute proceedings seeking declaratory and injunctive relief under section (a)(4) for an available avenue of plain, speedy and adequate review prescribed by the general assembly. Claskey v. Klapper, 636 P.2d 682 (Colo. 1981).

Review pursuant to C.R.C.P. 57 is appropriate where section (a)(4) relief is unavailable because the challenged action is legislative or because review of the record is an insufficient remedy. Grant v. District Court, 635 P.2d 201 (Colo. 1981).

The court acted within its discretion in dismissing a claim for declaratory relief under C.R.C.P. 57, because the review provided under this rule had already considered all the issues in that claim. Denver Center for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985).

Section (a)(4) cannot be substituted for an appeal. When a county court overruled defendant's motion to vacate the judgment, it had jurisdiction over the subject matter and over the person of the defendant and exercised that jurisdiction regularly. It may be that it ought to have vacated the judgment and that it committed error in not doing so, but this is a matter to be determined by appeal and not by a proceeding under section (a)(4). Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913).

The words "abuse of discretion" in section (a)(4) do not mean such an abuse of discretion as may be committed by a court in overruling a motion to vacate a judgment when the action of the court may be reviewed on appeal, for otherwise an action would lie to review the action of a county court in refusing to set aside a default and vacate a judgment taken thereon in almost any case. Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913).

"Abuse of discretion" does not entail only acts in excess of jurisdiction, and this section is not therefore limited solely to a determination of whether the inferior tribunal exceeded its jurisdiction. Ragsdale v. County Court, 39 Colo. App. 341, 567 P.2d 817 (1977).

Thus, claim of unconstitutionality is not considered. The question of constitutionality of a statute under which the executive department is proceeding is a matter to be raised on appeal after the executive has performed its function. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); Colo. Dept. of Rev. v. District Court ex rel. County of Adams, 172 Colo. 144, 470 P.2d 864 (1970).

Where the only question before the Colorado courts was the validity of an ordinance, and plaintiff could obtain relief only if the ordinance were held to be invalid, and where his allegations were adequate for this purpose, and that was the issue upon which the case was tried and decided, this rule was not applicable. Heron v. City of Denver, 251 F.2d 119 (10th Cir. 1958).

Contentions of unconstitutionality under this rule provide no basis for jurisdiction in the district court under this rule. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

De novo review was impermissible under this rule. Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977).

A trial de novo of the issues in a municipal court cannot be had under the certiorari provisions of this rule. Serra v. Cameron, 133 Colo. 115, 292 P.2d 340 (1956).

In a certiorari proceeding, the reviewing court is to ascertain from the record of the lower tribunal alone whether the inferior tribunal regularly pursued its authority, and thereupon pronounce judgment accordingly. Johnston v. City Council, 177 Colo. 223, 493 P.2d 651 (1972).

In the absence of some showing of facts, either in the petition for review or in the supporting affidavits, which would tend to indicate that the city council's action was arbitrary or an abuse of discretion, the district court's review under section (a)(4) of this rule is limited to the record before it. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

Reviewing court on certiorari review of an administrative body's decision is limited to what appeared of record. Ford Leasing Dev. Co. v. Bd. of County Comm'rs, 186 Colo. 418, 528 P.2d 237 (1974).

District court review under this rule proceeding is limited to the record. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

In a certiorari proceeding pursuant to section (a)(4), the district court's review is limited to a review of the record before it and introduction of new testimony is not appropriate. Hazelwood v. Saul, 619 P.2d 499 (Colo. 1980).

In reviewing a decision pursuant to this rule, an appellate court must review the decision of the agency rather than the decision of the district court; review of an agency's findings of fact is limited to whether the agency had competent evidence on which to base its decision. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App. 1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

The reviewing court must also determine whether an agency misconstrued or misapplied the law; the agency's interpretation of its own regulations must be reviewed to ensure that it does not amend its regulations in the guise of interpreting them. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App. 1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

Taking testimony is unnecessary for review. In the course of hearing under a writ of certiorari, this section sets up the correct procedure. Essentially it is a review proceeding of an inferior tribunal and thus testimony is not in order. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

District court on its own motion may not order a remand to supplement the record where the evidence had been presented on all issues necessary for a determination of the validity of the action taken and the record is complete. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); Garland v. Bd. of County Comm'rs, 660 P.2d 20 (Colo. App. 1982).

Court cannot interfere with commission's findings if supported by competent evidence. The scope of review in certiorari proceedings, and the authority of courts to interfere with the findings of tribunals vested with exclusive jurisdiction to determine particular issues has been judicially defined. The reviewing court cannot consider whether the commission's findings are right or wrong, substitute its judgment for that of the commission, or interfere in any manner with the commission's findings if there is any competent evidence to support the same. State Civil Serv. Comm'n v. Hazlett, 119 Colo. 173, 201 P.2d 616 (1948).

The lawful determination of a properly constituted authority will not be interfered with when the record discloses competent evidence on which it is based, and the action of the inferior tribunal appears to be neither arbitrary nor capricious. Marker v. City of Colo. Springs, 138 Colo. 485, 336 P.2d 305 (1959).

Where civil service commission, acting in a quasi-judicial capacity, reviews record of proceedings before city manager of safety for purpose of determining whether police officers were properly discharged, and the evidence before the manager substantiated the charge and supported his findings and conclusions, the commission is bound by the manager's supported findings and may not adopt different conclusions to hold a de novo trial without expressly determining that the findings are not supported by the evidence, or that errors of law have occurred. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

The authority of the court and the scope of its review in certiorari proceedings is limited to a determination of whether there is any competent evidence to support the decision of the inferior tribunal. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967); Cooper v. Civil Serv. Comm'n, 43 Colo. App. 258, 604 P.2d 1186 (1979); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

While the reviewing court can determine that a portion of the test established by the civil service commission was arbitrary and capricious, the court cannot determine the remedy. Determination of a remedy is left to the commission. Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

The proper function of a district court under this rule is to affirm a city council where there is ''any competent evidence'' to support the council's decision. Bauer v. City of Wheat Ridge, 182 Colo. 324, 513 P.2d 203 (1973).

A court subjecting a rezoning decision of a city zoning authority to this rule review must uphold the decision unless there is no compe-

tent evidence to support it. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Pub. Emp. Ret. Ass'n v. Stermole, 874 P.2d 444 (Colo. App. 1993); City of Colo. Springs v. Givan, 897 P.2d 753 (Colo. 1995); IBC Denver II, LLC v. City of Wheat Ridge, 183 P.3d 714 (Colo. App. 2008).

An administrative finding of fact must be upheld on review under section (a)(4) where competent evidence supports it in the record. Denver Ctr. for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985); Elec. Power Res. v. City & County of Denver, 737 P.2d 822 (Colo. 1987); Fedder v. McCurdy, 768 P.2d 711 (Colo. App. 1989); Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. 1989).

Record must clearly show abuse of discretion. To authorize a court finding that a municipal zoning board has grossly abused its discretion in failing to restrict an owner in the use of his property, the record should clearly show such abuse when the complaint is made by those who seek a benefit to their own properties by the imposition of restrictions on others. Bd. of Adjustment v. Handley, 105 Colo. 180, 95 P.2d 823 (1939).

In a proper case for the issuance of the writ, the extent of the review by the district court should have been to ascertain from the record whether the county court regularly pursued its authority. Morefield v. Koehn, 53 Colo. 367, 127 P. 234 (1912).

The determination of whether there is competent evidence to support a lower tribunal's decision is made upon examination of the record of administrative proceedings, including a transcript of the testimony and other evidence before the inferior tribunal. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Abuse of discretion means there is no competent evidence to support the decision. Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304 (Colo. 1986); Bentley v. Valco, Inc., 741 P.2d 1266 (Colo. App. 1987).

A petition for certiorari showing on its face that no relief could be granted, was properly dismissed without further inquiry. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

In order for a court to set aside a decision of an administrative body on certiorari review, there must be no competent evidence to support the decision. Ford Leasing Dev. Co. v. Bd. of County Comm'rs, 186 Colo. 418, 528 P.2d 237 (1974).

Court review of agency decision under this rule limited to matters contained within the record of the proceeding before the agency. Fedder v. McCurdy, 768 P.2d 711 (Colo. App. 1989).

Burden of providing record on petitioner. In appealing an administrative decision to the district court, the burden of providing an adequate record is upon the administrative agency on the order to show cause from the district court. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

Burden of proof on petitioner. A party seeking to invoke prohibition to restrain county court from proceeding in a pending action has the burden of establishing facts justifying its application. Bristol v. County Court, 143 Colo. 306, 352 P.2d 785 (1960).

A zoning ordinance is presumed to be valid, and one assailing it bears the burden of overcoming that presumption, and the courts must indulge every intendment in favor of its validity. Huneke v. Glaspy, 155 Colo. 593, 396 P.2d 453 (1964).

Petitioners must show substantial prejudice in a rezoning decision by the city council acting as a quasi-judicial decision-maker to overcome a presumption of integrity, honesty, and impartiality. Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

When a city council relies on competent evidence to determine that rezoning is in compliance with justifying circumstances, its decision is not demonstrated to be arbitrary and capricious. Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

One claiming the invalidity of a rezoning ordinance has the burden of establishing its invalidity beyond a reasonable doubt. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976).

Before relief can be granted under section (a)(4), the plaintiff must prove that the inferior tribunal lacked jurisdiction or abused its discretion. Clary v. County Court, 651 P.2d 908 (Colo. App. 1982).

Threshold showing required to avoid strict application of rule requiring record review only. The burden is on the person seeking review to show that either there are imperfections in the record as well as resulting prejudice or that members of the board improperly considered evidence not before the board or that members engaged in improper conduct affecting the result of the board. Whelden v. Bd. of County Comm'rs, 782 P.2d 853 (Colo. App. 1989).

Incomplete record leaving nothing to review requires reversal. Imperfection of a determination of an administrative board which leaves no avenue for a court to take in reviewing the matter, and which furnishes no basis upon which to resolve whether the board may or may not be sustained, requires reversal. Bd. of County Comm'rs v. Salardino, 136 Colo. 421, 318 P.2d 596 (1957).

In absence of record, taking testimony on jurisdiction not improper. A district court could hardly determine whether a justice of the peace exceeded his jurisdiction when it has no record before it. In the circumstances, the

court's action in hearing testimony bearing on the issue of jurisdiction alone was not improper. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

Civil service commission disciplinary decision upheld unless gross abuse of discretion. The discipline imposed by a civil service commission is a matter peculiarly within its area of expertise, and will not be interfered with by the courts in the absence of a gross abuse of discretion. Ramirez v. Civil Serv. Comm'n, 42 Colo. App. 383, 594 P.2d 1067 (1979).

Review of quasi-judicial action. Decision of a hearing officer for the Denver career service board is sustained when it is shown that the findings are supported by ''any competent evidence''. Jimerson v. Prendergast, 697 P.2d 804 (Colo. App. 1985); Mayerle v. Civil Serv. Comm'n, 738 P.2d 1198 (Colo. App. 1987); Getsch v. Hawker, 748 P.2d 1304 (Colo. App. 1987).

Role of a district court on review of a rezoning application is to affirm the findings of fact of a city council if there is ''any competent evidence'' in the record to support the findings. Dillon Cos. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973).

Ex parte exchanges may not arbitrarily be screened from appellate scrutiny. Ex parte exchanges between an advocate and an adjudicatory tribunal may not arbitrarily be screened from appellate scrutiny. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Appellate court is in same position as district court when reviewing an administrative decision under this rule. The appropriate consideration for an appellate court is whether there is adequate evidentiary support for the decision reached by the administrative tribunal, not whether there is adequate evidentiary support for the lower court's decision on reviewing the record. City of Colo. Springs v. Givan, 897 P.2d 753 (Colo. 1995); Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

An administrative body's decision may be reversed only if there is no competent evidence to support the decision. McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

"No competent evidence" means that there is an absence of evidence in the record to support the ultimate decision of the administrative body, and hence, the decision can only be explained as an arbitrary and capricious exercise of authority. McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

"No competent evidence" means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. Cruzen v. Career Serv. Bd. of City & County of Denver, 899 P.2d 373 (Colo. App. 1995); Bd. of County Comm'rs of Routt County v. O'Dell, 920 P.2d 48 (Colo. 1996); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001); Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

Court of appeals should not have reweighed the evidence in section (a)(4) action merely because the evidence considered by the board was documentary in nature. The competent evidence standard of review should have governed. Bd. of Comm'rs of Routt County v. O'Dell, 920 P.2d 48 (Colo. 1996).

A complete written transcript of the evidentiary phase of a proceeding before an agency is not required in order for the court to conduct a meaningful review of that agency's actions. Whether a review of an agency's actions is meaningful depends on whether the record contains sufficient competent evidence to support its decision. Martinez v. Bd. of Comm'rs, 992 P.2d 692 (Colo. App. 1999).

Meaningful review requires that there be a record that accurately and fully reflects the evidence relied upon and the findings of fact and conclusions of law from the agency's proceedings, so that a reviewing court is able to determine, upon the state of the record before it, whether the agency's actions were arbitrary and capricious. Martinez v. Bd. of Comm'rs, 992 P.2d 692 (Colo. App. 1999).

It is not unduly burdensome to require the plaintiff to produce an affidavit containing sufficient allegations and evidence to raise questions concerning whether competent evidence had been presented in support of an agency's decision. Martinez v. Bd. of Comm'rs, 992 P.2d 692 (Colo. App. 1999).

Scope of review on appeal is limited to determining whether the tribunal exceeded its jurisdiction or abused its discretion. Coates v. City of Cripple Creek, 865 P.2d 924 (Colo. App. 1993); Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995); McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

Review of the decision of an administrative law judge is limited to a determination of whether the ALJ exceeded his or her jurisdiction or abused his or her authority. City & County of Denver v. Fey Concert Co., 960 P.2d 657 (Colo. 1998).

Section (a)(4)(I) does not provide the judicial standards of review of a decision of the public utilities commission; the controlling standards of a district court's review of a public utilities commission decision are provided in § 40-6-115. Ace West Trucking v. P.U.C., 788 P.2d 755 (Colo. 1990).

Inappropriate application of section (a)(4)(I) not reversible error. District court's use of incorrect standard of review of a decision of the public utilities commission did not constitute reversible error where record as a whole demonstrated that the court could not have oth-

erwise resolved the issues applying the correct standard of review. Ace West Trucking v. Pub. Utils. Comm'n, 788 P.2d 755 (Colo. 1990).

The proceedings authorized by section (a)(4) cannot be substituted for regular appellate procedures and this rule may not be used to review pretrial evidentiary rulings. People v. Adams County Court, 793 P.2d 655 (Colo. App. 1990).

The trial court's scope of review in proceeding under this rule was strictly limited to determining whether the board for the fire and police pension association, in conducting a hearing under the Board's rules, exceeded its jurisdiction or abused its discretion. Pueblo v. Fire & Police Pension Ass'n, 827 P.2d 597 (Colo. App. 1992).

In reviewing action of administrative agency, court may consider whether agency's hearing officer misconstrued or misapplied law in making a determination as to abuse of discretion. Stamm v. City & County of Denver, 856 P.2d 54 (Colo. App. 1993).

When interpreting an ordinance, a court may review its other provisions in order to construe the disputed section in context. Humana, Inc. v. Bd. of Adjustment, 537 P.2d 741 (Colo. 1975); Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995).

The construction of an ordinance by administrative officials charged with its enforcement should be given deference by the courts and if there is a reasonable basis for the administrative agency's application of the law, the decision may not be set aside on review. Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

The court may not set aside an administrative board's interpretation of the law if it is supported by a reasonable basis. Lieb v. Trimble, 183 P.3d 702 (Colo. App. 2008); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

Appeals involving sufficiency of the evidence determinations are generally discouraged. People v. Holder, 658 P.2d 870 (Colo. 1983); Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Judicial review of prison disciplinary proceedings must take into account the correctional setting of the proceeding and state's interest in safe and efficient operation of its prison system. Review of a prison disciplinary decision is limited to whether the prison officials exceeded their jurisdiction or abused their discretion. A reviewing court must uphold the decision of the prison officials if the decision is supported by some evidence in the record. The scope of judicial review in this type of case is very limited. Thomas v. Colo. Dept. of Corr., 117 P.3d 7 (Colo. App. 2004).

C. Illustrative Cases.

Challenge must await exercise of statutory duties. In an action by package liquor licensees to compel the secretary of state to prohibit other licensees from making deliveries to customers, there was nothing upon which certiorari can operate where there are no proceedings before the secretary of state for the court to review, where there is no complaint of excess of jurisdiction, and the secretary of state not having acted at all, cannot be said to have abused his discretion. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

After the agriculture commissioner has determined the amount of the assessment and called for collection, if payment is not forthcoming, then the commissioner may file a claim for collection of the assessment. It is at such time that the corporate respondents have a full and complete opportunity to challenge the assessment. Until the commissioner makes a determination of the amount of the assessment, the judiciary has no jurisdiction to interfere where the commissioner is merely exercising his statutory duties. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

Restricted statutory review was not adequate remedy at law. Where by the terms of the ordinance there could be no dispute but that the Denver board of adjustment, having resort solely to the terms of the ordinance, would be bound to find that the building permit was in error, and in any further "appeal" under the ordinance prescribed certiorari procedure, the court would be confined to a review of the record upon that same restricted issue under section (a) of this rule, and likewise could only affirm that the permit did not comply with the ordinance terms, plaintiff did not have an "adequate remedy at law" by an ordinance-appeal since the board was powerless, because of its restricted jurisdiction to reverse the revocation of the permit on the grounds of equitable estoppel due to advanced construction or to do anything other than affirm that the permit did not comply with the requirements of the ordinance. City & County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957).

Failure to exhaust statutory review bars remedy under rule. A claimant who fails to seek a review of an industrial commission order in the district court within the 20-day period specified by § 8-53-107 is thereafter barred from asking judicial review and cannot obtain what amounts to similar relief by asserting a right under section (a)(2) and section (4). Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

Not applicable where breach of contract alleged. Section (a)(4) of this rule, review in the nature of certiorari, is applicable where a party is attacking an action taken by a board. However, that rule is directed to an action against the board for exceeding its jurisdiction or abusing its discretion, but permits relief only where there is no ''plain, speedy, and adequate remedy'', and thus does not apply where the plaintiffs allege a breach of a preexisting contract. Ebke v. Julesburg Sch. Dist. No. RE-1, 37 Colo. App. 349, 50 P.2d 355 (1976), aff'd on other grounds, 193 Colo. 40, 562 P.2d 419 (1977).

Neither district court nor court of appeals can properly review county court's finding of probable cause in a proceeding under this rule. Zaharia v. County Court ex rel. County of Jefferson, 673 P.2d 378 (Colo. App. 1983).

District court may not review a county court's finding that no probable cause exists. Gallagher v. Arapahoe County Court, 772 P.2d 665 (Colo. App. 1989), cert. denied, 778 P.2d 1370 (Colo. 1989).

District court review of county court judge's denial of motion to recuse is proper under section (a)(4). Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008).

Action does not lie to the collector of taxes, either to review his action, or any prior action upon which his own is based, and it would be an anomalous practice to convert an action brought against a county treasurer to restrain the collection of a void tax into an action against the board of county commissioners to review its proceedings in levying the tax, even though, in a proper case, this remedy is appropriate. Insurance Co. of N. Am. v. Bonner, 24 Colo. 220, 49 P. 366 (1897).

No action to compel warrants for moral obligation. Where a city charter forbade the auditor to disburse city funds except in payment of legal obligations, an action could not be maintained to compel him to issue warrants as directed by the city council for the payment of a mere moral obligation. Cross v. McNichols, 118 Colo. 442, 195 P.2d 975 (1948).

District court has jurisdiction to enjoin city from requiring railroads to pay for viaduct construction. Where a city manager is directed to recommend a bill for an ordinance requiring the construction of a viaduct and apportioning the cost as he deems proper and reasonable among the railroads, although relief under this rule is inappropriate insofar as the manager may make changes in his plan for the viaduct or in his apportionment of costs, the district court has jurisdiction to declare that the city is proceeding without authority and to enjoin it from proceeding to require the railroads to pay for construction of the viaduct. Denver & R. G. W. R. R. v. City & County of Denver, 673 P.2d 354 (Colo. 1983).

District court could not entertain city's action under this rule as the city was required to file appeal of county court's dismissal of traffic prosecution pursuant to municipal court rule rather than seek review in district court. City & County of Denver v. Harrell, 759 P.2d 847 (Colo. App. 1988).

Jurisdiction to restrain county judge under disqualification. Where motions were filed in county court to set aside judgments rendered by a former county judge before a presiding county judge who had acted as counsel for the judgment debtors, the presiding judge was disqualified to act on such motions, and it was his duty to certify the matter to the district court, and refusing to do so the district court had jurisdiction by writs of prohibition and certiorari to restrain the county judge from setting aside said judgments and to order him to certify the proceedings to the district court. People ex rel. Brown v. District Court, 26 Colo. 226, 56 P. 1115 (1899).

Judgments of justices of the peace may be reviewed by a proceeding under section (a)(4) from the county court where no appeal is provided by statute. Loloff v. Heath, 31 Colo. 172, 71 P. 1113 (1903).

Review of decision of state board of health. An action under § 13-45-113, providing for a review in the district court of a decision of the state board of health, is a statutory action and not controlled by this rule. Grimm v. State Bd. of Health, 121 Colo. 269, 215 P.2d 324 (1950).

Certiorari lies to state board of public welfare. The appropriate proceeding to review a determination of the state board of public welfare directing payment of benefits to a resident of a federal military reservation is certiorari. Bd. of County Comm'rs v. Donoho, 144 Colo. 321, 356 P.2d 267 (1960).

Interlocutory orders in eminent domain reviewable. In eminent domain proceedings, where an order for temporary possession was clearly interlocutory, and an appeal would not lie to review the same, complainants had no plain, speedy or adequate remedy at law, and certiorari will lie. Swift v. Smith, 119 Colo. 126, 201 P.2d 609 (1948); Potashnik v. Pub. Serv. Co., 126 Colo. 98, 247 P.2d 137 (1952).

The proper proceeding for relief from an interlocutory order in eminent domain actions is by certiorari, when directed to an endangered fundamentally substantive and substantial right. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

Prison board proceedings reviewable. This section is an authorization to test the legality of the prison board proceedings in the state courts whereby good time credits were forfeited by the prison board following the return of the appellant to prison after an escape. Henry v. Patterson, 363 F.2d 443 (10th Cir. 1966).

Discretionary release of dangerous patient from state penitentiary reviewable. For a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient, petitioner is entitled to attack the superintendent's good faith and discretion in failing to initiate the statutory proceedings to certify the patient sane by resort to the procedures outlined in Parker v. People (108 Colo. 362, 117 P.2d 316 (1941)) or in section (a)(4) of this rule. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

Administrative acts of parole board not reviewable. The action of a parole board is type of administrative decision not reviewable by certiorari. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

The referral of an inmate for placement in a community corrections program is not reviewable under section (a)(4). Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

The dismissal of personnel under home rule charter not reviewable. Where the city charter of a home rule city does not provide for a civil service system, the charter places authority in the city manager for hiring and firing police department personnel, and there are no provisions in the charter for hearing or review of dismissals ordered by the city manager, the district court has no jurisdiction to review the city manager's action in dismissing a police officer on certiorari. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Whether county court abused its discretion in failing to allow a plaintiff to recall witnesses at a preliminary hearing is properly before district court. Zaharia v. County Court ex rel. County of Jefferson, 673 P.2d 378 (Colo. App. 1983).

Quasi-judicial acts of city council are properly reviewable. When deciding upon the proper form of judicial review, acts of a city council which had the earmarks of quasi-judicial proceedings, i.e., notice to individual landowners, hearings, and decision-making by the application of facts to specified criteria established by law, were properly reviewed under section (a)(4). Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

Ordering cessation of waste disposal at landfill is quasi-judicial. In ordering the cessation of hazardous waste and sewage sludge disposal at a landfill, the county commissioners were adjudicating the rights and obligations of only the parties involved, which is quasi-judicial action. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

Sale of real estate by city council not a judicial or quasi-judicial action subject to review because there is no state or local law requiring city council to apply certain criteria before selecting a buyer. Walsenburg Sand & Gravel Co. v. City Council of Walsenburg, 160 P.3d 297 (Colo. App. 2007).

Individual or public may exercise remedy from civil service orders. Certiorari from an order of the civil service commission of Denver is available on behalf of an aggrieved employee, and the public, the city and county of Denver, acting through its proper officers in the public interest, may exercise the remedy extended to individuals even though specific provision is not made therefor in the charter. The rules of civil procedure are broad enough to cover this condition. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Plaintiffs' complaint for breach of contract should not have been dismissed based on exclusivity of review under this section because the board of county commissioners, who denied the plaintiffs' claim was not acting as a quasi-judicial body. Montez v. Bd. of County Comm'rs, 674 P.2d 973 (Colo. App. 1983).

It is the nature of the decision rendered by the governmental body and the process by which that decision was reached that is the predominant consideration in determining whether the body has exercised a quasi-judicial function, and not the existence of a legislative scheme mandating notice and a hearing. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill., 757 P.2d 622 (Colo. 1988); Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

If the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts, then the governmental body appears to be acting in a quasi-judicial capacity. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill., 757 P.2d 622 (Colo. 1988); Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

A school district's decision about whether to terminate an employee who claims that he acted in good faith and in compliance with a conduct and discipline code involves a determination of the rights, duties, or obligations of specific individuals on the basis of presently existing standards to past or present facts. Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

Dual incorporation subject to jurisdiction. The county court was acting improperly in allowing both incorporations to proceed simultaneously, and it was proper for the district court to entertain an action to enforce this priority of jurisdiction, and to enter its order staying pro-

ceedings. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

Court cannot prohibit duties where statute provides for review. Where the state board of medical examiners is proceeding pursuant to its statutory authority, a trial court has no authority to issue an absolute writ prohibiting the board from performing the duties imposed upon it by law, where a statute provides for reconsideration by the board of any orders issued by it and court review of any action taken in revoking a physician's license. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

Court lacks jurisdiction to compel stay in violation of statute. No discretion is afforded the annexing municipality. Section 31-8-118 (1), providing that judicial review shall not stay the application of annexation ordinances, is mandatory and therefore, absent a finding of inapplicability or unconstitutionality, the district court lacks jurisdiction to order the city to disobey the clear mandate of the statute. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

No abuse of discretion where commissioner had not yet acted. There could be no abuse of discretion by the agriculture commissioner in conducting a hearing, for he had not yet acted when the order in the nature of prohibition was issued by the district court. The only basis which would support the district court's action would be that the commissioner lacked jurisdiction to proceed, and it is clear that there could be no such finding for the reason that the commissioner did and does have jurisdiction — sole and exclusive original jurisdiction. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

By holding a suspension hearing upon being advised that gambling activities had occurred on the licensed premises in violation of statute and departmental rule and regulation, the director of revenue was proceeding within his power, authority, and jurisdiction. The director had not yet acted in any manner whatsoever to the prejudice of the rights of the licensees. The trial court's rule prohibiting the director from proceeding with the hearing presumed that respondents' constitutional rights might be violated because a criminal proceeding had been previously commenced. No court can presume public officers will, in the performance of their duties, conduct their offices in an unlawful manner so as to deprive affected persons of their constitutional rights. The writ of prohibition was prematurely invoked in the trial court by respondents. People ex rel. Heckers v. District Court, 170 Colo. 533, 463 P.2d 310 (1970).

Eminent domain order was not abuse of discretion. In a proceeding in the nature of prohibition brought pursuant to this rule, the trial court was held not to have exceeded its jurisdiction or abused its discretion in denying motion to dismiss condemnation proceedings and in finding that the parties to the condemnation proceedings had failed to reach an agreement as to the purchase price of the land thereby giving the trial court jurisdiction over such proceedings. Old Timers Baseball Ass'n v. Housing Auth., 122 Colo. 597, 224 P.2d 219 (1950).

Denial of pension not supported by evidence. The firemen's pension fund board of trustees did not exceed its jurisdiction nor abuse its discretion in denying the application for retirement and pension where the findings were based on conflicting evidence. Hubbard v. Pueblo Firemen's Pension Fund, 150 Colo. 495, 374 P.2d 492 (1962).

Decision of zoning authority not beyond its jurisdiction. The district court correctly determined that the board of adjustment did not exceed its jurisdiction or abuse its discretion when it allowed homeowner to repair stock car in his garage. A reviewing court should not lightly find an abuse of discretion where a zoning authority refuses to restrict an owner's use of his property upon the complaint of persons seeking to benefit their own property by imposing restrictions on another's use of his property. Shumate v. Zimmerman, 166 Colo. 488, 444 P.2d 872 (1968).

The director of the building department lawfully issued the permit in conformance with the practice and ordinances in effect at the time of the application; that the director's letter attempting to limit the height of the contemplated structure, and thus give effect to the height limitations of the ''mountain view ordinance'' adopted after the permit was issued, was based upon a strained and unrealistic interpretation of the nature of the permit. The permittee justifiably changed his position in reliance on the permit to his detriment, thus, in ordering the director to recognize the construction permit as a general building permit, not foundation permit, the board of appeals was acting within its delegated jurisdiction, and in so doing it did not abuse its discretion. Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970).

The record shows that proper notice was given, that full public hearings were held, and that all of the procedural aspects required by ordinance and due process of law were followed meticulously by the city. The hearings did not produce any unanimity of opinion as to the desirability of the rezoning, but there was more than ample support in the evidence to warrant the council's conclusion that the intent and aims of the ordinance were well met by the proposed plan of the church. Plaintiffs, on the other hand, fell far short of showing that they had been deprived of any reasonable use of their property by operation of the zoning ordinance. As a matter of law the city council did

not act unreasonably, arbitrarily, or abuse its discretion. Moore v. City of Boulder, 29 Colo. App. 248, 484 P.2d 134 (1971).

Sufficient standards in county zoning resolution for denial of special use. Where a county zoning resolution sets out general standards for granting or denying a special use, which include the requirements that the proposed use: (1) Will be in harmony and compatible with the character of the surrounding areas and neighborhood; (2) will be consistent with the county comprehensive plan; (3) will not result in an over-intensive use of land; (4) will not have a material adverse effect on community capital improvement programs; (5) will not require a level of community facilities and services greater than that which is available; (6) will not result in undue traffic congestion or traffic hazards; (7) will not cause significant air, water, or noise pollution; (8) will be adequately landscaped, buffered, and screened; and (9) will not otherwise be detrimental to the health, safety, or welfare of the present or future inhabitants of the county; and also provides that if a special use is granted, the commissioners may impose such conditions and safeguards as are necessary to insure compliance with these standards, these provisions provide sufficient standards for the denial of a special use. C & M Sand & Gravel v. Bd. of County Comm'rs, 673 P.2d 1013 (Colo. App. 1983).

Rezoning decision. The determination of whether a council reasonably applied statutory criteria in exercising its statutory power to rezone involves a consideration of whether the council abused its discretion or exceeded the bounds of its jurisdiction and is properly resolved in a certiorari proceeding under section (a)(4). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Landowner with land adjacent to or in vicinity of rezoned land may proceed under this rule. A landowner has standing to challenge a rezoning and then to seek review of the zoning authority's action under section (a)(4) if his land is adjacent to or in the vicinity of the land being rezoned, even though he may not live within the territory of the zoning authority. City of Thornton v. Bd. of County Comm'rs, 42 Colo. App. 102, 595 P.2d 264 (1979), aff'd, 629 P.2d 605 (Colo. 1981); Whitelaw v. Denver City Council, 2017 COA 47, 405 P.3d 433.

Plain language of zoning code authorizes zoning authorities of municipality, including planning commission, to review and deny the development plan of a permitted use. Because zoning code can and does grant such authority to the planning commission, the commission was authorized to deny a permitted use by means of the review criteria and, in doing so, did not abuse its discretion or exceed its jurisdiction. City of Colo. Springs v. Securcare Self Storage, Inc., 10 P.3d 1244 (Colo. 2000).

City properly denied property owner's subdivision application, and district court properly rejected property owner's challenge to denial under section (a)(4). "Geologic condition" or "natural hazard", as used in the city's zoning code, includes threats of flooding and mud flows from a diverted natural waterway. Evidence in the record supports city's conclusion that the subject parcel was threatened by flooding and mud flow, which required mitigation. City rightly concluded that relevant provision of the code allows subdivision approval to be conditioned on mitigation of public safety risks. This flooding risk potentially endangers public health, safety, and welfare. The risk remains intertwined with both the geologic feature of the area and natural events, although water would overflow from a diversionary structure built by the city. City properly denied application because flooding risk from diverted creek required mitigation of the geologic conditions and natural hazards threatening the subject property for which the application did not provide. Alpenhof, LLC v. City of Ouray, 2013 COA 9, 297 P.3d 1052.

In connection with section (a)(4) proceeding, trial court abused its discretion when it failed to adopt reasonable interpretation by county board of adjustment (BOA) of county land use code (code) and when it ordered a remand to the BOA for additional findings based on court's own interpretation of those provisions. BOA did not abuse its discretion when it ruled that a lapse provision in the code did not apply to a special use permit because the permit had been issued before the provision's enactment. The BOA had adopted the construction of the code provided by the director of the county's land use department, which is a reasonable construction of the code provisions especially in light of the record. Sierra Club v. Billingsley, 166 P.3d 309 (Colo. App. 2007).

Even assuming withholding by county land use official of copy of e-mail was in violation of Colorado Open Records Act (CORA), neither CORA nor section (a)(4) contains any provision that would authorize remand for reconsideration of determination by BOA that lapse provision contained in county land use code did not apply to special use permit in light of withholding copy of e-mail. Moreover, inclusion of withheld e-mail in administrative record of BOA was irrelevant to court's determination under section (a)(4). Even if the appropriate remedy were to remand for inclusion of e-mail in BOA's administrative record, document would not affect conclusion that BOA did not abuse its discretion when it ruled lapse provision did not apply to permit. Because BOA determined lapse provision did not apply, e-mail's assertion that special use had

lapsed was irrelevant. Sierra Club v. Billingsley, 166 P.3d 309 (Colo. App. 2007).

Standing to challenge annexation lacking under this rule. Standing to challenge zoning and standing to challenge annexation are quite different matters; proceedings of the former may be, and proceedings of the latter may not be, attacked under this rule. City of Thornton v. Bd. of County Comm'rs, 42 Colo. App. 102, 595 P.2d 264 (1979), aff'd, 629 P.2d 605 (Colo. 1981).

Finding of temporary disability unsupported by evidence is arbitrary. There is credible evidence in the record showing a permanent disability status; there is no evidence whatsoever to support the pension board's supplemental finding of a temporary disability status. The board in making its award on a temporary disability basis rather than on a permanent disability basis exercised its discretion arbitrarily and capriciously. Putnam v. Trustees of Police Pension Bd., 170 Colo. 278, 460 P.2d 778 (1969).

Refusal to hear jurisdiction question was abuse. In an action against nonresident defendants who are served with process by service upon an alleged agent, where one defendant moves to quash the service and the other defendant moves to dismiss the action, granting a motion to strike the motion to quash and the motion to dismiss is an abuse of discretion under this rule, since it denies such defendants a right to be fully heard on the question of the court's jurisdiction of the person. Bardahl Mfg. Corp. v. District Court, 134 Colo. 112, 300 P.2d 524 (1956).

To favor one applicant over another is discriminatory and suggests the exercise of an unwarranted and uncontrolled discretion on the part of the licensing authority. Thus, the issuance of a license to another person in an area shortly after applicant's application was rejected on the ground that the needs of the neighborhood were satisfied is arbitrary. Geer v. Presto, 135 Colo. 536, 313 P.2d 980 (1957).

Prohibition issues where accused is charged with offense outside court's jurisdiction. The general rule is that the writ of prohibition may not be used to test the sufficiency of an information; but this is subject to qualification, recognized in almost every jurisdiction, that where the accusation is not merely defective or technically insufficient, nor merely demurrable or subject to a motion to quash or set aside, but is elementary and fundamentally defective in substance, so that it charges a crime in no manner or form, an accused is entitled to have a writ of prohibition issue, or where it appears that the information charges an offense not within the jurisdiction of a trial court. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Regulations by county commissioners designed to depress property values with a view to future acquisition thereof may form the basis of a cause of action for compensation on the theory of inverse condemnation against the public entity initiating the regulation. Hermanson v. Bd. of County Comm'rs, 42 Colo. App. 154, 595 P.2d 694 (1979).

Where a decision of a county board of adjustment is challenged, that board is the ''inferior tribunal'' that is the subject of a section (a)(4) proceeding. Benes v. Jefferson County Bd. of Adjustment, 36 Colo. App. 131, 537 P.2d 753 (1975).

In an action challenging the legality of a special assessment by a city council, judicial review is obtained and is limited to certiorari under this rule. City & County of Denver v. District Court, 189 Colo. 342, 540 P.2d 1088 (1975).

Where city code of home-rule city did not specify nature of review from special assessment, it is appropriate that review be had under section (a)(4), which is specifically authorized where there is no available plain, speedy, or adequate remedy. Orchard Court Dev. Co. v. City of Boulder, 182 Colo. 361, 513 P.2d 199 (1973).

Section (a)(4), is a proper vehicle for judicial review of special assessments levied under Boulder's home-rule powers. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

Attacks on application of historical preservation ordinance. An allegation that the vagueness of an historical preservation ordinance is indicated by the fact that it does not show which design the historical commission will approve is not a facial constitutional attack, but rather a challenge upon the application of the ordinance, which must be brought under this rule. South of Second Assocs. v. Georgetown, 196 Colo. 89, 580 P.2d 807 (1978).

Refusal of city to issue multiple licenses under state law was ultra vires. Where the state fermented malt beverages act permits a licensee to hold multiple licenses, the city of Denver may not prohibit the issuance of more than one license. When a city is vested with authority to administer a statute and adopt regulations to enforce it, regulation must be within the perimeter of the statute. In prohibiting what it could only regulate, the city acted ultra vires. Big Top, Inc. v. Schooley, 149 Colo. 116, 368 P.2d 201 (1962).

Residents of neighborhood affected by liquor licensing decision may seek judicial review. Residents of a neighborhood affected by the granting of a liquor license, by virtue of that fact alone, have a strong interest in insuring that the liquor licensing procedure is fairly and properly administered, and are persons who may seek judicial review of liquor licensing

decisions under this rule. Norris v. Grimsley, 41 Colo. App. 231, 585 P.2d 925 (1978).

Operator of competing liquor store lacks standing to appeal liquor licensing decision of a local authority, either under § 12-47-101 or as a person ''substantially aggrieved'' by the disposition of the case in the lower court pursuant to this rule, since economic injury from lawful competition does not confer standing to question the legality of a competitor's operations. Norris v. Grimsley, 41 Colo. App. 231, 585 P.2d 925 (1978).

Default judgment exceeded court's discretion and authority. The grant of a default judgment for failure of the civil service commission to timely request an extension of time for filing the record on review exceeded its discretion and authority when at the time of the hearing in the lower court on the motion for default, the record had been lodged and the merits of the case had been put in issue. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Grant of discovery was abuse of discretion. Where no facts were presented which tended to indicate that the city council's zoning decision was irregular, invalid, arbitrary, and capricious or the result of an abuse of discretion, the district court abused its discretion under section (a)(4) of this rule by granting discovery. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

Civil service commission order justified relief. Refusal by the civil service commission to restore a former policeman to his previous position on the police force of Denver after his honorable discharge from the armed forces of the United States because he volunteered when he was in no immediate danger of being drafted was an abuse of discretion as contemplated by this rule and hence the district court had jurisdiction to reinstate him. Hanebuth v. Patton, 115 Colo. 166, 170 P.2d 526 (1946).

Where civil service commission specifically upheld findings of police chief that police officer was guilty under disciplinary charges that demonstrated a direct disregard for the public good and purposes of the police department, the commission's decision to suspend the officer rather than to discharge him as police chief had ordered was an invasion of authority delegated to police chief by city charter and constituted an abuse of discretion. Thomas v. City & County of Denver, 29 Colo. App. 442, 487 P.2d 591 (1971).

Because the civil service commission failed to tell the applicant why she was disqualified from employment, the applicant could not submit reasons and documentation in support of her appeal. The commission's denial of her appeal was, therefore, an abuse of discretion. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Civil service commission decision not arbitrary, capricious, or without justification where commission deemed an assault committed by the plaintiff involved the use of force, was a misdemeanor crime of violence barring possession of a firearm under federal law, and plaintiff was thus subject to disqualification from employment as a police officer. Even though the municipal assault statute was broad enough to be violated without the use of physical force, it is appropriate to look at the charging documents as a whole to determine the precise crime of which the defendant was convicted. Ward v. Tomsick, 30 P.3d 824 (Colo. App. 2001).

Where zoning ordinance authorizes continuance, in separate provisions of both nonconforming uses and nonconforming structures and allows for change of nonconforming use to another nonconforming use but contains no provision relating to change of nonconforming structure to another nonconforming structure, any use change is required to be effected within existing structures or not at all, and board of adjustment has no authority to grant permit to allow razing of nonconforming greenhouse and construction on the site of four apartment buildings as more restrictive nonconforming structures. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Setting of salaries is a legislative function, and the establishment of prevailing rates as an incident to fixing salaries is a quasi-legislative rather than a judicial or quasi-judicial function. Denver Police Protective Ass'n v. City & County of Denver, 665 P.2d 150 (Colo. App. 1983).

Vacating a roadway is a legislative act, and is not subject to review under this rule. Sutphin v. Mourning, 642 P.2d 34 (Colo. App. 1981).

Review of water ratemaking proceeding. Because a water ratemaking proceeding is a legislative action, section (a)(4) is not the proper vehicle for review of a ratemaking order of the county commissioners. Talbott Farms, Inc. v. Bd. of County Comm'rs, 43 Colo. App. 131, 602 P.2d 886 (1979).

Decisions by college or its president not subject to review under section (a)(4). Van Pelt v. State Bd. for Cmty. Colls. & Occupational Educ., 195 Colo. 316, 577 P.2d 765 (1978).

Private hospital board not inferior tribunal. A private hospital board is not a public agency and, therefore, not an ''inferior tribunal'' within the scope of section (a)(4). Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100 (Colo. App. 1981); Green v. Lutheran Med. Ctr. Bd. of Dirs., 739 P.2d 872 (Colo. App. 1987).

Actions of municipal advisory board not reviewable. Actions by an advisory board reporting to a city council in an effort to set salaries of certain municipal employees are not

subject to review under section (a)(4). Reeve v. Career Serv. Bd., 636 P.2d 1307 (Colo. App. 1981).

County board of commissioners' actions were quasi-legislative and not quasi-judicial and therefore not subject to judicial review under the arbitrary and capricious standard of section (a)(4). Dill v. Bd. of County Comm'rs of Lincoln County, 928 P.2d 809 (Colo. App. 1996).

Defense attorney's conduct in contesting court's refusal to allow withdrawal of guilty plea based on sentencing not contemplated in plea agreement was zealous representation of the client and did not constitute contempt because it did not create an obstruction which hindered the performance of the court's judicial duty. Jordan v. County Court, 722 P.2d 450 (Colo. App. 1986).

Trial court applied proper standard of review. In considering decision of board of adjustment, the trial court found competent evidence in the record to support the board's decision and that there was a reasonable basis for the agency's application of the law. Platte River Environ'l Conservation Org. v. Nat'l Hog Farms, Inc., 804 P.2d 290 (Colo. App. 1990).

Trial court did not err in reviewing PERA board's decision under section (a)(4) where it was held that PERA trustees' fiduciary duties did not prevent them from performing quasi-judicial functions in determining member's eligibility for disability benefits, and thereby did not exceed its jurisdiction nor were certain board rules ultra vires. Tepley v. Pub. Emp. Retirement Ass'n, 955 P.2d 573 (Colo. App. 1997).

District court does not have jurisdiction to review a county court's finding of probable cause pursuant to this section. Defendant may seek extraordinary relief under C.A.R. 21. Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Review pursuant to this rule is available for nonfactual procedural matters in preliminary hearing. Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Action for review for an abuse of discretion under section (a)(4) of this rule was not appropriate where the statute limited the school district board of education's discretion in determining whether to renew a probationary teacher's employment contract. Section 22-32-110 (4)(c), prohibits the board from using as grounds for nonrenewal any actions taken by the probationary teacher in good faith and in compliance with the school district's discipline policy. Since there is no remedy provided if the school board violates this prohibition, the probationary teacher's action in seeking mandamus, rather than review of an abuse of discretion, was appropriate. McIntosh v. Bd. of Educ. of Sch. Dist. No. 1, 999 P.2d 224 (Colo. App. 2000).

District court has the authority to review an action of a board of education for an abuse of discretion under this rule and § 22-33-108. Nichols ex rel. Nichols v. DeStefano, 70 P.3d 505 (Colo. App. 2002), aff'd by an equally divided court, 84 P.3d 496 (Colo. 2004).

Applied in Protect Our Mountain v. District Court, 677 P.2d 1361 (Colo. 1984); Montoya v. Career Serv. Bd., 708 P.2d 478 (Colo. App. 1985); Fisher v. County Court, 718 P.2d 549 (Colo. App. 1986); Krupp v. Breckenridge Sanitation Dist., 1 P.3d 178 (Colo. App. 1999); Stor-N-Lock Partners # 15 v. City of Thornton, 2018 COA 65, __ P.3d __.

VI. OTHER WRITS.

Law reviews. For article, ''One Year Review of Contracts'', see 34 Dicta 85 (1957).

Annotator's note. Since section (a)(5) of this rule is similar to §§ 255 through 260 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of those sections have been included in the annotations to this rule.

Remedy is exclusive. The method provided by section (a)(5), whereby partners not served in an action against a partnership may be made individually liable on the judgment rendered therein against the partnership, is exclusive. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Section (a)(5) does not provide an "alternate, cumulative remedy" to § 13-50-105 that a party may elect in lieu of naming a defendant during the pendency of an action where a corporate respondent was a member of the partnership whose identity was known by plaintiff but not named in the original action based upon a friendship with plaintiff's counsel. Gutrich v. LaPlante, 942 P.2d 1266 (Colo. App. 1996), aff'd sub nom. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Section (a)(5) may provide relief in the context of partnership law when: (1) The plaintiff could not have determined the existence or status of individual partners despite reasonable attempts to ascertain their identities; (2) the plaintiff could not bring about personal jurisdiction in the original action; or (3) some other reason beyond the plaintiff's control prevented the plaintiff from naming and serving the individual partners. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Show cause rule remedies nondisclosure of partnership interest. Although application to add an additional party was not made at the time of the trial when the facts appeared, no injury could obtain by requiring the wife to show cause why she is not liable to answer

under this judgment. Had she and her husband properly demeaned themselves concerning the matter of revealing to the public by proper affidavit the status of their partnership business interests, she would no doubt have been made a party defendant in the original action. The judgment creditor had a right to rely upon the record at the time of filing his action. To now deny plaintiff the right to discover the true interest entering into the judgment would be to reward people for misrepresentation and nondisclosure to the injury and detriment upon a relying public. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Creditor entitled to rule against active partner not of record. Where a husband and wife were active partners in an enterprise, but the public records did not disclose that the wife had an interest therein, a creditor who obtains a judgment against the husband on a partnership obligation in an action to which the wife was not made a party is entitled to a rule on the wife under section (a)(5) to show cause why she should not be held to answer for the judgment. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

When judgment may be rendered. The only judgment which can be rendered against a copartnership on a firm debt or obligation is one against the copartnership jointly, and the partners summoned or appearing, whether the summons is served upon all or one or more of the defendants. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Partnership interest of nonparty subject to judgment lien. A judgment against one partner is not effective against another partner not made a party to the action, nor against the partnership where the partnership was not sued, except that the partnership interest of the partner sued is subject to the judgment lien to the extent of such interest and such partner's interest therein may be sold on execution. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Section (a)(5) permits a trial court to issue a show-cause order, analogous to a writ of scire facias, to partners who were neither named nor served originally in an action against the partnership. Federal Deposit Ins. Corp. v. Wells Plaza Ltd. P'ship, 826 P.2d 427 (Colo. App. 1992).

Section (a)(5) was designed to provide relief, previously available under the writ of scire facias, as a post-judgment remedy permitting a creditor to collect on an existing yet unsatisfied judgment. It is not a substitute for maintaining an action where remedies are available to a person under statutory provisions. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Because the fire and police pension association is not an agency of state government, the standard of review of a decision of the association is not whether there is "substantial evidence" under § 24-4-106 (7), of the State Administrative Procedure Act, but rather, whether there is "no competent evidence" under section (a)(4) to support the decision. Pueblo v. Fire & Police Pension Ass'n, 827 P.2d 597 (Colo. App. 1992).

This rule merely abolished the form and not the substance of remedial writs such as the writ of ne exeat. A district court still possesses the authority to issue a writ in the nature of ne exeat, which is designed to prevent a person from leaving the court's jurisdiction. In re People ex rel. B.C., 981 P.2d 145 (Colo. 1999).

Rule 106.5. Correctional Facility Quasi-Judicial Hearing Review

(a) Scope. This rule applies to every action brought by an inmate to review a decision resulting from a quasi-judicial hearing of any facility of the Colorado Department of Corrections ("CDOC") or any private facility in Colorado involving a CDOC inmate for events that occurred at the facility. To the extent this rule does not cover procedures in such cases, the parties shall follow C.R.C.P. 106(a)(4). All other provisions of C.R.C.P. 106(a)(4) shall apply except where modified by this Rule 106.5. The provisions of C.R.C.P. 106(b) and C.R.C.P. 5 shall govern all cases brought under this Rule 106.5.

(b) Designation of Defendant. Only the Executive Director of the CDOC and the Warden of the facility shall be named as Defendants and shall be listed as such. The District Court shall dismiss any other Defendant.

(c) Venue. All actions under this rule shall be filed in the district court in the county in which the quasi-judicial agency action occurred, even if the inmate is no longer assigned to that facility at the time the complaint is filed.

(d) Service of Process.

(1) If the inmate does not qualify for *in forma pauperis* status, the rules relating to service of process set forth in C.R.C.P. 4(e)(10) shall apply, but only the Warden, the Executive Director of the Department of Corrections, and the Attorney General shall be served.

(2) If the inmate files a motion to proceed *in forma pauperis* status and that motion is

granted, service of process shall be accomplished in the following manner: The clerk of the District Court shall scan the complaint and serve it by electronic means on the Attorney General, the Executive Director of the Department of Corrections, and the Warden of the Facility (or the designee of each of these officials), along with a notice indicating the fact of the inmate's filing and the date received by the Court. Each person notified shall send an acknowledgment by electronic means indicating that the specified official has received the electronic notice and the scanned copy of the complaint.

(e) Response of Defendant. Within 21 days after the date on which the Attorney General sends acknowledgment that it has received the notice and complaint from the Clerk of the District Court, the Defendants shall file either (1) an answer to the complaint and a certified copy of the record as explained below, or (2) a motion in response to the complaint.

(f) Notice to Submit Record. The facility shall file the certified record and affidavit of certification directly to the Court no later than the deadline to file an answer or motion as indicated above. This obligation to submit the record shall not apply if the Attorney General notifies the Warden within 14 days of the electronic service that a motion to dismiss the complaint for lack of subject matter jurisdiction has been filed, in which event the filing of the record shall be suspended pending disposition of the motion.

(g) Contents of the Record. The certified record submitted by the Warden to the District Court shall contain all material related to the proceeding at the facility to permit the Court to address the issues raised in the complaint. The record shall include the Notice of Charges, the Disposition of Charges, the Offender Appeal Form, all exhibits offered at the hearing, and the current applicable version of the Code of Penal Discipline. If any part of the proceeding was recorded, a copy of the recording shall be provided.

(h) Cost of the Record. The cost of preparation of the record shall initially be paid by the Warden but, upon the filing of the certified record with the Court, the Warden shall immediately deduct the cost of preparation of the record, including the recording, from the inmate's account. If there are insufficient funds in that account, the Warden shall apply a charge to that account. In no event shall the filing of the record be delayed because the inmate has no assets and no means by which to pay the cost of certification of the record.

(i) Briefs.

(1) If counsel for the Defendants files a motion to dismiss, the inmate shall have 14 days after service of the motion to file a brief in response, and the defense counsel shall have 14 days after service of the response to file a reply.

(2) If the defense counsel files an answer and the Warden files the certified record, the inmate shall have 42 days following notice of filing of the record in which to file a brief. In this event, the brief shall set forth the reasons why the inmate believes that the District Court should rule that the Warden has exceeded his or her jurisdiction or abused his or her discretion. The inmate must set forth in the brief specific references to the record that support the inmate's position. Defense counsel shall have 35 days after service of the brief to file a response and the inmate shall have 14 days after service of the response to file a reply.

(j) Time Periods. The parties shall follow the time periods set forth above unless the Court, on motion and for good cause shown, enters an order altering those time periods.

(k) Promulgation of Rule. A copy of this Rule 106.5 shall be made available in the law library of every facility operated by the Colorado Department of Corrections and every private prison in Colorado that houses CDOC inmates.

Source: Entire rule added and effective February 7, 2008; (e), (f), and (i) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, ''Judicial Review of Prison Quasi-Judicial Hearings Under Rule 106.5,'' see 44 Colo. Law. 37 (Dec. 2015).

Because private prison lacks authority to make a final determination on a disciplinary action that affects the liberty of an inmate,

timely filing of an appeal is measured from the date of the private prisons monitoring unit's decision and not the date of the warden's decision. Geerdes v. Colo. Dept. of Corr., 226 P.3d 1261 (Colo. App. 2010).

This rule does not apply to actions seeking review of parole board decisions. It is not a mechanism for obtaining judicial review of parole board decisions. Moore v. Exec. Dir. of Colo. Dept. of Corrs., 2018 COA 99, 440 P.3d 1163.

This rule applies only to review of quasi-judicial decisions over which the department of corrections' executive director and the prison warden have ultimate authority. Moore v. Exec. Dir. of Colo. Dept. of Corrs., 2018 COA 99, 440 P.3d 1163.

Rule 107. Remedial and Punitive Sanctions for Contempt

(a) Definitions. (1) Contempt: Disorderly or disruptive behavior, a breach of the peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings; behavior that obstructs the administration of justice; disobedience or resistance by any person to or interference with any lawful writ, process, or order of the court; or any other act or omission designated as contempt by the statutes or these rules.

(2) Direct Contempt: Contempt that the court has seen or heard and is so extreme that no warning is necessary or that has been repeated despite the court's warning to desist.

(3) Indirect Contempt: Contempt that occurs out of the direct sight or hearing of the court.

(4) Punitive Sanctions for Contempt: Punishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.

(5) Remedial Sanctions for Contempt: Sanctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.

(6) Court: For purposes of this rule, ''court'' means any judge, magistrate, commissioner, referee, or a master while performing official duties.

(b) Direct Contempt Proceedings. When a direct contempt is committed, it may be punished summarily. In such case an order shall be made on the record or in writing reciting the facts constituting the contempt, including a description of the person's conduct, a finding that the conduct was so extreme that no warning was necessary or the person's conduct was repeated after the court's warning to desist, and a finding that the conduct is offensive to the authority and dignity of the court. Prior to the imposition of sanctions, the person shall have the right to make a statement in mitigation.

(c) Indirect Contempt Proceedings. When it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may ex parte order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished. The citation and a copy of the motion, affidavit and order shall be served directly upon such person at least 21 days before the time designated for the person to appear. If such person fails to appear at the time so designated, and it is evident to the court that the person was properly served with copies of the motion, affidavit, order, and citation, a warrant for the person's arrest may issue to the sheriff. The warrant shall fix the date, time and place for the production of the person in court. The court shall state on the warrant the amount and kind of bond required. The person shall be discharged upon delivery to and approval by the sheriff or clerk of the bond directing the person to appear at the date, time and place designated in the warrant, and at any time to which the hearing may be continued, or pay the sum specified. If the person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the bond may be forfeited upon proper notice of hearing to the surety, if any, and to the extent of the damages suffered because of the contempt, the bond may be paid to the aggrieved party. If the person fails to make bond, the sheriff shall keep the person in custody subject to the order of the court.

(d) Trial and Punishment. (1) Punitive Sanctions. In an indirect contempt proceeding where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt action. If the judge initiates the contempt proceedings, the person shall be advised of the right to have the action heard by another judge. At the first

appearance, the person shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel. The maximum jail sentence shall not exceed six months unless the person has been advised of the right to a jury trial. The person shall also be advised of the right to plead either guilty or not guilty to the charges, the presumption of innocence, the right to require proof of the charge beyond a reasonable doubt, the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, the right to have subpoenas issued to compel attendance of witnesses at trial, the right to remain silent, the right to testify at trial, and the right to appeal any adverse decision. The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The person shall have the right to make a statement in mitigation prior to the imposition of sentence.

(2) Remedial Sanctions. In a contempt proceeding where remedial sanctions may be imposed, the court shall hear and consider the evidence for and against the person charged and it may find the person in contempt and order sanctions. The court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed shall be described in the motion or citation. Costs and reasonable attorney's fees in connection with the contempt proceeding may be assessed in the discretion of the court. If the contempt consists of the failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be fined or imprisoned until its performance.

(e) Limitations. The court shall not suspend any part of a punitive sanction based upon the performance or non-performance of any future acts. The court may reconsider any punitive sanction. Probation shall not be permitted as a condition of any punitive sanction. Remedial and punitive sanctions may be combined by the court, provided appropriate procedures are followed relative to each type of sanction and findings are made to support the adjudication of both types of sanctions.

(f) Appeal. For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.

Source: Entire rule amended and adopted, January 26, 1995, effective April 1, 1995; (b) corrected and effective, June 15, 1995; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For failure to comply with deposition order, see C.R.C.P. 37(b)(1); for disobedience of writ of habeas corpus by jailer, see § 13-45-113, C.R.S.; for refusal to answer questions of the assessor concerning taxable property, see § 39-5-119, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment on Shapiro v. Shapiro, appearing below, see 20 Rocky Mt. L. Rev. 313 (1948). For article, ''One Year Review of Civil Procedure and Appeals'', see 39 Dicta 133 (1962). For article, ''Enforcing Family Law Orders Through Contempt Proceedings Under C.R.C.P. 107'', see 332 Colo. Law. 75 (Mar. 2003). For article, ''Proper Application of CRS § 15-12-723 for Recovery of Estate Assets'', see 32 Colo. Law. 59 (May 2003). For article, ''Advice to Attorneys on Contempt'', see 41 Colo. Law. 79 (Jan. 2012).

Annotator's note. Since C.R.C.P. 107, is similar to §§ 166 and 356 through 369 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections

have been included in the annotations to this rule.

This rule applies to both civil and criminal contempt. In re Stone, 703 P.2d 1319 (Colo. App. 1985).

As part of its inherent authority to issue orders that are necessary for the performance of judicial functions, a court has the power to enforce obedience to its orders through contempt sanctions. People v. McGlotten, 134 P.3d 487 (Colo. App. 2005).

The power to punish for contempt is a judicial power within the meaning of the constitution, and it belongs exclusively to the courts except in cases where the constitution confers such power upon some other body. People v. Swena, 88 Colo. 337, 296 P. 271 (1931).

A finding of contempt is within the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion. In re Gomez, 728 P.2d 747 (Colo. App. 1986); In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

Nothing in this rule or the forcible entry and detainer (FED) statute precludes the remedy of contempt in an FED action under appropriate circumstances. Hartsel Springs Ranch v. Cross Slash Ranch, 179 P.3d 237 (Colo. App. 2007).

A finding of contempt can be brought under this rule and proved with evidence other than jury deliberation, provided the prosecution can show beyond a reasonable doubt the following elements: (1) The prospective juror knowingly and willfully gave an untruthful answer or deliberately failed to disclose information during voir dire in response to a specific question asked; (2) the purpose of the juror's untruthful answer or nondisclosure was to gain acceptance on the jury and to obstruct the administration of justice; and (3) the juror's untruthful answer or nondisclosure did obstruct the administration of justice. People v. Kriho, 996 P.2d 158 (Colo. App. 1999).

Court must make findings in both types of contempt procedures. For contempt in the presence of the court, the judgment must recite the facts constituting the contempt. For contempt out of the presence of the court, the judgment must include, among other considerations, a finding that the court's order has not been complied with. In re McGinnis, 778 P.2d 281 (Colo. App. 1989).

The power to punish for contempt is inherent in all courts. Allen v. Bailey, 91 Colo. 260, 14 P.2d 1087 (1932).

Jurisdiction to punish contempt rests solely in contemned court; no court can try a contempt against another. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

A court's right of self-preservation is not limited by statutory enumeration of causes of contempts. Hughes v. People, 5 Colo. 436 (1880).

The power to punish for contempt should be used sparingly, with caution, deliberation, and due regard to constitutional rights; it should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951); Conway v. Conway, 134 Colo. 79, 299 P.2d 509 (1956).

Intent to interfere with administration of justice not required for contempt finding; rather, the intent is a guide to be used by the trial court in exercising its discretion to punish. In re Stone, 703 P.2d 1319 (Colo. App. 1985).

This rule does not purport to limit the application of contempt to parties, officers of the court, or those subject to direct orders. Rather, the rule defines contempt broadly to include any conduct by any person that obstructs or interferes with judicial proceedings. In re Lopez, 109 P.3d 1021 (Colo. App. 2004).

Correction officials are officers of the court whose compliance with a mittimus directing them to take custody of a juvenile could be enforced by a contempt proceeding. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Judge conducting a settlement conference has the same authority to impose sanctions as the trial judge for conduct related to the settlement conference which interferes with the functions of the court. Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992).

Language in this rule authorizing district court to sanction an "officer of the court" does not include a judge who is presiding over the same case in which the alleged contempt has taken place. People v. Proffitt, 865 P.2d 929 (Colo. App. 1993).

A remedial contempt order only describes the means by which the contempt can be purged and the sanctions that will be in effect until the contempt is purged. Other than costs and reasonable attorney fees, a trial court is without authority to require, as a remedial sanction, monetary payments that do not force compliance with or performance of a court order. Sec. Investor Prot. Corp. v. First Entm't Holding Corp., 36 P.3d 175 (Colo. App. 2001).

Attorney fees can be awarded under section (d)(2) only as a component of remedial sanctions; however, under section (a)(1)(5), a remedial sanction must include a purge clause. Where the contemnor commits a one-time violation, incapable of being purged, attorney fees may not be assessed as a remedial sanction. Thus, a punitive sanction, such as a fine or imprisonment, is the only avenue for punishment. No remedial sanction was imposed, nor could one have been. The CAT scan contempt constituted a one-time violation of a

2007 order committed over a year before father even raised the issue with the court. By that time, mother could not undo what she had done. In re Webb, 284 P.3d 107 (Colo. App. 2011).

A pro se attorney litigant is not necessarily precluded from an attorney fee award under either section (d)(2) of this rule or § 13-17-102 in a contempt proceeding. Wimmershoff v. Finger, 74 P.3d 529 (Colo. App. 2003).

Not error for defendants' counsel to have been permitted to prosecute the contempt proceedings. Conduct that is found to be offensive to the authority and dignity of the court pursuant to this rule is not criminal conduct, and contempt is not a statutory criminal offense. The power to impose punitive sanctions for such conduct is an inherent and indispensable power of the court. It is not derived from statute and exists independent of legislative authority. Eichhorn v. Kelley, 111 P.3d 544 (Colo. App. 2004).

Lack of an express grant of authority in the Colorado Rules for Magistrates to award attorney fees on review does not divest or otherwise curtail the district court's already existing authority to make such an award under section (d)(2). In re Naekel, 181 P.3d 1177 (Colo. App. 2008).

Applied in Catron v. Catron, 40 Colo. App. 476, 577 P.2d 322 (1978); Cavanaugh v. State, Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982); People v. Coyle, 654 P.2d 815 (Colo. 1982); Menin v. County Court, 697 P.2d 398 (Colo. App. 1984).

II. DEFINITION.

A. In General.

Contempt consists as well in the manner of the person committing it as in the subject-matter of its foundation. Matters which, if true, would in their very nature be scandalous may be presented, hinted at, or brought to the attention of the court in so respectful a manner that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see when, under the guise and pretense of setting out privilege and necessary matters, circumstances are detailed, and scandalous and insulting charges and innuendos are made and insinuated upon pretended ''information and belief'' in manner that bears the unmistakable earmarks of malice and deliberate contempt. Hughes v. People, 5 Colo. 436 (1880).

The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature which goes to the gravamen of the offense. Hughes v. People, 5 Colo. 436 (1880); In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Rule is applicable to criminal contempt. This rule clearly includes a definition encompassing, and procedures governing, both civil and criminal contempt. People v. Razatos, 699 P.2d 970 (Colo. 1985).

Distinction between civil and criminal contempts. Contempts of court are civil where they consist in the disobedience of some judicial order entered for the benefit or advantage of another party to the proceeding and criminal where there are acts disrespectful to the court or its process, or obstructing the administration of justice, or tending to bring the court into disrepute. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

Two types of civil contempt are recognized: One, consisting of a present refusal to perform an act in the power of the person to perform, which normally constitutes injury to others for whose benefit it is required; the other, conduct which is derogatory to the authority or dignity of the court. In the former case, the court may order the respondent imprisoned, not for a definite time, but until he performs the act which he is commanded and is able to perform; in the latter case, the court may order punishment to vindicate the dignity of the court by fine or imprisonment, or both, which should be definite as to amount and time, regardless of subsequent compliance with the court order. In the former case, the court must, upon hearing, make a finding both of the facts constituting contempt and of a present duty and ability to perform; in the latter case, the court must make a finding of facts constituting misbehavior and that the conduct is offensive to the authority and dignity of the court. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Rules for civil contempt may guide, but do not control, procedures for prosecuting criminal contempt. People v. Tyer, 796 P.2d 15 (Colo. App. 1990).

B. Misbehavior.

There is no exact rule to define such contempts; but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judges presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or, a fortiori, any assault made in view of the court is punishable in this summary way. Hughes v. People, 5 Colo. 436 (1880).

Contempt by press. Courts have the inherent power to summarily convict and punish for a contempt of court those responsible for articles published in reference to a cause pending when such articles are calculated to interfere with the due administration of justice in such cause. Neither the statutes nor the constitution present any barrier to the exercise of such powers, and the power to punish summarily in such cases is essential to the very existence of a court, since

the contrary rule would place it in the power of a vicious person to so conduct himself as to prevent any kind of a trial. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

The press may without liability to punishment for contempt challenge, in the interest of the public good, the conduct of judges and other court officers and also of parties, jurors, and witnesses in connection with causes that have been wholly determined. It may also fairly and reasonably review and comment upon court proceedings from day to day as they take place. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

C. Disobedience of Court Orders.

Law reviews. For article, "The Enforcement of Divorce Decrees in Colorado", see 21 Rocky Mt. L. Rev. 364 (1949).

Refusal to obey an order of court entered in connection with a criminal investigation is a criminal contempt. Mainland v. People, 111 Colo. 198, 139 P.2d 366 (1943).

In order for court to enter punitive order in a criminal contempt proceeding, the court must find that the alleged contemner's behavior constitutes noncompliance with the court order and that such conduct is offensive to the authority and dignity of the court. Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988).

Where an order of the court is made in a civil action, its violation constitutes a civil, not a criminal, contempt. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

Disobedience of a lawful order made by the court for the benefit of a private litigant comes clearly within this rule. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

Contempt of supreme court rule is punishable and enforceable by lower court before whom contempt occurred. Wooden v. Park Sch. District, 748 P.2d 1311 (Colo. App. 1987).

A person who has actual notice of an injunctive order violates it at his peril. People ex rel. Darby v. District Court, 19 Colo. 343, 35 P. 731 (1894).

Contempt proceedings are equally available to enforce a judgment determining the property rights of the parties to a divorce proceeding, as are orders for the payment of alimony, counsel fees, and other costs. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

Court may exercise power of contempt to enforce orders entered in a dissolution of marriage proceeding. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

A district court which has entered a decree of dissolution possesses continuing in personam and subject matter jurisdiction to enforce its child support orders by punishing a noncomplying obligor for contempt of court. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

There is a distinction between a contempt proceeding and an action to collect accrued alimony or support installments. Hauck v. Schuck, 143 Colo. 324, 353 P.2d 79 (1960).

One who refuses to pay money belonging to an estate into court in compliance with a judicial order is guilty of civil contempt. Munson v. Luxford, 95 Colo. 12, 34 P.2d 91 (1934).

Where the contempt order is based on the failure of the husband to obtain drug counseling, the order is remedial in nature and the trial court must specify how the husband may purge himself of that contempt. In re Zebedee, 778 P.2d 694 (Colo. App. 1988).

Post-dissolution contempt proceeding to enforce permanent orders is remedial in nature if the court's order imposes remedial sanctions such as an attorney fees award, a requirement to pay amounts due plus arrearages, and the initial suspension of a sentence to imprisonment, but the order does not contain language concerning vindication of the court's authority and dignity. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Court reporters may be held in contempt for failing to produce transcripts in a timely manner. People v. McGlotten, 134 P.3d 487 (Colo. App. 2005).

Constructive contempt. Where a court having jurisdiction has ordered the payment of money into the registry of the court and the person to whom the order is directed fails to make the payment as commanded and contempt proceedings are instituted, the alleged contempt is constructive or indirect. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

The violation of the term of a decree in a quiet-title action is not contempt of court unless the decree contained a mandatory or prohibitive provision. McMullin v. City & County of Denver, 125 Colo. 231, 242 P.2d 240 (1952).

Interference with a water commissioner in the discharge of his official duties does not constitute contempt of court within this rule declaring disobedience to any lawful writ, order, rule, or process issued by the court to be a contempt, since he is not an officer of the court in which the decree of priorities is entered under which he is distributing water, being appointed by the governor and, to a certain extent, being under the control and direction of the irrigation division engineer and the state engineer. Roberson v. People ex rel. Soule, 40 Colo. 119, 90 P. 79 (1907).

No contempt where one is unable to comply with court order. There was insufficient evidence, as a matter of law, to support the conclusion of the judge that the respondents had neglected or refused to comply with the writs of habeas corpus, which was the contempt with which they were charged, where the respondents could not produce children in court

against the wishes of the mother, who had continuous control and custody. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

A mittimus issued by the district court ordering corrections officials to take custody of state prisoners is not a basis for contempt where the corrections officials lack the ability to admit the prisoners. People v. Lockhart, 699 P.2d 1332 (Colo. 1985).

Correction officials were guilty of contempt for disobeying a mittimus directing them to take custody of a juvenile, where their duty to take custody of the juvenile was statutorily mandated and adequate funds would have been available throughout the juvenile's period of commitment to enable the officials to take custody of the juvenile. Under such circumstances, the existence of a blanket administrative policy of refusing admittance to such juveniles, which was instituted because the department was running out of money, is not a defense. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Insufficient basis for contempt and abuse of trial court's discretion where attorney made a single comment, "Sir, it does not.", to the judge concerning a reference in the Code of Professional Responsibility. The test is whether or not the comment constitutes an obstruction of the court's administration of justice or operates to bring the judiciary into disrespect or disregard. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd in part and rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

Record does not support judge's finding that defense counsel violated the court's previous rulings. Therefore, the court abused its discretion in finding defense counsel in contempt. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Contempt of a court order does not supercede requirement to set a hearing pursuant to § 13-54.5-109 (1)(a). The court may not sanction a party for his or her failure to comply with a court order by refusing to set or by suspending a hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. Borrayo v. Lefever, 159 P.3d 657 (Colo. App. 2006).

Bankruptcy stay applicable to civil contempt action for post-divorce enforcement of separation agreement. The nature of the contempt action is determined by review of the purpose and character of the sanctions imposed against the contemnor. Where the contemnor had the ability to request reconsideration of the jail time once payment was made; the sanctions were designed to force payment to a third party, not to uphold the dignity of the court; the court imposed attorney fees for the enforcement proceeding; and the court's primary consideration was the impact on third parties, the contempt action was remedial in nature. In re Weis, 232 P.3d 789 (Colo. 2010).

Contemnor cannot turn an enforcement action into a criminal matter outside of the automatic bankruptcy stay simply by requesting punitive sanctions. In re Weis, 232 P.3d 789 (Colo. 2010).

Arbitrator's award is not a "court order" for purposes of contempt statute. Where neither party petitioned the district court for an order confirming the award, the court erred in finding husband guilty of indirect contempt for failing to comply with arbitrator's order to take the parties' children to therapy. In re Leverett, 2012 COA 69, 318 P.3d 31.

III. DIRECT CONTEMPT.

In the absence of statutory regulation, courts may deal with matter of contempt in a summary manner. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

This rule permits summary punishment of a contemner for acts committed in the court's presence. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

The summary contempt power may be used to punish acts or conduct which take place in the immediate presence of the court and are witnessed by the trial judge. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

The summary contempt power is necessary to insure and preserve decorum in the courtroom. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

The summary contempt power is ample to prevent disruption and provides the trial judge with the power to punish contemptuous conduct which occurs in his presence. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

Design of contempt power. The power of a judge to punish contempt committed in his presence is not designed to protect his own dignity or person, but to protect the rights of litigants and the public by ensuring that the administration of justice shall not be thwarted or obstructed. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Summary punishment for contempt is permitted because a court could not properly administer justice if disturbances within the courtroom could not be suppressed by immediate punishment. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Punishment for contempt can only be imposed summarily when a direct contempt is committed; that is, when the judge has personal knowledge of the act which has disrupted court proceedings or demonstrated the contemner's disrespect for the court. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Summary punishment for contempt of court must be strictly confined to those instances

where the contemptuous conduct occurs in open court and is seen or heard by the trial judge. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Attorney's alleged lack of preparation for a hearing was indirect, not direct, contempt, and therefore summary punishment was improper. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Fact that judge ordered a hearing two days after occurrence of allegedly contemptuous behavior was evidence that judge considered the contempt indirect rather than direct. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

A court may hold a person in direct contempt only when the court has either given prior warning that a person's behavior, if repeated, will constitute contempt and the contemnor persists in such behavior or the person's conduct is so extreme that no warning is necessary. People v. Aleem, 149 P.3d 765 (Colo. 2007).

If conduct amounts to a direct contempt committed in the presence of the court, the record must show, with reference to the matter allegedly constituting the contempt, what actually happened with particularity. Pittman v. District Court, 149 Colo. 380, 369 P.2d 85 (1962).

Where full evidentiary hearing not necessary. Where the judge is aware of the contemptuous conduct from personal observation, where no lawful justification exists for the contemptuous behavior, and where the penalty is not of the type that can be mitigated by any evidence offered, a full-fledged evidentiary hearing is not necessary and summary procedure is appropriate. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

Where a judgment does not recite the facts constituting the contempt, the judgment is not properly supported. Handler v. Gordon, 108 Colo. 501, 120 P.2d 205 (1941).

This rule requires the order of commitment to recite the facts only where summary punishment is inflicted. Shore v. People, 26 Colo. 516, 59 P. 49 (1899); Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922).

Cases of criminal contempt are not within the provisions of this rule requiring the order of commitment to recite the facts only where summary punishment is inflicted. Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922).

For cases of criminal contempt for refusal to answer to grand jury question analogized to this rule, see Smaldone v. People, 158 Colo. 7, 405 P.2d 208 (1965), cert. denied, 382 U.S. 1012, 86 S. Ct. 616, 15 L. Ed. 2d 527 (1966); see also Salardino v. People, 158 Colo. 12, 405 P.2d 211 (1965), cert. denied, 382 U.S. 1012, 86 S. Ct. 617, 15 L. Ed. 2d 527 (1966); Quintana v. People, 158 Colo. 14, 405 P.2d 212 (1965), cert. denied, 382 U.S. 1013, 86 S. Ct. 618, 15 L. Ed. 2d 527 (1966); Smaldone v. People, 158 Colo. 16, 404 P.2d 276 (1965); Smaldone v. People, 158 Colo. 21, 404 P.2d 279 (1965); Tomeo v. People, 158 Colo. 26, 404 P.2d 287 (1965).

Trial judge has power to punish summarily for contempt any lawyer who in his presence willfully contributes to disorder or disruption in the courtroom. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Voluntary appearance in court subjects one to contempt power of court. Where defendant was served an unsigned copy of summons and default judgment was therefore rendered invalid, defendant's voluntary appearance in court submitted him nevertheless to the jurisdiction of the court and would support a contempt judgment where he was found to have committed perjury in the presence of the court. Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Contempt sentence of contemnor who has left the court will be upheld. Where the contempt is a direct one made in the presence of the court and the court proceeds at once to try the contemnor and sentence him, such sentence will be upheld, though made after the contemnor has left the presence of the court. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

Refusal of witness receiving immunity to supply grand jury testimony. A witness who, despite receiving immunity, persists before a trial court judge in refusing on fifth amendment grounds to supply grand jury testimony, commits contempt ''in the presence of the court'' and may be punished summarily. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

A court has the right to punish one summarily for contempt for manifest perjury committed in the court's presence where it knows judicially that his testimony was false. Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922); Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

In order that perjury may be a contempt of court it must appear that: (1) The alleged false answers had an obstructive effect, (2) that there existed judicial knowledge of the falsity of the testimony, and (3) that the question was pertinent to the issue. Handler v. Gordon, 111 Colo. 234, 140 P.2d 622 (1943).

Perjurious statements do not by themselves substantially obstruct or halt a trial or demonstrate contempt for the judicial process if the court cannot judicially know that the testimony is false without the presentation of collateral evidence to establish such falsity. Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

Where the trial court's finding of perjury is based on collateral evidence introduced by a party to impeach the other party's testimony, and not upon anything inherently incredible or

self-contradictory in the other party's testimony itself, such perjury does not have the effect of substantially obstructing or halting the judicial process, and thus a contempt finding would be in error. Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

Where a party is using delaying tactics in his request for continuance, the court should deny request rather than holding him in contempt. Altobella v. Priest, 153 Colo. 309, 385 P.2d 585 (1963).

Facts would not support a finding of direct contempt, where no warning was given at the time defendant allegedly made offensive statement to the court, and the primary factual foundation consisted of the defendant's responses to the courts questions. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

Facts supported finding of direct contempt when defendant admittedly made offensive statement during the course of proceedings even though obscenity was directed toward counsel for the People and merely overheard by the court. There was no abuse of discretion by the trial court given the fact that the defendant admitted it was inappropriate and an affront to the dignity of the court and its proceedings, and given the fact that defendant was an attorney admitted to the Bar. People v. Holmes, 967 P.2d 192 (Colo. App. 1998).

Oral stipulations rescinded. Behavior was not direct contempt punishable by summary proceedings, where all respondent did was to rescind a previous oral stipulation entered into in open court by directing her attorney to repudiate the stipulation. Ealy v. District Court, 189 Colo. 308, 539 P.2d 1244 (1975).

Provision in this rule that judgments shall be "final" refers only to extent of review. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

IV. INDIRECT CONTEMPT.

Law reviews. For article, ''The Nuts and Bolts of Collecting Support'', see 19 Colo. Law. 1595 (1990).

Contempt, which does not occur in the presence of the court, is either criminal or civil, depending on the purpose and character of the sanctions sought to be imposed in the citation. People v. Razatos, 699 P.2d 970 (Colo. 1985); Groves v. District Court, 806 P.2d 947 (Colo. 1991).

A delay in trial caused by counsel's preparation of jury instructions should have been evaluated as indirect contempt rather than direct contempt because the court did not observe or hear any of the offending behavior. The order for sanctions was set aside because none of the procedures for a hearing and the imposition of sanctions was followed by the trial court. Martinez v. Affordable Hous. Network, Inc., 109 P.3d 983 (Colo. App. 2004), rev'd on other grounds, 121 P.3d 1201 (Colo. 2005).

This rule is applicable to civil contempt for violating an injunction. Shore v. People, 26 Colo. 516, 59 P. 49 (1899).

Those to be adjudged in contempt must be subject to court's jurisdiction. Where contempt citations were issued to officers of home for the mentally defective because they had refused admission of child ordered there by court, said officials were parties to no proceeding and had not submitted themselves to jurisdiction of court and consequently were not amenable to its commands. People ex rel. Dunbar v. County Court, 128 Colo. 374, 262 P.2d 550 (1953).

A court which acquires personal jurisdiction over party in divorce proceedings has continuing "in personam" jurisdiction to modify child support orders and to enforce original custody orders through exercise power of contempt; therefore, personal service on party out of state is sufficient and party's failure to appear does not deprive court of jurisdiction or power to punish for contempt. Brown v. Brown, 31 Colo. App. 557, 506 P.2d 386 (1972), modified, 183 Colo. 356, 516 P.2d 1129 (1974).

Compliance with the procedure governing contempt matters is essential before jurisdiction to punish for contempt attaches. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

The procedural provisions of section (c) are not exclusive. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

There is no fixed procedural formula for contempt proceedings; rather the polestar in determining the validity of contempt procedures is whether due process of law is accorded. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

Section (c) does not mandate a conference with opposing counsel before filing a motion for an indirect contempt citation, although doing so could be useful, or even advisable. In re Cyr, 186 P.3d 88 (Colo. App. 2008).

The provision in this rule, requiring an affidavit of facts constituting contempt, is designed to meet actual contemptuous acts committed out of the presence of the court; it has no application to contempt committed in the immediate presence of the court. Jensen v. Jensen, 96 Colo. 151, 40 P.2d 238 (1935).

A constructive contempt must be brought to the court's attention by affidavit; this affidavit must state facts which, if established, would constitute a contempt, and if it does not do so the court is without jurisdiction to proceed. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

This provision as to affidavits is simply declaratory common-law practice, and the rule concerning the materiality of the affidavit

should prevail to the same extent in the absence of statute. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

The affidavit must contain an averment that the charges were false as well as malicious. Fort v. Coop. Farmers' Exch., Inc., 81 Colo. 431, 256 P. 319 (1927).

It is not necessary that the affidavit charging the offense set forth the evidence by which the general declarations therein are to be established; general declarations or ultimate facts only are required. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926); In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

If the petition and affidavit state facts which if true show that a contempt was committed, the court acquires jurisdiction, otherwise not. Fort v. People ex rel. Coop. Farmers' Exch., Inc., 81 Colo. 420, 256 P. 325 (1927).

Where affidavit fails to state facts showing contempt, court is without jurisdiction. When an affidavit is presented as a basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere errors. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

Notice of charge required. A contempt sanction may not be imposed until the alleged contemner has received notice of the charge, including the nature of the act of contempt that he is alleged to have committed. Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Right to notice of purpose of hearing. Under section (c), a defendant has the right to have notice of the purpose of the hearing and to have an opportunity to be heard. Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977).

Essential to due process in contempt proceedings is the right of one to know that the purpose of the hearing is the ascertainment of whether he is guilty of contempt. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

A judgment of contempt entered without affidavit, notice, or hearing is void for want of jurisdiction. Pomeranz v. Class, 82 Colo. 173, 257 P. 1086 (1927).

Direct criminal contempts are punishable summarily without affidavit, notice, rule to show cause, or other process. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

Jurisdiction over a criminal contempt charge was not lost because it was initiated by the filing of a verified information rather than by the citation procedure under this rule, which would have been the better practice. People v. Barron, 677 P.2d 1370 (Colo. 1984).

Motion may be included in affidavit. An affidavit containing a statement equivalent to a motion for the issuance of a citation is a sufficient "motion supported by affidavit"; the fact that the motion is included in the affidavit instead of being presented as a separate document does not invalidate it. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946).

Court must issue a citation in order to obtain jurisdiction. To obtain jurisdiction to punish for contempt based on interference with the execution of legal process or the administration of justice, it is necessary for the trial court to issue a citation commanding the respondents to show cause why they should not be held in contempt for interfering with the execution of legal process or obstructing the administration of justice. Where this is not done, the trial court has no power to punish for contempt based on the grounds of interference and obstruction. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

The accused can be convicted of no contempt other than that charged in the citation, since the citation for contempt plays a very important role in enabling the person charged to understandingly shape his course and prepare his defense. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970); Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Where contempt citation alleged only that attorney failed to prepare for hearing, court's findings referring to attorney's habits in courtroom and in his preparation and filing of motions and briefs could not stand. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Even though the citation did not include all of the grounds for contempt that were specified in the verified motion attached to the citation, the court held that the issues specified in the motion could be raised as grounds for contempt because the husband received full notice of them through the motion and was not denied due process. In re Lamutt, 881 P.2d 445 (Colo. App. 1994).

Citation for failing to appear in court as directed is specific enough. A citation reciting that one is to appear on a certain day to show cause why he should not be adjudged in contempt in accordance with an attached court order citing him for contempt for failure to appear in court as directed is specific enough to enable him either to defend or explain in mitigation his absence from court. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

Hearing necessary for out-of-court contempt. In those cases where the judge did not personally observe the contemptuous conduct, a hearing is necessary to find the facts, and the

hearing enables the judge to ascertain the facts of the occurrence and permits the defendant to explain his behavior and offer evidence to mitigate the penalty. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

A hearing is essential to due process. When it is clear that matters happened outside the presence of the court, it is necessary to hold a hearing on the contempt charge, for a procedure which accords with due process of law is essential. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

A situation, involving a possible indirect contempt, requires, as a minimum, notice of the charge, the right to be represented by counsel, a hearing, the right to call and confront witnesses, and specific findings by the court. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Due process is a sham when a judge is both prosecutor and judge in an indirect contempt case. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

Procedure held violative of provisions of this rule. Where the only citation served upon the defendant was that which commanded him to appear before the court ''for examination upon oath on the matter of said complaint and to abide by the orders of this court entered upon said hearing''; at the time he appeared he was not informed by the citation that he was being subjected to proceedings in contempt; no order of the court had as yet been entered requiring any act on his part; on the date of his appearance, the court at one and the same time, entered the order requiring the performance of an act within 30 days, and erroneously adjudged that a warrant for the imprisonment might issue at the expiration of that time if the act commanded was not performed; this procedure was in violation of the mandatory provisions of this rule. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

Failure of defendant to appear as ordered by the court may constitute an indirect contempt of court. As an indirect contempt, the procedure prescribed by sections (c) and (d) must be followed. People v. Madonna, 651 P.2d 378 (Colo. 1982).

Attorney's appearance by telephone rather than in person at court hearing constituted indirect contempt instead of direct contempt. Attorney did nothing during telephone call to disrupt court proceedings and attorney's alleged violation was her failure to appear at a scheduled hearing. In re Johnson, 939 P.2d 479 (Colo. App. 1997).

An alleged assault by a third party could in no way constitute contempt by defendant either within or without the presence of the court, even if he ''instigated'' or was indirectly involved in the attack, such behavior (occurring in front of the courthouse, outside of the judge's view) would in no event be punishable under the summary procedures of this rule. Duran v. District Court, 190 Colo. 272, 545 P.2d 1365 (1976).

Rule held not complied with. McMullin v. City & County of Denver, 125 Colo. 231, 242 P.2d 240 (1952).

V. TRIAL AND PUNISHMENT.

Law reviews. For note, ''Trial by Jury in Contempt Cases'', see 2 Rocky Mt. L. Rev. 115 (1930). For article, ''Expediting Court Procedure'', see 10 Dicta 113 (1933).

Two types of civil contempt are provided for by section (d). Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976).

The first type of civil contempt consists of a present refusal to perform an act in the power of the person to perform, normally constituting injury to others for whose benefit the act is required. Where such contempt is found, a court may enter a remedial order to enforce obedience consisting of an imposition of imprisonment, not for a definite time, but only until respondent performs the act which he is commanded and is able to perform. However, before a court can make a finding of contempt which would justify a remedial order, it must make findings which are supported by evidence that there is a refusal to perform the act in question, that there is a present duty to perform such act, and that there is a present ability to perform. Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976); In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

To justify punishment for civil contempt consisting of a refusal to perform a required act for the benefit of others, the trial court must upon hearing make a finding both of the facts constituting contempt and of the present duty and ability to perform. Marshall v. Marshall, 191 Colo. 165, 551 P.2d 709 (1976).

There must be two findings of present duty and ability to pay: one which supports the contempt finding, and a second which justifies the imposition of a remedial order. In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

The second type of civil contempt consists of conduct derogatory to the authority or dignity of the court. For such contempt, the court may enter a punitive order to vindicate its dignity, imposing a fine or imprisonment, or both, but that punishment should be definite as to amount and time, regardless of subsequent compliance with the court order. The court must, however, make findings of fact which are supported by evidence that respondent's conduct constitutes misbehavior and that such conduct is offensive to the authority and dignity of the court. Furthermore, before a court may con-

sider the issue of contempt which would support a punitive order the citation issued to the respondent must state that punishment may be imposed to vindicate the dignity of the court. Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976).

Requirement of finding that conduct offends court's dignity constitutionally grounded. Although there is no fixed procedural formula for contempt proceeding, the requirement that there be an explicit finding by the trial court that the contemner's conduct offends the dignity of the court is grounded in constitutional principles. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Finding need not be in exact language of rule. Although a trial court need not make a finding in the exact language of section (d), i.e., "to vindicate the dignity of the court," nevertheless, the language used must be sufficient to comply with the rule. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Contempt proceedings should accord due process. Although there is no fixed procedural formula for contempt proceedings, so that technical nicety is not required, courts should improvise a procedure which accords with due process of law. Essential to due process in contempt proceedings is the right of one to know that the purpose of a hearing is the ascertainment of whether he is guilty of contempt. Austin v. City & County of Denver, 156 Colo. 180, 397 P.2d 743 (1964).

A court violates an attorney's due process rights if the court does not provide reasonable notice of the charges and an opportunity to be heard when it delays final adjudication and sentencing on a contempt charge until after the trial that created the contempt situation. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Fifth amendment protection against self-incrimination operates in a contempt proceeding. Griffin v. Western Realty Sales Corp., 665 P.2d 1031 (Colo. App. 1983); People v. Razatos, 699 P.2d 970 (Colo. 1985).

Sixth amendment right to be present at trial applies to criminal contempt proceedings. The conclusions and findings made by a presiding disciplinary judge when the respondent was not present were rejected by the court. While the record indicated that respondent had proper notice of the hearing, it contained no affirmative waiver of his right to be present, and no findings that respondent knowingly, intelligently, and voluntarily waived his right to be present and participate at the hearing. In re Bauer, 30 P.3d 185 (Colo. 2001).

Although punitive contempt is not a common law or statutory crime, the possibility of incarceration associated with such proceedings is sufficient to require recognition and protection of the rights afforded to criminal defendants, including the right not to be called as a witness. In re Alverson, 981 P.2d 1123 (Colo. App. 1999).

Magistrate's error of requiring father to take the stand to invoke the privilege on a question by question basis after magistrate had been informed that father would assert the privilege violated father's fifth amendment right not to be called as a witness, and because the magistrate error was not harmless beyond a reasonable doubt, it required reversal of the contempt order. In re Alverson, 981 P.2d 1123 (Colo. App. 1999).

Petitioner is entitled to detailed notice and an opportunity to be heard before a contempt sanction can be imposed against her. Ealy v. District Court, 189 Colo. 308, 539 P.2d 1244 (1975); Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977); People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Defendant's due process rights were not violated when trial court entered judgment in the amount of accrued fines under contempt order without conducting an additional hearing. Due process entitles contemnor to an evidentiary hearing only if, in response to county's motion, he raised a genuine issue of material fact as to whether he complied with original order. Court's November 2003 contempt order put defendant on notice that remedial fines would accrue until he had complied with original July 2003 order, and county's motion in April 2006 put defendant on notice that fines had accrued for noncompliance with original order and that county had asked court to enter judgment in that amount. Defendant's response to county's motion failed to raise genuine issues of material fact that required trial court to conduct an evidentiary hearing. Bd. of County Comm'rs for Larimer v. Gurtler, 181 P.3d 315 (Colo. App. 2007).

Where a jail sentence may be imposed in a contempt proceeding, the alleged contemnor, if indigent, is entitled to the appointment of counsel. If a husband cited for contempt for failure to make child support payments to his former wife was refused legal services by at least two private attorneys because he was unable to pay requested fee, he was entitled to have his assets examined and considered by court in determining eligibility for court-appointed counsel under supreme court indigency guidelines. In re Wyatt, 728 P.2d 734 (Colo. App. 1986).

The question of whether there was any willful intent to interfere with the administration of justice requires a notice and hearing as a prerequisite to a judgment of contempt. District Att'y v. District Court, 150 Colo. 136, 371 P.2d 271 (1962).

When a trial court renders judgment "regardless of intent", it commits error in failing

to determine intent because willful intent to inconvenience and delay the court is essential to a finding of contempt where an attorney fails to appear. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

It is error for a judge who cites one for indirect contempt to also act as trial judge and prosecutor in a later hearing on the charge. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

It is proper to ask a fellow judge to take his place. Where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt in which he is involved may, without flinching from his duty, properly ask that one of his fellow judges take his place. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

A person is entitled to have a different judge hear a contempt proceeding than the judge who issued the contempt charge if there is actual bias or the appearance of bias. The appearance of bias may be shown by a running controversy between the judge and the accused. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Where the contempt is charged by affidavit and the contemner makes no denial thereof, the court need not examine witnesses, in the absence of a request therefor by the accused. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

In any event, the right of trial by jury does not extend to cases of contempt. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

Statutory provisions relating to change of venue have no application to proceedings to punish contempts unless such proceedings are expressly included in the written law. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

One charged with contempt of court has no right to a change of venue. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

The doctrine of laches is applicable to enforcement procedures for contempt. Hauck v. Schuck, 143 Colo. 324, 353 P.2d 79 (1960).

An accused can be convicted of no contempt other than that charged in the citation. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

An order for attorney's fees is an adjunct of a finding of guilty of contempt, and so an award of attorney's fees by the trial court must be set aside if the judgment of contempt cannot stand. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

Awards of reasonable attorneys' fees to the person damaged by the contemner's behavior are an adjunct of a finding that the contemner is guilty of contempt and are not conditioned upon the ability to pay. In re Weisbart, 39 Colo. App. 115, 564 P.2d 961 (1977).

Imposition of attorney's fees limited. This rule does not authorize imposition of attorney's fees to recompense the contemnor, no matter how inappropriate may be the contempt proceeding initiated by the person claiming damage. Avco Fin. Servs. of Colo., Inc. v. Gonzales, 653 P.2d 751 (Colo. App. 1982).

This rule does not extend beyond authorization for imposition of attorney's fees against a contemnor for the benefit of the person damaged by the contempt. Avco Fin. Servs. of Colo., Inc. v. Gonzales, 653 P.2d 751 (Colo. App. 1982).

Attorney fees cannot be awarded as a punitive sanction in a contempt proceeding. Eichhorn v. Kelley, 56 P.3d 124 (Colo. App. 2002); In re Lopez, 109 P.3d 1021 (Colo. App. 2004).

District court erred in awarding costs and attorney fees under section (d)(1). Sheep grazing activities that resulted in contempt citation were not ongoing at the time of the contempt hearing; they had occurred in the past. Thus contemnor could not purge his contempt because he could not undo what he had done. Therefore, remedial sanctions such as the assessment of costs and attorney fees could not be imposed against contemnor in these circumstances. Section (d)(2) permits the assessment of costs and attorney fees if remedial sanctions are imposed against a contemnor. In contrast, the provisions relating to punitive contempt sanctions under section (d)(1) do not authorize the assessment of costs and attorney fees. Aspen Springs Metro. Dist. v. Keno, 2015 COA 97,716 P.3d 369.

Although attorney fees cannot be awarded as a punitive sanction in a contempt proceeding, attorney fees can be awarded if the case involves an agreement or contract for an award of such fees to the prevailing party. This rule does not preclude the trial court from enforcing a valid fee-shifting agreement. In re Sanchez-Vigil, 151 P.3d 621 (Colo. App. 2006).

Specific findings as to the reasonableness of attorney fees not required. In re Bernardoni, 731 P.2d 146 (Colo. App. 1986).

Trial court did not abuse its discretion in awarding plaintiff costs for travel and meal expenses related to contempt order because the costs were reasonable and necessary. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Trial court abused its discretion in awarding plaintiff costs for a client fee related to contempt order because the affidavit submitted for recovery of the fee failed to establish that it was incurred solely for the related litigation. At least some portion of the fee was for general business costs; therefore, the fee is not recover-

able. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Plaintiff's costs and attorney fees incurred in connection with defendants' appeal of contempt order may be awarded under section (d)(2) rule since they were incurred in connection with the contempt proceedings. However, plaintiff's fees and costs incurred in connection with defendants' appeal of award of said attorney fees may not be awarded under section (d)(2) because they were not incurred in connection with the related contempt proceedings. Rather, they were incurred as a consequence of defendants' appeal of the standards applied by the trial court in awarding said fees and costs. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Words apparently scandalous or offensive, but susceptible of a different construction, may be explained by the speaker or writer, and he be relieved of the charge of contempt on sworn disavowal of intent to commit it; but when the words are necessarily offensive and insulting, such disavowal, while it may excuse, cannot justify. Hughes v. People, 5 Colo. 436 (1880).

No contempt where "not in the power of the person to perform". Where evidence disclosed that parent was unable to make immediate payment of support for minor child ordered by juvenile court, there was no failure to perform "an act in the power of the person to perform", and contempt proceeding should have been dismissed. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

If the evidence in a contempt proceeding discloses that a party is unable to make the payments required by a support order, there is no refusal to perform an act within his power under section (d) and the contempt proceeding must be dismissed. In re Crowley, 663 P.2d 267 (Colo. App. 1983); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Remedial contempt sanctions cannot be imposed on an attorney who failed to pay restitution ordered by the court when the master's findings did not establish the attorney's present ability to pay the ordered restitution. People v. Razatos, 699 P.2d 970 (Colo. 1985).

Before a remedial contempt order under section (c) can enter, the court must find that the contemnor has the ability to comply with its order and make findings that justify the imposition of the remedial sanction. Wilkinson v. Bd. of County Comm'rs, 872 P.2d 1269 (Colo. App. 1993); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

A court may not impose remedial contempt sanctions without making the required finding of a present ability to comply or without including a purge clause. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Exclusive penalties. Since section (d) precisely delineates the penalties to be assessed for the purpose of vindicating the dignity of the court, the only remedies available are a fine or imprisonment. Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975).

Remedial orders and punitive orders distinguished. Under section (d) of this rule, there is recognized the distinction between a remedial order, the purpose of which is primarily to enforce obedience to a writ, and a punitive order to vindicate the authority of the law and uphold the dignity of the court. In the former case the fine which may be imposed is limited to the damages and expense resulting from the contempt and is payable to the person damaged thereby, and the imprisonment which may be imposed may continue only until the contemnor shall comply with the order of the court. In the latter case the fine or imprisonment is not dependent on damage or subsequent performance but is a matter solely within judicial discretion. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946).

If punishment for contempt of court is conditioned upon the contemner's future performance of a duty he has to another person, then the contempt order is no longer punitive, but becomes remedial. In re Crowley, 663 P.2d 267 (Colo. App. 1983); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Where sanctions could not be clearly categorized as punitive or remedial, but appeared to contain attributes of both, order was vacated and remanded. People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

One thousand dollar fine for attorney's failure to timely file jury instructions is necessary to vindicate dignity of court and is not arbitrary or vindictive. Wooden v. Park Sch. District, 748 P.2d 1311 (Colo. App. 1987).

Proof of willfulness need not predicate a court's order for remedial contempt sanctions. In re Cyr, 186 P.3d 88 (Colo. App. 2008).

Contempt order cannot be construed to constitute both a punitive and remedial contempt order where single sanction was imposed to compel performance of act. McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Fine in any amount is permissible for vindication of the dignity of the court, but it is made payable to the court, not to the parties. Brown v. Brown, 183 Colo. 356, 516 P.2d 1129 (1973).

When court levies fine, it must make findings of fact that the parties' conduct constituted misbehavior which offended the court's authority and dignity. Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978).

Imposition of jail sentence could not be sustained when the trial court did not make any

finding that appellant had the present ability to comply with its remedial orders for the payment of money. In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

A court may imprison a receiver for contempt for failure to pay over funds as ordered. Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

Penal sanctions imposed only to prevent obstruction of justice. A court before imposing penal sanctions for contempt should proceed with caution and deliberation as the power should be exercised only when necessary to prevent obstruction or interference with the administration of justice. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Confinement for contempt for longer than six months is constitutionally impermissible unless the person has been given the opportunity for a jury trial. People v. Zamora, 665 P.2d 153 (Colo. App. 1983).

Language of court imposing jail term for punitive contempt complies with rule. Language of trial court imposing jail term for punitive contempt that: ''The reason for the punitive finding or punitive order of the court was to vindicate the dignity of this court and I think that vindication is long overdue in this case'' was sufficient to comply with the requirements of this rule. In re Joseph, 44 Colo. App. 128, 613 P.2d 344 (1980).

A commitment to jail for contempt is justified for failure to pay alimony and attorneys' fees in a divorce action, but any commitment for failure of the defendant-husband to pay the plaintiff-wife for money loaned is not justified. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

Trial court can enforce its temporary maintenance and child support orders through punitive contempt proceedings, despite the fact that a judgment had entered on amounts due and not paid under such orders. In re Nussbeck, 974 P.2d 493 (Colo. 1999).

Neither the Colorado Children's Code nor this rule authorizes default judgment as a sanction against a parent for failing to appear at a dependency and neglect adjudicatory hearing. People in Interest of K.J.B., 2014 COA 168, 342 P.3d 597.

An order of imprisonment for making false report held unauthorized. An order imprisoning a quasi-receiver for making false reports, unless she pay a judgment rendered against her based in part, at least, on rents and issues received from the property under claim of right is unauthorized. Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

One may be imprisoned until he performs instead of a term certain. This rule, by providing that a party guilty of contempt consisting of failure to perform an act in the power of such person to perform may be imprisoned until its performance, negates a claim that one may be committed only for a term certain. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

When imprisonment of contemnor for indefinite period prohibited. Where the trial court fails to find that contemnor had resources at the time of sentence with which he could purge himself of contempt, it may not order his imprisonment for an indefinite period. In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

A punitive fine or imprisonment may be imposed only if the citation so states. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946); People v. Razatos, 699 P.2d 970 (Colo. 1985).

Unconditional fine imposed as punitive sanction in remedial contempt proceeding was error because a separate contempt proceeding to address the failure to submit a financial affidavit as ordered was never commenced. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Finding required to enter punitive order. In order for a court to enter a punitive order for contempt, it must, on supporting evidence, find that the alleged contemner's conduct constitutes misbehavior and that such conduct is offensive to the authority and dignity of the court. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Damages and attorney fees. Awards of attorney fees are incidental to a finding of contempt and are not conditioned upon the ability to pay. Likewise, awards of damages suffered by the contempt, plus costs, are incidental to the contempt finding and are not conditioned upon the ability to pay. In re Harris, 670 P.2d 446 (Colo. App. 1983).

In a proceeding involving only contempt for violation of a temporary restraining order, it is not proper for a court to make a restraining order permanent. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

The matter of dealing with contempt is within the sound discretion of the trial court, and its determination is final unless an abuse of such discretion is clearly shown. Conway v. Conway, 134 Colo. 79, 299 P.2d 509 (1956); DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

Trial court's decision on facts is conclusive. Where the trial court has jurisdiction, regularly pursues its authority, and there is evidence of contempt, its decision on the facts is conclusive. Wall v. District Court, 146 Colo. 74, 360 P.2d 452 (1961).

In the review of judgments in contempt, the supreme court goes no farther than to inquire if the court pronouncing sentence had jurisdiction of the parties and of the offense charged. Wall v. District Court, 146 Colo. 74, 360 P.2d 452 (1961).

Hearing required before revocation of suspended contempt sentence. In re Bernardoni, 731 P.2d 146 (Colo. App. 1986).

Review must be within the appellate court's jurisdiction. The supreme court has no jurisdiction to review the judgment of the district court imposing a penalty for a contempt of court civil in character, unless some question is involved such as is required to give the supreme court jurisdiction in other civil actions. Naturita Canal & Reservoir Co. v. People ex rel. Meenan, 30 Colo. 407, 70 P. 691 (1902).

Appellate court lacked jurisdiction to consider defendants' appeal of contempt order because defendants did not file a timely appeal of the order. Order entering remedial sanctions against defendant was final and appealable under this rule, but defendants failed to file appeal within 45 days after the order was entered pursuant to C.A.R. 4(a) and section (f) of this rule. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Review is confined to whether the trial court had jurisdiction and regularly pursued its authority. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889); Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926); Clear Creek Power & Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926); Fort v. Coop. Farmers' Exch., Inc., 81 Colo. 431, 256 P. 319 (1927); Fort v. People ex rel. Coop. Farmers' Exch., Inc., 81 Colo. 420, 256 P. 325 (1927).

An order in contempt proceedings, if beyond the power of the trial court to enter, is subject to review. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892); Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

Although, in reviewing a contempt proceeding, the appellate court is not privileged to pass upon the weight or sufficiency of the evidence but is limited to the question of whether the trial court had jurisdiction. Coolidge v. People ex rel. District Att'y, 72 Colo. 35, 209 P. 504 (1922).

Mere irregularities are not reviewable. Where in a proceeding to punish a contempt the court acts within its jurisdiction, mere irregularities are not reviewable on error. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

However, the punishment may be reviewed to determine whether excessive or arbitrary. While punishment for contempt which consists of conduct derogatory is discretionary, the supreme court not only may inquire as to jurisdiction and regularity of procedure, but also may determine whether or not the punishment imposed is so excessive and incommensurate with the gravity of the offense as to be arbitrary and vindictive. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Combining contempt and alimony findings inappropriate. Where respondent court combined its ruling on contempt issue with its decision to terminate alimony, there is no alternative but to remand this case to the trial court to take further evidence on the alimony issue and to make more appropriate findings. Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975).

Punishment held excessive. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325, reh'g denied, 343 U.S. 937, 970, 72 S. Ct. 772, 1062, 96 L. Ed. 1350, 1365 (1952).

Punishment held arbitrary and oppressive. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Applied in Schnier v. District Court, 696 P.2d 264 (Colo. 1985).

CHAPTER 16

Affidavits, Arbitration, Miscellaneous

ANALYSIS BY RULE

CHAPTER 16

AFFIDAVITS, ARBITRATION, MISCELLANEOUS

Rule 108. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands.

Cross references: For officers authorized to take acknowledgments of deeds, see §§ 24-12-104, 24-12-105, and 38-30-126 to 38-30-135, C.R.S.

ANNOTATION

Annotator's note. Since C.R.C.P. 108 is similar to § 373 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of that section has been included in the annotations to this rule.

An officer of a foreign jurisdiction administering an oath to an affiant is presumed to be acting within the territorial jurisdiction for which he was appointed. Tucker v. Tucker, 21 Colo. App. 94, 121 P. 125 (1912).

That in the caption of an affidavit the venue as laid in Colorado is not sufficient to overcome this presumption. Tucker v. Tucker, 21 Colo. App. 94, 121 P. 125 (1912).

Rule 109. Arbitration

Repealed March 17, 1994, as to cases filed on or after July 1, 1994.

Rule 109.1. Mandatory Arbitration

Repealed May 30, 1991, as to cases filed on and after July 1, 1991.

Rule 110. Miscellaneous

(a) Amendments. No writ or process shall be quashed, nor any order or decree set aside, nor any undertaking be held invalid, nor any affidavit, traverse, or other paper be held insufficient if the same is corrected within the time and manner prescribed by the court, which shall be liberal in permitting amendments.

(b) Use of Terms. Words used in the present tense shall include the future; singular shall include the plural; masculine shall include the feminine; person or party shall include all manner of organizations which may sue or be sued. The use of the word clerk, sheriff, marshal, or other officer means such officer or his deputy or other person authorized to perform his duties. The word ''oath'' includes the word ''affirmation''; and the phrase ''to swear'' includes ''to affirm''; signature or subscription shall include mark, when the person is unable to write, his name being written near it and witnessed by a person who writes his own name as a witness. A superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules.

(c) Certificates. Certificates shall be made in the name of the officer either by the officer or by his deputy.

(d) Cross Claimants, Counterclaimants and Third-Party Claimants. Where a cross claim, counterclaim or third-party claim is filed, the claimant thereunder shall have the same rights and remedies as if a plaintiff.

ANNOTATION

In construing section 128 of the former Code of Civil Procedure, relating to affidavits or bonds, the court held that amendments under that section must be confined to cases in which the insufficiency was not jurisdictional, and that the section was not intended to permit interposing of affidavit where there was either none at all or its equivalent. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896).

Prior to the adoption of this rule, general assembly endeavored to make it plain that substance, not form, was the controlling consideration. Waite v. People, 83 Colo. 162, 262 P. 1009 (1928) (decided under § 478 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Rules 111 to 119.

Rules 111 to 119, inclusive, Supreme Court Proceedings, are deleted and are replaced by Chapter 32, Colorado Appellate Rules 1 through 58.

CHAPTER 17

Court Proceedings: Sales Under Powers

ANALYSIS BY RULE

CHAPTER 17

COURT PROCEEDINGS: SALES UNDER POWERS

Rule 120. Orders Authorizing Foreclosure Sale Under Power in a Deed of Trust to the Public Trustee the Public Trustee

(a) Motion for Order Authorizing Sale. When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: ''Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120,'' and shall be verified by a person with knowledge of the contents of the motion who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust;

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale; and

(v) those persons whose interest in the real property may otherwise be affected by the foreclosure.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response;

(3) the following advisement: ''If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response.''; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of a representative authorized to address loss mitigation requests. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior to the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. § 3931, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper

under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order is not appealable and shall not have preclusive effect in any other action or proceeding.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

COMMENTS

1989

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

[3] There was considerable debate concerning whether the Federal ''Fair Debt Collection Practices Act'' is applicable to a C.R.C.P. 120

proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal ''Fair Debt Collection Practices Act'' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Source: (b), (e), and (f) amended February 7, 1991, effective June 1, 1991; (a) amended February 17, 1993, effective April 1, 1993; (a) amended and adopted, effective November 16, 1995; (c) and (d) amended and effective June 28, 2007; (d) corrected and effective November 5, 2007; (b) amended and effective January 7, 2010; (b) amended and effective October 14, 2010; (a), (b), and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire section and comments amended December 7, 2017, effective March 1, 2018.

ANNOTATION

Law reviews. For article, ''War Legislation Affecting Titles to Real Estate'', see 21 Dicta 11 (1944). For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado'', see 28 Dicta 437 (1951). For article, ''Forms Committee Presents Standard Pleading Samples to Be Used in Foreclosures Through Public Trustee'', see 28 Dicta 461 (1951). For article, ''Amendments to the Colorado Rules of Civil Procedure'', see 28 Dicta 242 (1951). For article, ''Additional Real Estate Standards'', see 30 Dicta 431 (1953). For article, ''One Year Review of Civil Procedure and Appeals'', see 38 Dicta 133 (1961). For comment, ''The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado'', see 52 U. Colo. L. Rev. 301 (1981). For article, ''Inadequacy of Sales Price at Judicially Ordered Sales of Real Property'', see 12 Colo. Law, 1435 (1983). For article, ''Marshalling in Judicial or Nonjudicial Foreclosure in Colorado'', see 13 Colo. Law. 1809 (1984). For article, ''Foreclosure by Private Trustee: Now Is the Time for Colorado'', see 65 Den. U. L. Rev. 41 (1988). For article, ''Rule 120: Relocation of the Meaningful Hearing'', see 20 Colo. Law. 495 (1991).

Annotator's note. Since this rule is similar to this rule as it existed prior to its 2017 amendment and to rules antecedent to that rule, relevant cases construing those rules are included in these annotations.

This rule was repealed and readopted to provide for due process safeguards to one who challenges the entitlement to foreclose a deed of trust containing a power of sale to the public trustee. Valley Dev. at Vail, Inc. v. Warder, 192 Colo. 316, 557 P.2d 1180 (1976).

Due process requires opportunity to be heard. Due process under section (d) requires only that the respondents to the motion be given an opportunity to be heard on their contentions. Moreland v. Marwich, Ltd., 629 P.2d 1095 (Colo. App. 1981), rev'd on other grounds, 665 P.2d 613 (Colo. 1983).

Provisions of this rule must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

A completed foreclosure need not be set aside where the complaining party received timely actual notice and was not prejudiced. Amos v. Aspen Alps 123, LLC, 298 P.3d 940 (Colo. App. 2010), aff'd, 2012 CO 46, 280 P.3d 1256.

The provisions of this rule are predicated upon the requirements of the soldiers' and sailors' civil relief act, and the rule was adopted for the purpose of establishing a procedure for compliance therewith. That act by its plain provisions does not prevent the foreclosure of security for any obligation pursuant to a written agreement of the parties executed during the period of military service. Whitaker v. Hearnsberger, 123 Colo. 545, 233 P.2d 389 (1951).

The purpose of the rule is only to establish the status of the debtor with respect to military service. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

Proceedings under this rule are designed to afford holders of notes secured by deeds of trust a means of avoiding questions of marketability of title derived from sales thereunder. Where the debtor was not in military service, the sale by the public trustee could have proceeded without reference to this rule without prejudice to the debtor. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

This rule implements the statutory public trustee foreclosure system. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are not adversary proceedings in which the court determines

issues and enters a final judgment, and no appeal may be taken to review the same. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

When hearing required. If a response to the motion seeking sale under the public trustee's deed is timely filed, the court should conduct a hearing on the existence of the default, and other relevant issues if raised in the response. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

The scope of inquiry for a hearing held pursuant to this rule is limited to the existence of a default or other circumstances authorizing the sale, and action collateral to such hearing is necessary to resolve all other issues. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987); In re Carpenter, 200 B.R. 47 (D. Colo. 1996).

The purpose and scope of a hearing pursuant to this rule are very narrow: the trial court must determine whether there is a reasonable probability that a default or other circumstance authorizing exercise of a power of sale has occurred. The test is whether, considering all relevant evidence, there is a reasonable probability that a default exists. United Guar. Residential Ins. Co. v. Vanderlaan, 819 P.2d 1103 (Colo. App. 1991); Plymouth Capital Co. v. District Court, 955 P.2d 1014 (Colo. 1998).

Determination of real party in interest. The trial court in a proceeding under this rule must consider whether the moving parties are the real parties in interest when the issue is properly raised by the debtors. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

The defenses of waiver and estoppel are valid defenses that should be considered by the trial court in a proceeding under this rule if properly raised by the debtor. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

There is no requirement that an order directing foreclosure be filed in the county where the property affected is located. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

The notice procedure requires nothing more than that the notices be mailed to the mortgagee at the address given in the deed of trust. Motlong v. World Sav. & Loan Ass'n, 168 Colo. 540, 452 P.2d 384 (1969).

Certificate of mailing not conclusive. Although section (b) states that ''mailing and posting shall be evidenced by the certificate of the clerk'', the certificate is not conclusive proof of compliance with the rule but only creates a presumption which may be rebutted with evidence of noncompliance. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

Court may retain supervisory jurisdiction over proposed foreclosure. The narrowly circumscribed scope of a proceeding under this rule does not preclude the court from retaining supervisory jurisdiction over a proposed foreclosure for purposes of ensuring that due process is accorded to the parties. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Ex parte appointment of receiver. While the ex parte appointment of a receiver may be permissible under emergency circumstances or where notice is impractical, a case must be pending at the time of the appointment. Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

A receivership hearing did not provide petitioners with an effective opportunity to be heard on the issue of foreclosure. Valley Dev. at Vail, Inc. v. Warder, 192 Colo. 316, 557 P.2d 1180 (1976).

Injunctive action is not the exclusive action which may be taken under this rule as an aggrieved person may also seek other relief in any court having jurisdiction. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Foreclosure sale must be scheduled within seven days of hearing. When a creditor seeks to foreclose a deed of trust or mortgage, the foreclosure sale must be scheduled not less than seven days after the hearing conducted under this rule. Kirchner v. Sanchez, 661 P.2d 1161 (Colo. 1983).

Petitioners may be allowed additional time to redeem. The trial court acts within the limits of its discretion when it allows the petitioners additional time to redeem from the foreclosure sales. Moreland v. Marwich, Ltd., 665 P.2d 613 (Colo. 1983).

Attorney's fees not provided for. The determination of whether attorneys' fees can be recovered and the amount that is due is not within the permissible scope of a proceeding under this rule. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are a ''judicial proceeding'' and, therefore, ''legal action'' for the purposes of the federal Fair Debt Collection Practices Act. Thus, former section (f) of this rule, which permitted an action to be filed in any county, was preempted by federal law. But acceptance by district court clerks of improperly filed actions was not ''state action'' for the purposes of 42 U.S.C. § 1983. Zartman v. Shapiro and Meinhold, 811 P.2d 409 (Colo. App. 1990) (decided under rule in effect prior to 1989 amendment), aff'd, 823 P.2d 120 (Colo. 1992).

The federal Fair Debt Collection Practices Act requires that an action to enforce an interest in real property securing a consumer's obligation, brought by a debt collector, must be brought only in a judicial district in which the real property is located. For purposes of the federal act an attorney who qualifies under the first sentence of the definition in

15 U.S.C. § 1692a(6) is a debt collector. Shapiro and Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (decided under rule in effect prior to 1989 amendment).

Entities engaged in non-judicial foreclosure actions in this state are not debt collectors under the FDCPA. A non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor. A creditor may collect a deficiency only after the non-judicial foreclosure sale and through a separate action. Thus, a non-judicial foreclosure proceeding is not covered because it only allows the trustee to obtain proceeds from the sale of the foreclosed property, and no more. Obduskey v. Wells Fargo, 879 F.3d 1216 (10th Cir. 2018), aff'd sub nom. Obduskey v. McCarthy & Holthus LLP, __ U.S. __, 139 S. Ct. 1029, 203 L. Ed. 3d 390 (2019).

Court order under this rule to reform a bid ex post facto was beyond its authority. United Guar. Res. Ins. v. Vanderlaan, 819 P.2d 1103 (Colo. App. 1991).

The statute of limitations applies to each installment due on a note separately and does not begin to run on any one installment until that installment is due. Right to foreclose on note pursuant to this rule is not extinguished because recovery on certain payments is barred by the statute of limitations. Application of Church, 833 P.2d 813 (Colo. App. 1992).

Plaintiffs' due process rights not violated where claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust. Plaintiffs failed to provide to defendant, in writing, a notice of change of address. Defendant thus utilized address specified in the deed of trust to serve its motion and notice under this rule and to provide the public trustee with plaintiffs' most current address. The plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address. Defendant's adherence to the deed of trust' notice provision complied with the notice requirements of section (a). Thus, the notice provision in the deed of trust and defendant's compliance with that provision comported with the requirements of section (a). Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Denver district court had jurisdiction to enter order authorizing foreclosure sale in proceeding filed in that court under this rule notwithstanding pending Larimer county proceeding. Under the circumstances of this case, the rule of priority of jurisdiction did not divest the Denver district court of jurisdiction to enter the order authorizing sale. There was no risk of inconsistent decision or duplicative efforts, because defendant had abandoned its efforts to obtain an order authorizing sale from the Larimer county district court and, indeed, had not even filed the necessary documentation to allow it to obtain such an order from the court. Thus, policy reasons supporting rule of priority of jurisdiction are not implicated here. Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Applied in Good Fund, Ltd.-1972 v. Church, 40 Colo. App. 403, 579 P.2d 1174 (1978); Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724 (Colo. App. 1981); Krause v. Columbia Sav. & Loan Ass'n, 631 P.2d 1158 (Colo. App. 1981); Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. App. 1981); Kemp v. Empire Sav., Bldg. & Loan Ass'n, 660 P.2d 899 (Colo. 1983); Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n 661 P.2d 254 (Colo. 1983); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983); Klingensmith v. Serafini, 663 P.2d 1058 (Colo. App. 1983).

Rule 120.1. Order Authorizing Expedited Sale Pursuant to Statute

(a) Motion; Contents. An order of the court authorizing an expedited sale pursuant to section 38-38-903, C.R.S. may be sought in conjunction with the order authorizing sale. An eligible holder as defined by statute may file a verified motion, together with a supporting affidavit, in a district court seeking an order authorizing an expedited sale together with the motion for order authorizing sale pursuant to C.R.C.P. Rule 120. The affidavit shall state the following: (1) The moving party is an eligible holder as that term is defined by statute; (2) the subject deed of trust secures an eligible evidence of debt as that term is defined by statute; and (3) the property has been abandoned as defined by statute, or in the alternative, the grantor of the deed of trust requests an order for expedited foreclosure sale. Upon receipt of the motion and supporting affidavit, the clerk shall fix a time and place for a hearing on the motion for order authorizing sale and the motion for an expedited sale. The time fixed for hearing shall be not less than twenty nor more than thirty calendar days after the filing of the motion for expedited sale.

(b) Notice; Contents; Service. The moving party shall issue a combined notice in English and in Spanish, which shall include the provisions as specified in C.R.C.P. Rule 120(b) and add a statement that the moving party is seeking in addition to the order

authorizing sale, an order for expedited foreclosure sale. The moving party shall additionally state that the property is abandoned, or in the alternative that the grantor of the deed of trust has requested the order for expedited foreclosure sale. At least fifteen calendar days prior to the hearing, the combined notice shall be served by the moving party as required by C.R.C.P. 120, and in addition shall be either personally served on the grantor of the deed of trust, or posted at the real property as provided in C.R.C.P. Rule 120(b). Such mailing, delivery to the clerk for posting, and personal service or property posting shall be evidenced by the certificate of the moving party or the moving party's agent.

(c) Response; Contents; Filing and Service. The grantor of the deed of trust may dispute the moving party's motion for expedited sale in the same time frame as provided in C.R.C.P. Rule 120.

(d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and responses, if any. The scope of inquiry under this section shall not extend beyond the determination that the property is abandoned as that term is defined by statute, or that the grantor requests for an order for expedited sale. The court shall enter the order for expedited sale if there is clear and convincing evidence that the property has been abandoned or that the grantor of the deed of trust has requested such order. In order to establish clear and convincing evidence that the property has been abandoned, the moving party shall file an affidavit with the court as provided by statute. The court shall determine whether there is clear and convincing evidence that the property is abandoned.

(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by C.R.C.P. Rule 120(c), the court shall examine the motion and, if satisfied that the moving party is entitled to an order for expedited sale upon the facts stated in the motion and affidavit, the court shall dispense with the hearing and forthwith enter the order for expedited sale.

Source: Entire rule added and effective October 14, 2010; (a) and (b) amended and effective September 20, 2012.

CHAPTER 17A

Practice Standards and Local Court Rules

ANALYSIS BY RULE

CHAPTER 17A

PRACTICE STANDARDS AND LOCAL COURT RULES

Rule 121. Local Rules — Statewide Practice Standards

(a) Repeal of local rules. All District Court local rules, including local procedures and standing orders having the effect of local rules, enacted before April 1, 1988 are hereby repealed.

(b) Authority to enact local rules on matters which are strictly local. Each court by action of a majority of its judges may from time to time propose local rules and amendments of local rules not inconsistent with the Colorado Rules of Civil Procedure or Practice Standards set forth in C.R.C.P. 121(c), nor inconsistent with any directive of the Supreme Court. A proposed rule or amendment shall not be effective until approved by the Supreme Court. No local procedure shall be effective unless adopted as a local rule in accordance with this Section (b) of C.R.C.P. 121. To obtain approval, three copies of any proposed local rule or amendment of a local rule shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local rules is required. Numbering and format of any proposed local rule or amendment of a local rule shall be as prescribed by the Supreme Court. The Supreme Court's approval of a local rule or local procedure shall not preclude review of that rule or procedure under the law of circumstances of a particular case.

(c) Matters of statewide concern. The Colorado Rules of Civil Procedure and the following rule subject areas called ''Practice Standards'' are declared to be of statewide concern and shall preempt and control in their form and content over any differing local rule:

DISTRICT COURT* PRACTICE STANDARDS

§§ 1-1 to End

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*Includes Denver Probate Court where applicable.

Section 1-1

ENTRY OF APPEARANCE AND WITHDRAWAL

1. Entry of Appearance.

No attorney shall appear in any matter before the court unless that attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; (d) the attorney's E-Mail address; and (e) the attorney's registration number.

2. Withdrawal From an Active Case.

(a) An attorney may withdraw from a case, without leave of court where the withdrawing attorney has complied with all outstanding orders of the court and either files a notice of withdrawal where there is active co-counsel for the party represented by the withdrawing attorney, or files a substitution of counsel, signed by both the withdrawing and replacement attorney, containing the information required for an Entry of Appearance under subsection 1 of this Practice Standard as to the replacement attorney.

(b) Otherwise an attorney may withdraw from a case only upon approval of the court. Such approval shall rest in the discretion of the court, but shall not be granted until a motion to withdraw has been filed and served on the client and the other parties of record or their attorneys and either both the client and all counsel for the other parties consent in writing at or after the time of the service of said motion, or at least 14 days have expired after service of said motion. Every motion to withdraw shall contain the following advisements:

(I) the client has the burden of keeping the court and the other parties informed where notices, pleadings or other papers may be served;

(II) if the client fails or refuses to comply with all court rules and orders, the client may suffer possible dismissal, default or other sanctions;

(III) the dates of any proceedings, including trial, which dates will not be delayed nor proceedings affected by the withdrawal of counsel;

(IV) the client's and the other parties' right to object to the motion to withdraw within 14 days after service of the motion;

(V) if the client is not a natural person, that it must be represented by counsel in any court proceedings unless it is a closely held entity and first complies with section 13-1-127, C.R.S.; and

(VI) the client's last known address and telephone number.

(c) The client and the opposing parties shall have 14 days after service of a motion to withdraw within which to file objections to the withdrawal.

(d) If the motion to withdraw is granted, the withdrawing attorney shall promptly notify the client and the other parties of the effective date of the withdrawal.

3. Withdrawal From Completed Cases.

In any civil case which is concluded and in which all related orders have been submitted and entered by the court and complied with by the withdrawing attorney, an attorney may withdraw from the case without leave of court by filing a notice in the form and content of Appendix to Chapters 1 to 17A, Form 36, C.R.C.P. [JDF Form 83], which shall be served upon the client and all other parties of record or their attorneys, pursuant to C.R.C.P. 5. The withdrawal shall automatically become effective 14 days after service upon the client and all other parties of record or their attorneys unless there is an objection filed, in which event the matter shall be assigned to an appropriate judicial officer for determination.

4. Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics.

The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

5. Notice of Limited Representation Entry of Appearance and Withdrawal.

In accordance with C.R.C.P. 11(b) and C.R.C.P. Rule 311(b), an attorney may undertake to provide limited representation to a pro se party involved in a court proceeding. Upon the request and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

COMMITTEE COMMENT

The purpose of section 1-1(5) is to implement Colorado Rules of Civil Procedure 11(b) and 311(b), which authorize limited representation of a pro se party either on a pro bono or fee basis, in accordance with Colorado Rule of Professional Conduct 1.2. This provision provides assurance that an attorney who makes a limited appearance for a pro se party in a specified case

proceeding(s), at the request of and with the consent of the pro se party, can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court.

Source: Committee comment amended and adopted June 17, 1999, effective July 1, 1999; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 2.(b) amended and effective January 7, 2010; 5. added and effective October 20, 2011; IP 2.(b), 2.(b)(IV), 2.(c), and 3. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

An ''active case'' is any case other than a ''completed case'' as described in subsection 3 of the Practice Standard.

Section 1-2

SPECIAL ADMISSION OF OUT-OF-STATE AND FOREIGN ATTORNEYS

Special admission of an out-of-state or foreign attorney shall be in accordance with C.R.C.P. Chapter 18, Rules Governing Admission to the Bar 205.3 and 205.5.

Source: Entire section amended and adopted and committee comment repealed October 20, 2005, effective January 1, 2006; amended and effective September 9, 2015.

Section 1-3

JURY FEES

Each party exercising the right to trial by jury shall file and serve a demand therefor and simultaneously pay the requisite jury fee. The demand and payment of the jury fee shall be in accordance with Rule 38. The jury fee shall not be returned under any circumstances. Failure of a party to timely file and serve a demand for trial by jury and pay the jury fee shall constitute a waiver of that party's right to trial by jury. When any party exercises the right to trial by jury, every other party to the action must pay the requisite jury fee unless such other party files a notice of waiver of the right to trial by jury pursuant to Rule 38(a)(2). Any party who has demanded a trial by jury and has paid the requisite jury fee and any party who has not waived the right to trial by jury and has paid the requisite jury fee is entitled to trial by jury of all issues properly designated for trial by jury unless that party waives such right pursuant to Rule 38(e).

Source: Entire section repealed and reenacted July 12, 1990, effective September 1, 1990.

COMMITTEE COMMENT

Amendment of this practice standard is to conform it to the requirements of C.R.S. 13-71-144 (1989) and amended C.R.C.P 38. Under that statutory requirement, each party who wishes to be assured of having a jury trial, must demand a jury trial and pay a jury fee within the time specified. The case will be tried to a jury if the party demanding a jury trial makes a timely demand, pays the jury fee at the time of the demand and does not later waive a jury trial. If a demand is timely made and the jury fee timely paid, the right to jury trial cannot be withdrawn as against a party who has demanded a jury trial and timely paid a jury fee. For a party to be certain of having a jury trial, that party must demand it and timely pay a jury fee.

Section 1-4

SUPPRESSION FOR SERVICE OF PROCESS

In any civil action, upon written request of the claiming party, the fact of the filing of a case shall be suppressed by the clerk only upon order of the court to secure service of summons or other process and such order shall expire upon service of such summons or other process.

COMMITTEE COMMENT

This Practice Standard was a local rule found in most districts. It provides the machinery for the clerk to temporarily suppress the fact of filing of a case temporarily to avoid publicity that may affect ability to serve process. Such temporary suppression in aid of service of process, is different from the Practice Standard pertaining to limitation of access to court files.

Section 1-5

LIMITATION OF ACCESS TO COURT FILES

1. Nature of Order. Upon motion by any party named in any civil action, the court may limit access to court files. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.

2. When Order Granted. An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

3. Application for Order. A motion for limitation of access may be granted, ex parte, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.

4. Review by Order. Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.

COMMITTEE COMMENT

This Practice Standard was made necessary by lack of uniformity throughout the districts concerning access to court files. Some districts permitted free access after service of process was obtained. Others, particularly in malpractice or domestic relations cases, almost routinely prohibited access to court file information. The committee deemed it preferable to have machinery available for limitation in an appropriate case, but also a means for other entities having interest in the litigation, including the media, to have access.

Section 1-6

SETTINGS FOR TRIALS OR HEARINGS/SETTINGS BY TELEPHONE

1. All settings of trials and hearings, other than those set on the initiative of the court, shall be by the courtroom clerk upon notice to all other parties. Settings by telephone are encouraged. The original or a copy of the notice shall be on file with the courtroom clerk before the setting and shall contain the following:

(a) The caption of the case with designation ''Notice to Set'' or ''Notice to Set by Telephone.''

(b) The nature of the matter being set.

(c) The date and time at which the setting will occur.

(d) The courtroom clerk's address, by division or courtroom number if applicable and telephone number.

(e) A statement that the party or attorney being notified may appear or if not present, will be called at or about the time specified.

(f) A statement if the setting is to be by telephone.

2. The party issuing the notice to set shall be responsible for contacting all other counsel and clearing available dates with them.

3. Any attorney receiving the notice to set who does not personally appear at the setting shall have personnel at his or her office, supplied with a current appointment calendar and authorized to make settings for that attorney, at the date and time in the notice.

4. The party requesting the setting shall immediately confirm in writing the date and time of the matter that has been set with all other parties or their attorneys and shall file that confirmation with the court.

COMMITTEE COMMENT

The change in Standard 1-6 is to allow for settings on initiative of the Court. This change is to resolve the question raised by several districts as to whether the Court had the power to initiate its own settings. There has also been a slight tidying-up of language of the first sentence.

Section 1-7

AUDIO-VISUAL DEVICES

The photographing, broadcasting, televising or recording of court proceedings in any courtroom shall be governed in accordance with Canon 3 of the Code of Judicial Conduct of the State of Colorado.

COMMITTEE COMMENT

This Practice Standard was deemed necessary because it was apparent from local rules of a number of counties that there was a general lack of awareness of Canon 3 of the Code of Judicial Conduct pertaining to photographing, broadcasting, televising or recording court proceedings. This Practice Standard draws attention to Canon 3 and incorporates its provisions by reference.

Section 1-8

CONSOLIDATION

A party seeking consolidation shall file a motion to consolidate in each case sought to be consolidated. The motion shall be determined by the court in the case first filed in accordance with Practice Standard § 1-15. If consolidation is ordered, all subsequent filings shall be in the case first filed and all previous filings related to the consolidated cases placed together under that case number, unless otherwise ordered by the court.

Section 1-9

MULTI-DISTRICT LITIGATION

Consolidation of matters pending in other districts shall be determined in accordance with C.R.C.P. 42.1.

Section 1-10

DISMISSAL FOR FAILURE TO PROSECUTE

1. Upon due notice to the opposite party, any party to a civil action may apply to have any action dismissed when such action has not been prosecuted or brought to trial with due diligence.

2. The court, on its own motion, may dismiss any action not prosecuted with due diligence, upon 35 days' notice in writing to each attorney of record and each appearing party not represented by counsel, or require the parties to show cause in writing why the case should not be dismissed. Showing of cause and objections thereto shall be determined in accordance with Practice Standard § 1-15 (Determination of Motions).

3. If the case has not been set for trial, no activity of record in excess of 12 continuous months shall be deemed prima facie failure to prosecute.

4. Failure to show cause on or before the date set forth in the court's notice shall justify dismissal without further proceedings.

5. Any dismissal under this rule shall be without prejudice unless otherwise specified by the court.

Source: 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The purpose of this Practice Standard is to encourage prosecution of pending cases and permit machinery to dispose of matters which are not being prosecuted. Dismissal is without prejudice, and there are sufficient safeguards incorporated into the Practice Standard to permit retention on the docket if cause for the delay and interest in the case is shown. The Practice Standard does not mandate that the court search its files and send out notices, but permits such action if the court wishes. The Practice Standard also permits initiation of the procedure by motion.

Section 1-11

CONTINUANCES

Motions for continuances of hearings or trials shall be determined in accordance with Practice Standard 1-15 and shall be granted only for good cause. Stipulations for continuance shall not be effective unless and until approved by the court. A motion for continuance or request for extension of time will not be considered without a certificate that a copy of the motion has also been served upon the moving attorney's client.

Source: Entire section amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date.

Section 1-12

MATTERS RELATED TO DISCOVERY

1. Unless otherwise ordered by the court, reasonable notice for the taking of depositions pursuant to C.R.C.P. 30(b)(1) shall not be less than 7 days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties. Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition. Pending resolution of any motion pursuant to C.R.C.P. 26(c), the filing of the motion shall stay the discovery at which the motion is directed. If the court directs that any discovery motion under Rule 26(c) be made orally, then movant's written notice to the other parties that a hearing has been requested on the motion shall stay the discovery to which the motion is directed.

2. Motions under Rules 26(c) and 37(a), C.R.C.P., shall set forth the interrogatory, request, question or response constituting the subject matter of the motion.

3. Interrogatories and requests under Rules 33, 34, and 36, C.R.C.P., and the responses thereto shall be served upon other counsel or parties, but shall not be filed with the court. If relief is sought under Rule 26(c), C.R.C.P., or Rule 37(a), C.R.C.P., copies of the

portions of the interrogatories, requests, answers or responses in dispute shall be filed with the court contemporaneously with the motion. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be made available and placed, but not filed, with the trial judge at the outset of the trial insofar as their use reasonably can be anticipated.

4. The originals of all stenographically reported depositions shall be delivered to the party taking the deposition after submission to the deponent as required by Rule 30(e), C.R.C.P. The original of the deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case. If a deposition is to be used at trial, it shall be made available for inspection and placed, but not filed with the trial judge at the outset of the trial insofar as its use reasonably can be anticipated.

5. Unless otherwise ordered, the court will not entertain any motion under Rule 37(a), C.R.C.P., unless counsel for the moving party has conferred or made reasonable effort to confer with opposing counsel concerning the matter in dispute before the filing of the motion. Counsel for the moving party shall file a certificate of compliance with this rule at the time the motion under Rule 37(a), C.R.C.P., is filed. If the court requires that any discovery motion be made orally, then movant must make a reasonable effort to confer with opposing counsel before requesting a hearing from the court.

Source: 1. amended April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected and effective January 9, 1995; 1. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 1., 5., and comments amended and adopted January 29, 2016, effective for motions filed on or after April 1, 2016.

COMMENTS

1994

[1] Provisions of the practice standard are patterned in part after the local rule now in effect in the United States District Court for the District of Colorado. This practice standard specifies the minimum time for the serving of a notice to take deposition. Before serving a notice, however, counsel are required to make a good faith effort to schedule the deposition by agreement at a time reasonably convenient and economically efficient to the deponent and all counsel. Counsel are also required to confer in a good faith effort to agree on a reasonable means of limiting the time and expense of any deposition. The provisions of this Practice Standard are also designed to lessen paper mass/filing space problems and resolve various general problems related to discovery.

2015

[2] This rule was amended to address situations arising in courts that require oral discovery motions.

Section 1-13

DEPOSITION BY AUDIO TAPE RECORDING

When a deposition is taken by audio tape recording under C.R.C.P. 30(b)(4), the following procedures shall be followed:

(a) An oath or affirmation shall be administered to the witness by a notary public or other officer authorized to administer oaths.

(b) Two tape recorders with separate microphones shall be used.

(c) Speakers shall identify themselves before each statement except during extended colloquy between examiner and deponent.

(d) The recording shall be transcribed at the expense of the party taking the deposition.

(e) The transcribed testimony shall be made available for correction and signature by the deponent in accordance with Rule 30(e), C.R.C.P.

(f) The tape from which the transcription is made shall be retained by the party taking

the deposition. The second tape shall be retained by the adverse party. Both tapes shall be preserved until the litigation is concluded.

(g) The party responsible for the transcription shall make available to the other parties upon request copies of the transcription at a reasonable charge and shall also submit to the other parties copies of changes, if any, which are made by the deponent and shall also inform the other parties of the date when the deposition is available for signature and whether signature is obtained.

(h) The transcription shall be retained by the party taking the deposition and made available in accordance with Paragraph 4 Practice Standard § 1-12 (Matters Related To Discovery).

Source: Entire section amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This Practice Standard sets forth detailed procedural safeguards for taking of depositions by tape recording as set out in Sanchez v. District Court, 200 Colo. 33, 624 P.2d 1314 (1981).

Section 1-14

DEFAULT JUDGMENTS

1. To enter a default judgment under C.R.C.P. 55(b) of the Colorado Rules of Civil Procedure, the following documents in addition to the motion for default judgment are necessary:

(a) The original summons showing valid service on the particular defendant in accordance with Rule 4, C.R.C.P.

(b) An affidavit stating facts showing that venue of the action is proper. The affidavit may be executed by the attorney for the moving party.

(c) An affidavit or affidavits establishing that the particular defendant is not a minor, an incapacitated person, an officer or agency of the State of Colorado, or in the military service. The affidavit must be executed by the attorney for the moving party on the basis of reasonable inquiry.

(d) An affidavit or affidavits or exhibits establishing the amount of damages and interest, if any, for which judgment is being sought. The affidavit may not be executed by the attorney for the moving party. The affidavit must be executed by a person with knowledge of the damages and the basis therefor.

(e) If attorney fees are requested, an affidavit that the defendant agreed to pay attorney fees or that they are provided by statute; that they have been paid or incurred; and that they are reasonable. The attorney for the moving party may execute the affidavit setting forth those matters listed in or required by Colorado Rule of Professional Conduct 1.5.

(f) If the action is on a promissory note, the original note shall be presented to the court in order that the court may make a notation of the judgment on the face of the note. If the note is to be withdrawn, a photocopy shall be substituted.

(g) A proposed form of judgment which shall recite in the body of the judgment:

(1) The name of the party or parties to whom the judgment is to be granted;

(2) The name of the party or the parties against whom judgment is being taken;

(3) Venue has been considered and is proper;

(4) When there are multiple parties against whom judgment is taken, whether the relief is intended to be a joint and several obligation;

(5) Where multiple parties are involved, language to comply with C.R.C.P. 54(b), if final judgment is sought against less than all the defendants;

(6) The principal amount, interest and attorney's fees, if applicable, and costs which shall be separately stated.

2. If further documentation, proof or hearing is required, the court shall so notify the moving party.

3. If the party against whom default judgment is sought is in the military service, or his status cannot be shown, the court shall require such additional evidence or proceeding as will protect the interests of such party in accordance with the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3931, including the appointment of an attorney when necessary. The appointment of an attorney shall be made upon application of the moving party, and expense of such appointment shall be borne by the moving party, but taxable as costs awarded to the moving party as part of the judgment except as prohibited by law.

4. In proceedings which come within the provisions of Rules 55 or 120, C.R.C.P., attendance by the moving party or his attorney shall not be necessary in any instance in which all necessary elements for entry of default under those rules are self-evident from verified motion in the court file. When such matter comes up on the docket with no party or attorney appearing and the court is of the opinion that necessary elements are not so established, the court shall continue or vacate the hearing and advise the moving party or attorney accordingly.

Source: 1., 3., and committee comment amended and adopted October 20, 2005, effective January 1, 2006; 3. and comment amended and effective January 12, 2017.

COMMENT

2006

This Practice Standard was needed because neither C.R.C.P. 55, nor any local rule specified the elements necessary to obtain a default judgment and each court was left to determine what was necessary. One faced with the task of attempting to obtain a default judgment usually found themselves making several trips to the courthouse, numerous phone calls and redoing needed documents several times. The Practice Standard is designed to minimize both court and attorney time. The Practice Standard sets forth a standardized check list which designates particular items needed for obtaining a default judgment. For guidance on affidavits, see C.R.C.P. 108. See also Section 13-63-101, C.R.S., concerning affidavits and requirements by the court.

Section 1-15

DETERMINATION OF MOTIONS

1. Motions and Briefs; When Required; Time for Serving and Filing — Length.

(a) Except motions during trial or where the court orders that certain or all non-dispositive motions be made orally, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion, which shall not be filed with a separate brief. Unless the court orders otherwise, motions and responsive briefs not under C.R.C.P. 12(b)(1) or (2), or 56 are limited to 15 pages, and reply briefs to 10 pages, not including the case caption, signature block, certificate of service and attachments. Unless the court orders otherwise, motions and responsive briefs under C.R.C.P. 12(b)(1) or (2) or 56 are limited to 25 pages, and reply briefs to 15 pages, not including the case caption, signature block, certificate of service and attachments. All motions and briefs shall comply with C.R.C.P. 10(d).

(b) The responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. If a motion is filed 42 days or less before the trial date, the responding party shall have 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) Except for a motion pursuant to C.R.C.P. 56, the moving party shall have 7 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief. For a motion pursuant to C.R.C.P. 56, the moving party shall have 14 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief.

(d) A motion shall not be included in a response or reply to the original motion.

2. Affidavits. If facts not appearing of record may be considered in disposition of the motion, the parties may file affidavits with the motion or within the time specified for filing

the party's brief in this section 1-15, Rules 6, 56 or 59, C.R.C.P., or as otherwise ordered by the court. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into a written motion, the court may deem the motion abandoned and may enter an order denying the motion. Other than motions seeking to resolve a claim or defense under C.R.C.P. 12 or 56, failure of a responding party to file a responsive brief may be considered a confession of the motion.

4. Motions to Be Determined on Briefs, When Oral Argument Is Allowed; Motions Requiring Immediate Attention. Motions shall be determined promptly if possible. The court has discretion to order briefing or set a hearing on the motion. If possible, the court shall determine oral motions at the conclusion of the argument, but may take the motion under advisement or require briefing before ruling. Any motion requiring immediate disposition shall be called to the attention of the courtroom clerk by the party filing such motion.

5. Notification of Court's Ruling; Setting of Argument or Hearing When Ordered. Whenever the court enters an order denying or granting a motion without a hearing, all parties shall be forthwith notified by the court of such order. If the court desires or authorizes oral argument or an evidentiary hearing, all parties shall be so notified by the court. After notification, it shall be the responsibility of the moving party to have the motion set for oral argument or hearing. Unless the court orders otherwise, a notice to set oral argument or hearing shall be filed in accordance with Practice Standard § 1-6 within 7 days of notification that oral argument or hearing is required or authorized.

6. Effect of Failure to Appear at Oral Argument or Hearing. If any of the parties fails to appear at an oral argument or hearing, without prior showing of good cause for non-appearance, the court may proceed to hear and rule on the motion.

7. Sanctions. If a frivolous motion is filed or if frivolous opposition to a motion is interposed, the court may assess reasonable attorney's fees against the party or attorney filing such motion or interposing such opposition.

8. Duty to Confer. Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel and any self-represented party shall confer with opposing counsel and any self-represented parties before filing a motion. The requirement of self-represented parties to confer and the requirement to confer with self-represented parties shall not apply to any incarcerated person, or any self-represented party as to whom the requirement is contrary to court order or statute, including, but not limited to, any person as to whom contact would or precipitate a violation of a protection or restraining order. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel and any self-represented parties about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why, including all efforts to confer, shall be stated.

9. Unopposed Motions. All unopposed motions shall be so designated in the title of the motion.

10. Proposed Order. Except for orders containing signatures of the parties or attorneys as required by statute or rule, each motion shall be accompanied by a proposed order submitted in editable format. The proposed order complies with this provision if it states that the requested relief be granted or denied.

11. Motions to Reconsider. Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice. The motion shall be filed within 14 days from the date of the order, unless the party seeking reconsideration shows good cause for not filing within that time. Good cause for not filing within 14 days from the date of the order includes newly available material evidence and an intervening change in the governing legal standard. The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard.

Source: 1. amended and effective September 6, 1990; 1. and committee comment amended July 9, 1992, effective October 1, 1992; 1., 3., and 8. amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected May 14, 1996; 1. and 8. amended and adopted and 9. added and adopted October 20, 2005, effective January 1, 2006; 1. amended and effective June 28, 2007; 1. corrected and effective November 5, 2007; 8. and committee comment para. 2 amended and effective October 12, 2009; 1. and 5. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 10. added and effective February 29, 2012; 10. amended and effective June 7, 2013; 2. amended and effective December 31, 2013; 11. added and committee comment amended and effective September 18, 2014; 1., 3., 4., 5., and comments amended and adopted January 29, 2016, effective for motions filed on or after April 1, 2016; 1.(a), 3., and 8., amended December 7, 2017, effective January 1, 2018; 1.(a) amended and effective April 5, 2018.

COMMENTS

1994

[1] This Practice Standard was necessary because of lack of uniformity among the districts concerning how motions were to be made, set and determined. The Practice Standard recognizes that oral argument and hearings are not necessary in all cases, and encourages disposition of motions upon written submissions. The standard also sets forth the uniform requirements concerning filing of legal authority, filing of matters not already of record necessary to determination of motions, and the manner of setting an oral argument if argument is permitted. The practice standard is broad enough to include all motions, including venue motions. Some motions will not require extended legal analysis or affidavits. Obviously, if the basis for a motion is simple and routine, the citation of authorities can be correspondingly simple. Motions or briefs in excess of 10 pages are discouraged.

[2] This standard specifies contemporaneous recitation of legal authority either in the motion itself for all motions except those under C.R.C.P. Rule 56. Moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion. Every motion must, at the beginning, contain a certification that the movant, in good faith, has conferred with opposing counsel about the motion. If there has been no conference, the reason why must be stated. To assist the court, if the relief sought by the motion has been agreed to or will not be opposed, the court is to be so advised in the motion.

[3] Paragraph 4 of the standard contains an important feature. Any matter requiring immediate action should be called to the attention of the courtroom clerk by the party filing a motion for forthwith disposition. Calling the urgency of a matter to the attention of the court is a responsibility of the parties. The court should permit a forthwith determination.

2014

[4] Paragraph 11 of the standard neither limits a trial court's discretion to modify an interlocutory order, on motion or sua sponte, nor affects C.R.M. 5(a).

2015

[5] The sentence in the 1994 comment that ''motions or briefs in excess of 10 pages are discouraged'' has been superseded by the 2015 amendments to the rule on the length of motions and briefs. The sentence in the 1994 comment that ''moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion'' is corrected to change the word ''should'' to ''shall'' to be consistent with the wording of the rule.

Section 1-16

PREPARATION OF ORDERS AND OBJECTIONS AS TO FORM

1. When directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a proposed order within 14 days of such direction or such other time as the court directs. Prior to filing the proposed order, the attorney shall submit it to all other parties for approval as to form. The proposed order shall be timely filed even if all parties have not approved it as to form. A party objecting to the form of the

proposed order as filed with court shall have 7 days after service of the proposed order to file and serve objections and suggested modifications to the form of the proposed order.

2. Alternatively, when directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a stipulated order within 14 days after the ruling, or such other time as the court directs. Any matter upon which the parties cannot agree as to form shall be designated in the proposed order as ''disputed.'' The proposed order shall set forth each party's specific alternative proposal for each disputed matter.

3. Objecting, proposing modification or agreeing to the form of a proposed order or stipulated order, shall not affect a party's rights to appeal the substance of the order.

Source: Entire section repealed and readopted October 20, 2005, effective January 1, 2006; 1. and 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Section 1-17

COURT SETTLEMENT CONFERENCES

1. At any time after the filing of Disclosure Certificates as required by C.R.C.P. 16, any party may file with the courtroom clerk and serve a request for a court settlement conference, together with a notice for setting of such request. The court settlement conference shall, if the request is granted, be conducted by any available judge other than the assigned judge. In all instances, the assigned judge shall arrange for the availability of a different judge to conduct the court settlement conference.

2. All discussions at the settlement conference shall remain confidential and shall not be disclosed to the judge who presides at trial. Statements at the settlement conference shall not be admissible evidence for any purpose in any other proceeding.

3. This Rule shall not apply to proceedings conducted pursuant to Rule 16.2(i).

Source: Entire section amended and adopted September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005.

COMMITTEE COMMENT

This Practice Standard provides machinery for settlement conference upon request of the parties. The Practice Standard was deemed necessary because it was previously not possible to have a settlement conference in some districts. The committee recognized that there may be practical difficulties in a particular district because of nonavailability of a separate judge. It was felt that this problem could perhaps be largely overcome by cooperation between several districts or by use of a retired judge to make the service available.

Part 2 of the Practice Standard was deemed necessary to encourage settlement conference participation by litigants. Confidentiality and nonadmissibility of statements or communications made at settlement conference should override and prevail as a matter of policy over any asserted right or interest to the contrary.

Section 1-18

PRETRIAL PROCEDURE, CASE MANAGEMENT, DISCLOSURE AND SIMPLIFICATION OF ISSUES

Pretrial procedure, case management, disclosure and simplification of issues shall be in accordance with C.R.C.P. 16.

Editor's note: The Committee Comment to this section, was deleted from these rules when changes were made to this section November 12, 1987, pursuant to Court change #1987 (17).

Section 1-19

JURY INSTRUCTIONS

Jury instructions shall be prepared and tendered to the court pursuant to C.R.C.P. 16(g).

Source: Entire section amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; entire section amended and comment added effective January 12, 2017.

COMMENT

1983

This Standard makes preparation and timing of submission of jury instructions uniform throughout the state. It reasonably assures preparation of instructions and verdict forms before commencement of trial, but retains some needed flexibility in their final form. To permit use of preprepared forms, save time and expense, and to facilitate last-moment revision, the Standard mandates use of photocopies rather than typed originals for submission to the jury.

Section 1-20

SIZE AND FORMAT OF DOCUMENTS

All court documents shall be prepared in 8-1/2" x 11" format with black type or print and conform to the format, and spacing requirements specified in C.R.C.P. 10(d). Except documents filed by E-Filing or facsimile copy, all court documents shall be on recycled white paper. Any form required by these rules may be reproduced by word processor or other means, provided that the reproduction substantially follows the format of the form and indicates the effective date of the form which it reproduces.

Source: Entire section amended and effective September 6, 1990; entire section and committee comment amended July 9, 1992, effective October 1, 1992; entire section amended March 17, 1994, effective July 1, 1994; entire section and committee comment amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This standard draws attention to the requirements of C.R.C.P. 10(d) pertaining to paper size, paper quality, format and spacing of court documents. Color of paper and print requirements for documents not filed by E-Filing or facsimile copy were made necessary because colors other than black and white create photocopying and microfilming difficulties. Provision is also made to clarify that forms reproduced by word processor are acceptable if they follow the format of the form and state the effective date of the form which it reproduces.

Section 1-21

COURT TRANSCRIPTS

1. A party requesting a transcript shall arrange for preparation of the transcript directly with the reporter, or if the session or proceeding was recorded by mechanical or electronic means, the courtroom clerk. Where a transcript is to be made a part of the record on appeal, a party shall request preparation of the transcript by reference in the Designation of Record and by direct arrangement with the court reporter or courtroom clerk as provided herein.
2. Unless otherwise ordered by the court, a court reporter may require a deposit of sufficient money to cover the estimated cost of preparation before preparing the transcript.
3. The transcript shall be signed and certified by the person preparing the transcript. A transcript lodged with the court shall not be removed from the court without court order except when transmitted to the appellate court.

Source: 1. and 3. amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This Practice Standard sets forth uniform requirements for obtaining, paying for, certification and removal of court reporter transcripts.

Section 1-22

COSTS AND ATTORNEY FEES

1. **Costs.** A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment or within such greater time as the court may allow. The Bill of Costs shall itemize and provide a total of costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15. Any party that may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply in support of the Bill of Costs. Any request shall identify those issues that the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party's timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion.

2. **Attorney Fees.** (a) **Scope.** This practice standard applies to requests for attorney fees made at the conclusion of the action, including attorney fee awards requested pursuant to Section 13-17-102, C.R.S. It also includes awards of fees made to the prevailing party pursuant to a contract or statute where the award is dependent upon the achievement of a successful result in the litigation in which fees are to be awarded and the fees are for services rendered in connection with that litigation. This practice standard does not apply to attorney fees which are part of a judgment for damages and incurred as a result of other proceedings, or for services rendered other than in connection with the proceeding in which judgment is entered. This practice standard also does not apply to requests for attorney fees on matters relating to pre-trial sanctions and motions for default judgment unless otherwise ordered by the court.

(b) **Motion and Response.** Any party seeking attorney fees under this practice standard shall file and serve a motion for attorney fees within 21 days of entry of judgment or such greater time as the court may allow. The motion shall explain the basis upon which fees are sought, the amount of fees sought, and the method by which those fees were calculated. The motion shall be accompanied by any supporting documentation, including materials evidencing the attorney's time spent, the fee agreement between the attorney and client, and the reasonableness of the fees. Any response and reply, including any supporting documentation, shall be filed within the time allowed in practice standard § 1-15. The court may permit discovery on the issue of attorney fees only upon good cause shown when requested by any party.

(c) **Hearing; Determination of Motion.** Any party which may be affected by the motion for attorney fees may request a hearing within the time permitted to file a reply. Any request shall identify those issues which the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party's timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion. In exercising its discretion as to whether to hold a hearing in these cases, the court shall consider the amount of fees sought, the sufficiency of the disclosures made by the moving party in its motion and supporting documentation, and the extent and nature of the objections made in response to the motion. The court shall make findings of fact to support its determination of the motion. Attorney fees awarded under this practice standard shall be taxed as costs.

Source: Amended and committee comment added, July 9, 1992, effective October 1, 1992; 1. and 2.(b) amended and adopted December 14, 2011, effective January 1, 2012, for

all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 1. and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

COMMENTS

1992

[1] Costs. This Standard establishes a uniform, optimum time within which to claim costs. The 15 day requirement encourages prompt filings so that disputes on costs can be determined with other post-trial motions. This Standard also requires itemization and totaling of cost items and reminds practitioners of the means of determining disputes on costs. C.R.S. 13-16-122 (1981) sets forth those items generally awardable as costs.

[2] Attorney Fees. Subject to certain exceptions, this Standard establishes a uniform procedure for resolving attorney fee disputes in matters where the request for attorney fees is made at the conclusion of an action or where attorney fees are awarded to the prevailing party (see ''Scope''). Unless otherwise ordered by the court, attorney fees under C.R.S. 14-10-119 should be heard at the time of the hearing on the motion or proceeding for which they are requested.

2015

[3] The prior version of Rule 121, Section 1-22(2) addressed when and under what circumstances a party is entitled to a hearing regarding an award of attorney fees, but no rule addressed the circumstances regarding a hearing on costs. The procedural mechanisms regarding awards of attorney fees and awards of costs should be the same, and thus the rule change adds the existing language regarding hearings on attorney fees to awards of costs.

Section 1-23

BONDS IN CIVIL ACTIONS

1. Bonds Which Are Automatically Effective Upon Filing With the Court. The following bonds are automatically effective upon filing with the clerk of the court:

(a) Cash bonds in the amount set by court order, subsection 3 of this rule, or any applicable statute.

(b) Certificates of deposit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The certificate of deposit shall be issued in the name of the clerk of the court and payable to the clerk of the court, and the original of the certificate of deposit must be deposited with the clerk of the court.

(c) Corporate surety bonds issued by corporate sureties presently authorized to do business in the State of Colorado in the amount set by court order, subsection 3 of this rule, or any applicable statute. A power of attorney showing the present or current authority of the agent for the surety signing the bond shall be filed with the bond.

2. Bonds Which Are Effective Only Upon Entry of an Order Approving the Bond.

(a) Letters of credit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The beneficiary of the letter of credit shall be the clerk of the district court. The original of the letter of credit shall be deposited with the clerk of the court.

(b) Any Other Proposed Bond.

3. Amounts of Bond.

(a) Supersedeas Bonds. Unless the court otherwise orders, or any applicable statute directs a higher amount, the amount of a supersedeas bond to stay execution of a money judgment shall be 125% of the total amount of the judgment entered by the court (including any prejudgment interest, costs and attorneys fees awarded by the court). The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court. Nothing in this rule is intended to limit the court's discretion to deny a stay with respect to non-money judgments. Any interested party may move the trial court (which shall have jurisdiction not withstanding the pendency of an appeal) for an increase in the amount of the bond to reflect the anticipated time for completion of appellate proceedings or any increase in the amount of judgment.

(b) Other Bonds. The amounts of all other bonds shall be determined by the court or by any applicable statute.

4. Service of Bonds Upon All Parties of Record. A copy of all bonds or proposed bonds filed with the court shall be served on all parties of record in accordance with C.R.C.P. 5(b).

5. No Unsecured Bonds. Except as expressly provided by statute, and except with respect to appearance bonds, no unsecured bond shall be accepted by the court.

6. Objections to Bonds. Any party in interest may file an objection to any bond which is automatically effective under subsection 1 of this rule or to any proposed bond subject to subsection 2 of this rule. A bond, which is automatically effective under subsection 1 remains in effect unless the court orders otherwise. Any objections shall be filed not later than 14 days after service of the bond or proposed bond except that objections based upon the entry of any amended or additional judgment shall be made not later than 14 days after entry of any such amended or additional judgment.

7. Bonding over a Lien. If a money judgment has been made a lien upon real estate by the filing of a transcript of the judgment record by the judgment creditor, the lien shall be released upon the motion of the judgment debtor or other interested party if a bond for the money judgment has been approved and filed as provided in this section 1-23. The order of the court releasing the lien may be recorded with the clerk and recorder of the county where the property is located. Once the order is recorded, all proceedings by the judgment creditor to enforce the judgment lien shall be discontinued, unless a court orders otherwise.

Source: Entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 7. added and comments amended, effective January 12, 2017.

COMMENTS

2006

[1] The Committee is aware that issues have arisen regarding the effective date of a bond, and thus the effectiveness of injunction orders and other orders which are conditioned upon the filing of an acceptable bond. Certain types of bonds are almost always acceptable and thus, under this rule, are automatically effective upon filing with the Court subject to the consideration of timely filed objections. Other types of bonds may or may not be acceptable and should not be effective until the Court determines the sufficiency of the bond. The court may permit property bonds upon such conditions as are appropriate to protect the judgment creditor (or other party sought to be protected). Such conditions may include an appraisal by a qualified appraiser, information regarding liens and encumbrances against the property, and title insurance.

[2] This rule also sets the presumptive amount of a supersedeas bond for a money judgment. The amount of a supersedeas bond for a non-money judgment must be determined in the particular case by the court and this rule is not intended to affect the court's discretion to deny a supersedeas bond in the case of a non-money judgment.

Section 1-24

SETTING OF DEADLINES

[Practice Standard on Setting of Deadlines being prepared.]

Section 1-25

FACSIMILE COPIES

1. Facsimile copy, defined. A facsimile copy is a copy generated by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone/data line, then reconstructs the signals to print an exact duplicate of the original document at the receiving end.

2. Facsimile copies which conform with the quality requirements specified in C.R.C.P. 10(d)(1) may be filed with the court in lieu of the original document. Once filed with the court, the facsimile copy shall be treated as an original for all court purposes. If a facsimile copy is filed in lieu of the original document, the attorney or party filing the facsimile shall retain the original document for production to the court, if requested to do so.

3. The court is not required to provide confirmation that it has received a facsimile transmission.

4. Any facsimile copy transmitted directly to the court shall be accompanied by a cover sheet which states the title of the document, case number, number of pages, identity and voice telephone number of transmitter and any instructions.

5. Payment of any required filing fees shall not be deferred for documents filed with the court by facsimile transmission.

6. This rule shall not require courts to have a facsimile machine nor shall the court be required to transmit orders or other material to attorneys or parties via facsimile transmission.

Source: Entire section and committee comment added and effective September 6, 1990.

COMMITTEE COMMENT

Facsimile transmissions are becoming commonplace in the business world. It was therefore deemed reasonable that the court system adapt to accommodate the use of this technology. Use of the technology, however, should not create more work for court staff. In order not to add to the duties of overburdened court personnel, provision is made that court personnel need not provide confirmation that a facsimile transmission has been received. This should not create difficulty for attorneys because almost all equipment manufactured today provides confirmation that a document has been received. This confirmation should be attached to the document sent and retained with the original document in the party's file.

The committee envisioned at least two ways in which facsimile filings could be accomplished. The first would be an arrangement where the facsimile machine would be located in a court clerk's office. The other would be where transmissions would be made to a machine outside the courthouse and then delivered to the clerk for filing. These rules were designed to accommodate both kinds of filings.

Ordinary thermofax paper fades in sunlight, deteriorates with handling and has a short shelf life. Therefore, only permanent plain paper which is not subject to these infirmities is acceptable for court purposes.

The committee also recognized that a requirement for filing of the original after filing of a facsimile copy would create more work for court staff. The committee therefore decided to accept facsimile copies in lieu of the original with the provision that the original would be maintained if it were ever needed for any purpose.

The requirement under C.R.C.P. 121, Sec. 1-15 for filing of a copy of any motions or briefs has been modified so that a copy is also filed with the clerk of the court. The clerk of the court is then responsible for distributing the copy to the courtroom clerk. This change is necessary because the courtroom clerk will ordinarily not have a separate facsimile machine.

Some judicial districts have or are acquiring the ability to accept credit cards or bank cards for payment of fees and fines. In the judicial districts where bank cards can be used for payment, parties may file complaints, answers and other pleadings which require a filing fee by faxing an appropriate bank card authorization along with the pleadings. If a judicial district does not accept payment by bank card, those types of pleadings cannot be filed by facsimile transmission because payment of filing fees will not be deferred.

The committee believes that reasonable fees can be charged for the costs associated with facsimile filings. However, the setting of such fees is not within the scope of the Rules of Civil Procedure.

The adoption of this rule does not require an attorney to have a designated facsimile telephone number.

Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

1. Definitions:

(a) **Document:** A pleading, motion, writing or other paper filed or served under the E-System.

(b) **E-Filing/Service System:** The E-Filing/Service System (''**E-System**'') approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(c) **Electronic Filing:** Electronic filing (''**E-Filing**'') is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(d) **Electronic Service:** Electronic service (''**E-Service**'') is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(e) **E-System Provider:** The E-Service/E-Filing System Provider authorized by the Colorado Supreme Court.

(f) **Signatures:**

(I) Electronic Signature: An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

(II) Scanned Signature: A graphic image of a handwritten signature.

2. Types of Cases Applicable: E-Filing and E-Service may be used for certain cases filed in the courts of Colorado as the service becomes available. The availability of the E-System will be determined by the Colorado Supreme Court and announced through its web site http://www.courts.state.co.us/supct/supct.htm and through published directives to the clerks of the affected court systems. E-Filing and E-Service may be mandated pursuant to Subsection 13 of this Practice Standard 1-26.

3. To Whom Applicable:

(a) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5, may register to use the E-System. The E-System provider will provide an attorney permitted to appear pursuant to C.R.C.P. 205.3 or 205.5 with a special user account for purposes of E-Filing and E-Serving only in the case identified by a court order approving pro hac vice admission. The E-System provider will provide an attorney certified as pro bono counsel pursuant to C.R.C.P. 204.6 with a special user account for purposes of E-Filing and E-Serving in pro bono cases as contemplated by that rule. An attorney may enter an appearance pursuant to Rule 121, Section 1-1, through E-Filing. In districts where E-Filing is mandated pursuant to Subsection 13 of this Practice Standard 1-26, attorneys must register and use the E-System.

(b) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

4. Commencement of Action—Service of Summons: Cases may be commenced under C.R.C.P. 3 by E-Filing the initial pleading. Service of a summons shall be made in accordance with C.R.C.P. 4.

5. E-Filing—Date and Time of Filing: Documents filed in cases on the E-System may be filed under C.R.C.P. 5 through an E-Filing. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

6. E-Service—When Required - Date and Time of Service: Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

7. Filing Party to Maintain the Signed Copy—Paper Document Not to Be Filed—Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals. For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys, parties', and notaries' signatures must be scanned and E-filed. For probate of a will, the original must be lodged with the court.

8. Documents Requiring E-Filed Signatures: For E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be affixed electronically or documents with signatures obtained on a paper form scanned.

9. C.R.C.P. 11 Compliance: An e-signature is a signature for the purposes of C.R.C.P. 11.

10. Documents under Seal: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the direction of the court; however, the filing party may object to this procedure.

11. Transmitting of Orders, Notices and Other Court Entries: Beginning January 1, 2006, courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

12. Form of E-Filed Documents: C.R.C.P. 10 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

13. E-Filing May be Mandated: With the permission of the Chief Justice, a chief judge may mandate E-Filing within a county or judicial district for specific case classes or types of cases. A judicial officer may mandate E-Filing and E-Service in that judicial officer's division for specific cases, for submitting documents to the court and serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

14. Relief in the Event of Technical Difficulties:

(a) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (1) an error in the transmission of the document to the E-System Provider which was unknown to the sending party; (2) a failure of the E-System Provider to process the E-Filing when received, or (3) other technical problems experienced by the filer or E-System Provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(b) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

15. Form of Electronic Documents

(a) **Electronic document format, size and density:** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(b) **Multiple Documents:** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(c) **Proposed Orders:** Proposed orders shall be E-Filed in editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk's office and must be resubmitted.

Source: Entire section and committee comment added and effective March 7, 2000; entire section and committee comment amended and effective April 17, 2003; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 1.(f), 4., 6. to 9., and 15.(a) amended and effective June 21, 2012; 4. and 6. amended and effective May 9, 2013; 3. and committee comment amended and effective December 31, 2013; 3.(a) amended and effective September 9, 2015; comments amended and effective January 12, 2017.

COMMENTS

2000

[1] C.R.C.P. 77 provides that courts are always open for business. This Practice Standard is intended to comport with that rule.

2013

[2] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces/). ''Editable Format'' is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

2017

[3] Effective November 1, 2016, the name of the court authorized service provider changed from the ''Integrated Colorado Courts E-Filing System'' to ''Colorado Courts E-Filing'' (www.jbits.courts.state.co.us/efiling/).

ANNOTATION

Law reviews. For article, ''Keeping up With Local Dissolution Procedures'', see 12 Colo. Law. 767 (1983). For article, ''Alternative Depositions: Practice and Procedure'', see 19 Colo. Law. 57 (1990). For article, ''Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure'', see 23 Colo. Law. 2467 (1994). For article, ''Motions for Default Judgments'', see 24 Colo. Law. 1295 (1995). For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (Jan. 2000). For article, ''Electronic Filing's First Year in Colorado'', see 31 Colo. Law. 41 (Apr. 2002). For article, ''Revisiting the Recovery of Attorney Fees and Costs in Colorado'', see 33 Colo. Law.11 (Apr. 2004). For article, ''Bonds in Colorado Courts: A Primer for Practitioners'', see 34 Colo. Law. 59 (Mar. 2005). For article, ''2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing'', see 35 Colo. Law. 21 (May 2006). For article, ''Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, § 1-1'', see 40 Colo. Law. 89 (Nov. 2011). For article, ''A Modest Proposal: The Rule 3(a) Waiver Agreement'', see 46 Colo. Law. 23 (Mar. 2017).

Purpose of rule. This rule is intended to provide uniformity among the various district courts as to procedural matters. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Authority of district court rules is recognized so long as they do not conflict with the Colorado rules of civil procedure or with any directive of the supreme court. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

Not all standing orders are local rules. Section (a) of this rule clearly distinguishes between ''standing orders having the effect of local rules'' and those that do not. Therefore, not all standing orders are required to be reviewed by the supreme court. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

This rule contemplates supreme court approval only for standing orders that affect the rights of litigants before the court. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Standing order of chief judge of judicial district prohibiting possession of a deadly weapon or firearm in designated areas of courthouse was a valid exercise of the chief judge's authority as to administrative matters, did not affect the procedural rights of litigants, and did not require supreme court approval under this rule. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Late filings. This rule applies only to the failure to file a brief and does not apply to late filings. Charles Milne Assoc. v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

Trial court's failure to comply with procedural requirements concerning notice and time for filing responsive brief before ruling on motion to dismiss is an abuse of discretion. Lanes v. Scott, 688 P.2d 251 (Colo. App. 1984).

Court order vacated where the court granted a proposed order three days after it was filed in violation of § 1-16, which allows a party seven days to object to the form of a proposed order. Laleh v. Johnson, 2016 COA 4, 405 P.3d 286, aff'd, 2017 CO 93, 403 P.3d 207.

Court's sua sponte order of dismissal for failure to prosecute cannot stand if it is not preceded by the notice required by § 1-10 and C.R.C.P. 41. In re Custody of Nugent, 955 P.2d 584 (Colo. App. 1997); Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

A delay reduction order does not suffice to provide notice of dismissal under § 1-10. Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

Juvenile court did not abuse its discretion in declining to consider failure of the mother to file a responsive pleading to the father's post-trial motion as a confession of motion. M.H.W. by M.E.S. v. D.J.W., 757 P.2d 1129 (Colo. App. 1988).

Failure to give an opportunity to respond to authority cited in support of or in opposition to a motion is harmless unless prejudice is shown. Benson v. Colo. Comp. Ins. Auth., 870 P.2d 624 (Colo. App. 1994).

Where there has been an unusual delay in prosecuting an action, prejudice to the defendant will be presumed. Therefore, in the absence of mitigating circumstances, an unusual delay in prosecuting an action justifies dismissal with prejudice. Richardson v. McFee, 687 P.2d 517 (Colo. App. 1984).

District court erred in exercising its discretion to dismiss appellant's case pursuant to § 1-10(3) of this rule due to appellant's inactivity while it waited 13 months for a ruling from the court on its motion for summary judgment on the counterclaims. Appellant, having done all that was required to obtain a ruling from the court on the merits, was not obligated to renew its motion for summary judgment on the counterclaims or even remind the court that the motion needed to be ruled on to avoid the prospect of dismissal. Hudak v. Med. Lien Mgmt., Inc., 2013 COA 83, 305 P.3d 429.

Trial court held not to have abused discretion in dismissing action with prejudice for failure to prosecute. Rossi v. Mathers, 749 P.2d 964 (Colo. App. 1987).

Scope of issues raised by a trial data certificate is limited only by the breadth of notice provided by the complaint. Under our rules of civil procedure, the precise legal theory asserted by a claimant is not controlling, so long as the complaint gives sufficient notice of the transaction sued upon. Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Trial court erred when it concluded deponent received "reasonable notice" of deposition under § 1-12 (1). Deponent received deposition notice only two days before the deposition, and one of those days was a Sunday. As such, deponent did not receive at least five days notice before the deposition. However, under C.R.C.P. 32(d)(1), ''all errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice''. Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008)

Provision inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under § 1-15 concerning confession of motions are inapplicable to motions for summary judgment under this rule. Seal v. Hart, 755 P.2d 462 (Colo. App. 1988).

Failure to present controverting affidavit or other evidentiary materials are not grounds for summary judgment. Murphy v. Dairyland Ins. Co., 747 P.2d 691 (Colo. App. 1987).

Failure of nonmoving party to present affidavits or other evidentiary materials opposing a motion for summary judgment does not alone provide a proper basis for the entry of a judgment on the pleadings. Quiroz v. Goff, 46 P.3d 486 (Colo. App. 2002).

Only under extreme circumstances should sanction of dismissal or entry of default judgment be imposed. This rule should not be applied in a manner which unreasonably denies a party its day in court. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption); Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

It is within the district court's discretion to conduct an evidentiary hearing or rule on the submitted motions to vacate or modify an arbitration award. BFN-Greely, LLC v. Adair Group, Inc., 141 P.3d 937 (Colo. App. 2006).

Mere citation of a rule of civil procedure is not a "recitation of legal authority" as required by § 1-15 (7) of this rule. Box v. Wickham, 713 P.2d 415 (Colo. App. 1985).

Trial court improperly awarded attorney fees upon determining that a motion was frivolous due to an erroneous finding that the court had no jurisdiction. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

Post-trial motion for the award of attorney fees is analogous to a request for taxing costs and should follow procedures established by C.R.C.P. 54(d) and § 1-22 of this rule. A trial court may address the issue of the award of attorney fees for services rendered in connection with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to ''reserve'' the issue. Roa v. Miller, 784 P.2d 826 (Colo. App. 1989).

An award of attorney fees under § 13-17-102 cannot be held to be confessed by failure to respond to a motion for fees. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

A claim or defense is frivolous for purposes of assessing attorney fees if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Determination of whether motion is frivolous is a matter within the discretion of the trial court. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Whether motion was frivolous under § 1-15 (7) is applied in Liebowitz v. Aimexco Inc., 701 P.2d 140 (Colo. App. 1985).

Award of attorney fees incurred in pursuing motions for sanctions improper under § 1-15 (7) where the defense to the motions, while ultimately unsuccessful, had a rational basis in fact and law and did not lack substantial justification. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

The provisions of § 1-15 concerning confession of a motion by failing to respond thereto are inapplicable to a motion for summary judgment. Koch v. Sadler, 759 P.2d 792 (Colo. App. 1988).

Rule is permissive, not mandatory, so that failure to file brief in opposition to motion for partial summary judgment may be considered a confession of the motion, but is not automatically considered such. Visintainer Sheep v. Centennial Gold, 748 P.2d 358 (Colo. App. 1987).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by C.R.C.P. 12(b)(5) in resolving defendant's motion to dismiss. Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856 (Colo. App. 2007).

A party has 15 days to respond to a motion and it is an abuse of discretion for a trial court to grant a motion only 12 days after it was filed. Weatherly v. Roth, 743 P. 2d 453 (Colo. App. 1987).

Trial court's ex-parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after the court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. App. 1999).

Trial judge's refusal to disqualify himself from proceeding amounted to abuse of discretion where trial judge acted as settlement judge in litigation underlying the present legal malpractice case and allegations, in light of policies expressed in § 1-17 of this rule that a settlement judge for a particular action should not thereafter have any dealings with the case and that a judge assigned for proceedings other than settlement should not be privy to discussions that occurred at court settlement conferences, were sufficient to raise a reasonable inference of the appearance of actual or apparent bias or prejudice. Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001).

For factors to use in determining appropriateness and severity of sanctions for failure to file a trial data certificate, see Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

Sanction imposed for violation of § 1-18's requirement of timely filing of trial data certificate denied defendant its right to defend against plaintiff's claim. AAA Crane Serv. v. Omnibank, 723 P.2d 156 (Colo. App. 1986).

Sanctions may include dismissal, but only if court follows notice requirements of C.R.C.P. 41(b) and § 1-10 (2) of this rule. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

In addition, it was an abuse of discretion for court to impose a sanction for both parties' failure to file trial data certificates which was detrimental only to plaintiff, and benefitted the equally noncomplying defendants. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Imposition of sanctions for noncompliance is not mandated; the language of § 1-18 (1) (d) is permissive in nature. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

The trial court has considerable discretion to determine whether noncompliance with mandatory pretrial procedures justifies the imposition of sanctions against the noncomplying party. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court's decision not to impose any sanction for noncompliance with pretrial procedures is an abuse of discretion only if, based on the particular circumstances, the decision was manifestly arbitrary, unreasonable, or unfair. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not abuse its discretion for failing to prohibit the state's witnesses from testifying in case in chief for failure to file trial data certificate setting forth the names of the witnesses. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not apply an erroneous legal standard in determining reasonableness of plaintiff's attorney fees. Without any supporting affidavit or exhibit, defendants' opposition to award of attorney fees incurred in connection with contempt proceedings constituted mere argument and did not create a genuine issue of material fact as to the reasonableness of the fees. Moreover, the award of attorney fees was based on sufficient evidence supporting the reasonableness of the fees. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Notwithstanding the discretionary language in § 1-22 (2)(c), a party is entitled to an evidentiary hearing to determine a reasonable amount of attorney fees, when the party presents an expert's affidavit raising disputed issues of fact and a significant amount of fees has been requested. Roberts v. Adams, 47 P.3d 690 (Colo. App. 2001).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Although § 1-22 requires a party seeking costs to file a request within 15 days of the judgment, it also permits the request to be filed within such greater time as the court may allow. Although plaintiff filed the request for costs outside of the deadline, the court chose to address the issue. There is no abuse of discretion in the trial court's decision to address plaintiff's request under the ''within such greater time as the court may allow'' standard. Phillips v. Watkins, 166 P.3d 197 (Colo. App. 2007).

A request for an award of costs and fees under § 1-22 which has been filed beyond the 15-day deadline does not preclude the trial court's consideration even though the party fails to request an extension of time. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Not an abuse of discretion for trial court to award attorney fees under § 1-22 beyond the 15-day deadline and without expressly granting an extension. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009); Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

The court relied on specified information indicating the reasons for the late filing of the motion for attorney fees. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009).

Trial court not required to deny a motion for costs and attorney fees if it is filed outside of the 15-day time limit, even if the submitting party does not request an extension of time. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Issues concerning recovery of attorney fees not sought as damages are outside the purview of C.R.C.P. 59 and outside the purview of C.R.C.P. 59(j)'s requirement that a motion be denied as a matter of law if it is not decided within 60 days. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Even though plaintiff filed his bill of costs and an amended bill of costs more than 15 days after the entry of judgment, the trial court considered both the bill of costs and the amended bill in awarding minimal costs. Thus, the bill of costs was filed within ''such greater time as the court may allow'' and the trial court was required under § 13-17-202 to award the plaintiff ''reasonable costs'' incurred after the offer of settlement. Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

The rule does not require a court to determine that a filing made outside the 15-day period was attributable to excusable neglect or to make any other findings such as those required under C.R.C.P. 6(b). Parry v. Kuhlmann, 169 P.3d 188 (Colo. App. 2007).

Section 1-22 (2) does not require a party seeking attorney fees as costs to provide the disclosures mandated under C.R.C.P. 26 for experts who will testify at trial. Chartier v. Weinland Homes, Inc., 25 P.3d 1279 (Colo. App. 2001).

Failure of wife to file a motion in conformity with this rule in dissolution of marriage action does not operate as a waiver of her request for fees where wife had properly requested fees in her response to husband's petition; attorney fees were also listed as a disputed issue in the parties' joint trial management certificate; and husband acknowledged that wife raised the issue at the permanent orders hearing. In re Hill, 166 P.3d 269 (Colo. App. 2007).

The right to a jury trial, once proper demand is made and fee is paid pursuant to § 1-3 of this rule, may be lost only for reasons stated in C.R.C.P. 39(a). The trial court, in an action for payment of medical benefits, abused its discretion in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with § 1-19 of this rule. Neither this rule nor C.R.C.P. 39(a) includes a waiver provision on such basis. Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent ''clarification'' of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

Expert's designation and summary of testimony was available and met the requirement of this rule to provide both sides with the opportunity to prepare adequately for trial and to prevent undue surprise. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Confession of motion due to failure to respond in accordance with subsection (3) does not automatically render a pro se litigant's claims ''frivolous and groundless''. Separate findings on the issue are required before court may award attorney fees against such parties under § 13-17-102. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

Defendants waived their rights to a hearing on costs pursuant to this section where they did not request such hearing at trial. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

It was within the trial court's discretion to award expert witness fees for designated experts who did not testify at trial where such award was supported by evidence in the record. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

Trial court had discretion to impose sanctions, including issuing an order limiting scope of expert's testimony at trial where plaintiff failed to disclose identity of experts or their opinions and failed to supplement responses to discovery when additional information became known. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly excluded psychiatrist's testimony regarding the association between IQ and hydrocephalic condition where plaintiff failed to disclose opinion, failed to disclose psychiatrist's qualifications, and failed to update discovery responses. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly held that tardily disclosed expert opinion went beyond fair scope of previously disclosed opinion where plaintiff failed to make timely disclosure of expert's opinion concerning damages relating to matters beyond those provided in discovery. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Generally, the trial court determines a motion on the written motion and submitted briefs, and it is within the discretion of the court whether to allow an evidentiary hearing. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Section 1-5 creates a presumption that all court records are to be open. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Section 1-5 places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The fact that the parties claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of that entire file under § 1-5. In re Purcell, 879 P.2d 468 (Colo. App. 1994); Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The expectation of privacy or confidentiality in court records has been found to exist only in those limited instances involving sexual assault claims, trade secrets, potentially defamatory material, or threats to national security. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

A broad limited access order denying access to the entire court file was not warranted where a medical malpractice charge against a licensed health care professional implicates the public interest and involves more than a private dispute between individuals. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court may not enter a limited access order based solely upon an agreement between the parties to the litigation. If the evidence does not support the required finding under § 1-5 (2), no such order may be entered. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court did not abuse its discretion in denying party's request to seal record where it was not required to seal the record under this section and the record contained nothing unusual and no material that would mandate that it be sealed. In re Purcell, 879 P.2d 468 (Colo. App. 1994).

Movant's constitutional right to due process was not violated by trial court's denial of motion for costs and damages without a separate hearing on the motion where movant did not request an evidentiary hearing on its motion and trial court, in ruling on the motion, assumed movant could prove damages but determined, based on written motion and briefs, that an award of damages would be oppressive and inequitable. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Trial court did not abuse its discretion in allowing defendants to file their reply to plaintiff's response more than ten days after the response was filed where, in accepting the reply, the court stated that it had been filed within a reasonable time and that, in the interest of fundamental fairness, substance would be placed ahead of procedure. Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995).

Letter of credit was properly released by trial court, since the court was the beneficiary of the letter of credit. Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

District court clerk's rejection of complaint filed does not, and cannot, alter the fact that the complaint had been "filed" in the district court under C.R.C.P. 106(b) on the date it was transmitted to the e-system provider. The rejection therefore also does not and cannot alter the fact that the litigants had invoked district court jurisdiction, including that of the intended county district court, on the date they e-filed their complaint with the other district court. Maslak v. Town of Vail, 2015 COA 2, 345 P.3d 972.

Section 1-1 (2) is applied in Barry v. Ashley Anderson, P.C., 718 F. Supp. 1492 (D. Colo. 1989).

Section 1-10 is applied in Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Section 1-10 (2) is applied in Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Section 1-11 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Todd v. Bear Valley Village Apts., 980 P.2d 973 (Colo. 1999).

Section 1-15 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Ogawa v. Riley, 949 P.2d 118 (Colo. App. 1997).

Section 1-18 is applied in Baumann v. Rhode, 710 P.2d 493 (Colo. App. 1985); Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986); Coffee v. Inman, 728 P.2d 376 (Colo. App. 1986).

Section 1-19 is applied in Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).

APPENDIX TO CHAPTERS 1 TO 17A

The Colorado Rules of Civil Procedure

APPENDIX TO CHAPTERS 1 TO 17A

FORMS
(See Rule 84.)

Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us/.

Forms

Introductory Statement.

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary according to the type of form being used. See the applicable forms to determine the appropriate title and party designation. Documents initiated by a party shall use a form of caption shown in sample caption A. Documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B. The number of the action and the division in which the action is pending, where applicable, should be indicated in the caption of all papers subsequently filed. In the caption of the summons and in the caption of the complaint all parties must be named, but for other documents it is sufficient to state the name of the first party on both sides of the litigation, with an appropriate reference to other parties, such as et al. See Rules 4(a), 7(b)(2), and 10(a).

3. When the action is in the County Court, the complaint in all cases should contain the jurisdictional allegation, as set forth in Form 2 below.

4. Each form is to be signed in the individual name of at least one attorney of record (Rule 11). If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney. The plaintiff's address must be given on the complaint and the defendant's address on the answer.

5. An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

6. Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

<table>
<tr><td colspan="2">☐ County Court ☐ District Court
_____, Colorado
Court Address:</td><td rowspan="2"></td></tr>
<tr><td colspan="2">Plaintiff(s):

v. [Substitute appropriate party designations & names]
Defendant(s):</td></tr>
<tr><td colspan="2" rowspan="2">Attorney or Party Without Attorney (Name and Address):

Phone Number: E-mail:
FAX Number: Atty. Reg. #:</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td>Case Number:

Division: Courtroom:</td></tr>
<tr><td colspan="3">NAME OF DOCUMENT</td></tr>
</table>

Sample Caption B for documents by the court under the signature of the clerk or judge

☐ County Court ☐ District Court _____, Colorado Court Address:	
Plaintiff(s): v. *[Substitute appropriate party designations & names]* **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us/.

SPECIAL FORM INDEX

CHAPTER 17B

Appointed Judges

Adopted by the

SUPREME COURT OF COLORADO

June 23, 2005,

Effective July 1, 2005

ANALYSIS BY RULE

CHAPTER 17B

APPOINTED JUDGES

Rule 122. Case Specific Appointment of Appointed Judges Pursuant to C.R.S. § 13-3-111

(a) Appointed Judges.

(1) At any time after a civil action, excluding juvenile delinquency proceedings, is filed in a trial court of record, upon agreement of all parties that a specific retired or resigned justice of the Supreme Court, or a retired or resigned judge of any other court of record within the state of Colorado be appointed to hear the action and upon agreement that one or more of the parties shall pay the agreed upon compensation of the selected justice or judge, together with all other compensation and expenses incurred, the Chief Justice may appoint such justice or judge who consents to perform judicial duties for such action.

(2) The decision as to whether such justice or judge shall be appointed to judicial duties, pursuant to subsection (1) of this section, shall be entirely within the discretion of the Chief Justice. The Chief Justice has the authority to reject or approve any deviations from these rules agreed to by the parties. The Chief Justice may require such undertakings as in his or her opinion may be necessary to ensure that proceedings held pursuant to this section shall be without expense to the state of Colorado.

(3) The compensation and expenses paid to an Appointed Judge shall be at the rate agreed upon by the parties and the Appointed Judge and rate of compensation must be approved by the Chief Justice at the time of making the appointment.

(4) The Appointed Judge shall have the same authority as a full-time sitting judge. Orders, decrees, verdicts and judgments entered by an Appointed Judge shall have the same force and effect and may be enforced or appealed in the same manner as any other order, decree, verdict, or judgment.

(b) Qualifications. To be eligible to serve as an Appointed Judge, a person must be a Senior Judge, a retired or resigned justice of the Supreme Court, or a retired or resigned judge of the court of appeals, a district court, probate court, juvenile court or county court, who has served as a judge in one or more of said courts for a total of at least six years. If a judge has served in the Colorado State Court System and as a judge in the Federal Court System, those years of service may be combined for the purpose of meeting the six year requirement. Such person must be currently licensed to practice law in Colorado.

(c) Motion for Appointment. A request for the appointment of an Appointed Judge shall be made by a joint motion filed by all parties to a case and shall be signed as approved by the Appointed Judge. The original of such motion shall be filed with the Supreme Court with a copy filed in the originating court — the court of record in which the case was originally filed. Such motion shall include:

(1) The name, address, and registration number of the Appointed Judge;

(2) The rate of compensation agreed to be paid to the Appointed Judge;

(3) The Appointed Judge's agreement to be bound by Section II of the Colorado Code of Judicial Conduct, Applicability of Code to Senior and Retired Judges, and the Appointed Judge's agreement that the Chief Justice may ask the Office of Attorney Regulation Counsel and the Colorado Commission on Judicial Discipline for any record of his or her imposed discipline, or pending disciplinary proceeding, if any;

(4) A realistic estimate of all compensation and expenses for the Appointed Judge, any needed personnel, rental of an appropriate facility outside the courthouse, if needed, in which to hold the proceedings, payment for any requested jury, and all other anticipated compensation and expenses, including travel, lodging and meals, and provisions assuring that all such compensation and expenses will be paid by the parties; and

(5) An agreement as to who is responsible for initial payment of the compensation and expenses of the action, and who is responsible for payment of the compensation and expenses upon final judgment;

(6) The agreement of the parties and the Appointed Judge that none of the compensation and expenses shall be paid by the state of Colorado;

(7) A copy signed by the Appointed Judge of the following oath: "I, (name of Appointed Judge), do solemnly swear or affirm that I will support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office upon which I am about to enter."

(8) Any other matters the parties desire to be considered by the Chief Justice in exercising his or her discretion.

(9) A form order approving the appointment.

(10) A statement acknowledging that the Chief Justice may approve or reject the order or, upon the agreement of all the parties and of the Appointed Judge, may change any of the provisions of the order.

The parties shall file the Chief Justice's ruling on the motion in the case file in the originating court.

(d) Duration of Appointment. The appointment shall last for so long as the parties specify in the motion and order of appointment. In the absence of such specification, the appointment shall last until entry of a final, appealable judgment, order or decree or, in dissolution actions, until the entry of Permanent Orders.

(e) Compensation and Expenses. Upon the appointment of an Appointed Judge by the Chief Justice, the parties shall forthwith deposit in an agreed escrow or trust account to be administered by the Appointed Judge or some other person acceptable to the parties and the Appointed Judge, sufficient funds to pay the estimated compensation and expenses of the case for the duration of the appointment. If, at any time, the Appointed Judge determines that the funds on deposit are insufficient to cover all further compensation and expenses, the Appointed Judge may order the parties promptly to deposit sufficient additional funds to cover such amount. An Appointed Judge may withdraw from the appointment after reasonable notice and with permission of the Chief Justice if this order is not complied with, and the case proceedings shall revert to the originating court. Within a reasonable time after the conclusion of the Appointed Judge's duties on the case, the parties shall file in the record of the case in the originating court a report of the total compensation paid for the Appointed Judge's services and the total expenses paid by the parties in the case.

(f) Rules Applicable to Proceedings. Proceedings before an Appointed Judge shall be conducted pursuant to Rules applicable to the originating court. All filings shall be open records available for public review and inspection unless sealed upon motion and order, and all proceedings shall be open to the public in the same manner and pursuant to the same law applicable to the originating court.

(g) Record.

(1) The original of each filing in all proceedings before an Appointed Judge shall be filed with the clerk of the originating court and a copy shall be provided to the Appointed Judge.

(2) The parties and the Appointed Judge shall comply with all applicable rules and Chief Justice Directives relating to reporting, filing and maintaining the record.

(3) The originals of any reporter's notes or recording medium, along with any exhibits tendered, shall be filed with the clerk of the originating court pursuant to C.R.C.P. 80(d). The parties shall pay the costs of a court reporter or for any recording equipment that is acceptable to all parties.

(h) Location of Proceedings.

(1) Unless consented to by the parties and ordered by the Appointed Judge for good cause, the location of evidentiary proceedings and trial of a matter subject to this rule shall be pursuant to C.R.C.P. 98.

(2) The parties and the Appointed Judge shall arrange for an appropriate facility in which proceedings shall be held. If available, a room in the courthouse may be used for one or more proceedings in the case. Use of available court rooms, equipment or facilities

within the courthouse shall not be considered an expense to the state that the parties are required to bear or reimburse;

(3) Whenever proceedings are scheduled in advance, the Appointed Judge shall timely file a Notice of Hearing with the clerk of the originating court giving notice of the date, time, nature and location of the proceedings.

(4) Except when proceedings are taking place in a courthouse, the parties shall arrange for or assure that there is sufficient premises liability insurance to assure that any injury to a party, other participant or spectator at the proceedings is covered without expense to the state of Colorado. Such insurance shall name the state of Colorado as an additional insured.

(i) Jury Trials.

(1) The Colorado Uniform Jury Selection and Service Act applies to jury trials conducted pursuant to this rule.

(2) When a trial by jury has been properly demanded, before setting the case for trial the Appointed Judge shall coordinate the start of the trial with the jury commissioner and the district administrator for the originating court so that jurors are selected and voir dire is held in the courthouse to which the prospective jurors are summoned.

(3) If the trial is held outside the courthouse, the parties shall be responsible for offering transportation from the courthouse to the location of the trial for the duration of the trial. Such transportation shall be at no cost to the jurors or the state of Colorado. The parties shall arrange for or assure that there is sufficient liability insurance to assure that any injury to a juror related to such transportation is covered without expense to the state of Colorado. Such insurance shall name the state of Colorado as an additional insured.

(4) Not later than 3 business days following the conclusion of their service as jurors, the parties shall pay the jurors at the statutory rate pursuant to the Colorado Uniform Jury Selection and Service Act. The parties also shall pay all related expenses such as meals for the jurors and the costs of a bailiff. Payments made pursuant to this section should not be made through the court.

(5) If the trial is held outside the courthouse, jurors shall be instructed to the effect that such fact does not affect their responsibility and the importance of their service.

(6) In the event the jury is cancelled, postponed or a jury is waived, the Appointed Judge shall notify the jury commissioner as soon as possible.

(j) Removal. An Appointed Judge shall preside over all matters throughout the duration of the appointment unless the Appointed Judge recuses, is removed pursuant to C.R.C.P. 97, dies or becomes incapacitated. In any such circumstance, the case proceedings shall immediately revert to the originating court.

(k) Immunity. An Appointed Judge shall have immunity in the same manner and to the same extent as any other judge in the state of Colorado.

This Rule is hereby enacted and adopted by the Court, En Banc, this 23rd day of June, 2005 and shall be effective with regard to all cases pending in courts as of July 1, 2005 or filed in courts on or after July 1, 2005.

Source: (c)(3) amended and effective June 16, 2011; (i)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (c)(1) and (c)(7) amended and effective January 12, 2017.

ANNOTATION

Law reviews. For article, ''Privatizing Family Law Adjudications: Issues and Procedures'', see 34 Colo. Law. 95 (August 2005). For article, ''Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants'', see 34 Colo. Law. 37 (September 2005).

Rules 123 to 200.

[Note: There are at present no Colorado Rules of Civil Procedure 123 to 200.]

Preamble
Chapters 18 to 20

Chapters 18 to 20

Rules Governing the Practice of Law

Preamble to Chapters 18 to 20

The Colorado Supreme Court has exclusive jurisdiction to regulate the practice of law in Colorado. The Court appoints an Advisory Committee, Attorney Regulation Counsel, Presiding Disciplinary Judge, Executive Director of the Colorado Lawyers Assistance Program (COLAP) and Director of the Colorado Attorney Mentoring Program (CAMP) to assist the Court. The Court also appoints numerous volunteer citizens to permanent regulatory committees and boards to assist in regulating the practice of law.

The legal profession serves clients, courts and the public, and has special responsibilities for the quality of justice administered in our legal system. The Court establishes essential eligibility requirements, rules of professional conduct and other rules for the legal profession. Legal service providers must be regulated in the public interest. In regulating the practice of law in Colorado in the public interest, the Court's objectives include:

1. Increasing public understanding of and confidence in the rule of law, the administration of justice and each individual's legal rights and duties;
2. Ensuring compliance with essential eligibility requirements, rules of professional conduct and other rules in a manner that is fair, efficient, effective, targeted and proportionate;
3. Enhancing client protection and promoting consumer confidence through Attorney Regulation Counsel, the Attorneys Fund for Client Protection, inventory counsel services, the regulation of non-lawyers engaged in providing legal services, and other proactive programs;
4. Assisting providers of legal services in maintaining competence and professionalism through continuing legal education; Attorney Regulation Counsel professionalism, ethics and trust account schools; and other proactive programs;
5. Helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients, through COLAP, CAMP and other proactive programs;
6. Promoting access to justice and consumer choice in the availability and affordability of competent legal services;
7. Safeguarding the rule of law and ensuring judicial and legal service providers' independence sufficient to allow for a robust system of justice;
8. Promoting diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice; and
9. Protecting confidential client information.

Source: Adopted and effective April 7, 2016.

CHAPTER 18

Rules Governing Admission to the Practice of Law in Colorado

ANALYSIS BY RULE

CHAPTER 18

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN COLORADO

Cross references: For general provisions concerning attorneys-at-law, see article 5 of title 12, C.R.S.

RULE 201

Rule 201.1. Supreme Court Jurisdiction

Repealed, effective September 1, 2014.

Rule 201.2. Board of Law Examiners

Repealed, effective September 1, 2014.

Rule 201.3. Classification of Applicants

Repealed, effective September 1, 2014.

Rule 201.4. Applications

Repealed, effective September 1, 2014.

Rule 201.5. Educational Qualifications

Repealed, effective September 1, 2014.

Rule 201.6. Moral and Ethical Qualifications

Repealed, effective September 1, 2014.

Rule 201.7. Review of Applications

Repealed, effective September 1, 2014.

Rule 201.8. Inquiry and Hearing Panels of the Bar Committee

Repealed, effective September 1, 2014.

Rule 201.9. Review by Inquiry Panel

Repealed, effective September 1, 2014.

Rule 201.10. Formal Hearings

Repealed, effective September 1, 2014.

Rule 201.11. Request for Disclosure of Confidential Information

Repealed, effective September 1, 2014.

Rule 201.12. Reapplication for Admission

Repealed, effective September 1, 2014.

Rule 201.13. Inspection of Essay Examination Answers

Repealed, effective September 1, 2014.

Rule 201.14. Oath of Admission

Repealed, effective September 1, 2014.

APPENDIX TO RULE 201

Approval of Law Schools

American Bar Association Standards and Rules of Procedure

301 (a) The law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar.
(b) A law school may offer an educational program designed to emphasize some aspects of the law or the legal profession and give less attention to others. If a school offers such a program, that program and its objectives shall be clearly stated in its publications, where appropriate.
(c) The educational program of the school shall be designed to prepare the students to deal with recognized problems of the present and anticipated problems of the future.

302 (a) The law school shall:
(i) Offer to all students instruction in those subjects generally regarded as the core of the law school curriculum;
(ii) Offer to all students at least one rigorous writing experience;
(iii) Offer instruction in professional skills;
(iv) Require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Model Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.
(b) The law school may not offer to its students, for academic credit or as a condition to graduation, instruction that is designed as a bar examination review course.

303 (a) The educational program of the law school shall provide adequate opportunity for:
(i) Study in seminars or by directed research,
(ii) Small classes for at least some portion of the total instructional program.
(b) The law school may not allow credit for study by correspondence.

304 (a) The law school shall maintain and adhere to sound standards of legal scholarship, including clearly defined standards for good standing, advancement, and graduation.
(b) The scholastic achievement of students shall be evaluated from the inception of their studies. As part of the testing of scholastic achievement, a written examination of suitable length and complexity shall be required in every course for which credit is given, except clinical work, courses involving extensive written work such as moot court, practice court, legal writing and drafting, and seminars and individual research projects.
(c) A law school shall not, either by initial admission or subsequent retention, enroll or continue a person whose inability to do satisfactory work is sufficiently manifest that the person's continuation in school would inculcate false hopes, constitute economic exploitation, or deleteriously affect the education of other students.

305 (a) Subject to the qualifications and exceptions contained in this Chapter, the law school shall require, as a condition for graduation, the completion of a course of study in residence of not less than 1200 class hours, extending over a period of not less than ninety weeks for full-time students, or not less than one hundred and twenty weeks for part-time students.

(i) ''In residence'' means attendance at classes in the law school.
(ii) ''Class hours'' means time spent in regularly scheduled class sessions in the law school, including time allotted for final examinations, not exceeding ten percent of the total number of class session hours.
(iii) ''Full-time student'' means a student who devotes substantially all working hours to the study of law.
(b) To receive residence credit for an academic period, a full-time student must be enrolled in a schedule requiring a minimum of ten class hours a week and must receive credit for at least nine class hours and a part-time student must be enrolled in a schedule requiring a minimum of eight class hours a week and must receive credit for at least eight class hours. If a student is not enrolled in or fails to receive credit for the minimum number of hours specified in this subsection, the student may receive residence credit only in the ratio that the hours enrolled in or in which credit was received, as the case may be, bear to the minimum specified.
(c) Regular and punctual class attendance is necessary to satisfy residence and class hours requirements.

306 If the law school has a program that permits or requires student participation in studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions, the time spent in such studies or activities may be included as satisfying the residence and class hours requirements, provided the conditions of this section are satisfied.
(a) The residence and class hours credit allowed must be commensurate with the time and effort expended by and the educational benefits to the participating student.
(b) The studies or activities must be approved in advance, in accordance with the school's established procedures for curriculum approval and determination.
(c) Each such study or activity, and the participation of each student therein, must be conducted or periodically reviewed by a member of the faculty to insure that in its actual operation it is achieving its educational objectives and that the credit allowed therefor is, in fact, commensurate with the time and effort expended by, and the educational benefits to, the participating student.
(d) At least 900 hours of the total time credited towards satisfying the ''in residence'' and ''class hours'' requirements of this Chapter shall be in actual attendance in regularly scheduled class sessions in the law school conferring the degree, or, in the case of a student receiving credit for studies at another law school, at the law school at which the credit was earned.

308 The law school may admit with advanced standing and allow credit for studies at a law school outside the United States if the studies
(i) Either were ''in residence'' as provided in Section 305, or qualify for credit under Section 306, and
(ii) The content of the studies was such that credit therefor would have been allowed towards satisfaction of degree requirements at the admitting school, and
(iii) The admitting school is satisfied that the quality of the educational program at the prior school was at least equal to that required for an approved school.
Advanced standing and credit allowed for foreign study shall not exceed one-third of the total required by the Standards for the first professional degree unless the foreign study related chiefly to a system of law basically followed in the jurisdiction in which the admitting school is located; and in no event shall the maximum advanced standing and credit allowed exceed two-thirds of the total required by the Standards for the first professional degree.

RULE 202

Rule 202.1. Supreme Court Jurisdiction

The Supreme Court exercises jurisdiction over all matters involving the licensing and regulation of those persons who practice law in Colorado. Accordingly, the Supreme Court has adopted the following rules governing admission to the practice of law in Colorado.

Source: Entire rule added and effective September 1, 2014.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 201.1, which was similar to this rule.

District courts are without subject matter jurisdiction to entertain challenges to the application and enforcement of rules governing admission to the bar. Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005).

Rule 202.2. Supreme Court Advisory Committee

(1) The Supreme Court Advisory Committee (Advisory Committee) is a permanent committee of the Supreme Court. *See* C.R.C.P. 251.34. The Advisory Committee oversees the coordination of administrative matters for all programs of the attorney regulation process.

(2) The Advisory Committee shall have oversight over the attorney admissions process.

(3) The Advisory Committee shall recommend to the Supreme Court proposed changes or additions to the rules of procedure governing admission to the practice of law.

(4) The Advisory Committee shall review the productivity, effectiveness and efficiency of all matters involving the admission of persons to practice law in the state of Colorado.

Source: Entire rule added and effective September 1, 2014.

Rule 202.3. Board of Law Examiners

(1) Colorado State Board of Law Examiners. The Colorado State Board of Law Examiners (Board) shall consist of two committees: the Law Committee and the Character and Fitness Committee.

(2) Law Committee. The Law Committee shall serve as a permanent committee of the Supreme Court.

(a) Members. The Law Committee shall consist of eleven volunteer attorneys appointed by the Supreme Court. With the exception of the chair and vice-chair, members shall be appointed for one term of seven years. Diversity shall be a consideration in making the appointments. The terms of the members of the Law Committee shall be staggered to provide, so far as possible, for the expiration each year of the term of one member. All members, including the chair and vice-chair, serve at the pleasure of and may be dismissed at any time by the Supreme Court. A member of the Law Committee may resign at any time.

(b) Chair and Vice-Chair. The Supreme Court shall designate the two members of the Law Committee to serve as its chair and vice-chair for unspecified terms. The chair shall exercise overall supervisory control of the Committee. The chair shall also be a member of the Advisory Committee and serve as the chair of the Board.

(c) Powers and Duties. The Law Committee shall:

(i) Oversee the administration of two written examinations each year in the metropolitan Denver area, one in February and one in July, or at such other times and places as may be designated by the Supreme Court;

(ii) Make recommendations to the Supreme Court regarding passing scores for the written examination, Uniform Bar Exam (UBE) and Multi-State Professional Responsibility Examination (MPRE);

(iii) Oversee the process of grading the written examination to ensure uniformity and quality of grading;

(iv) Periodically report to the Advisory Committee on the operations of the Law Committee;

(v) Make recommendations to the Advisory Committee regarding proposed changes or additions to rules that concern the functions of the Law Committee; and

(vi) Adopt such practices as may from time to time become necessary to govern the internal operation of the Law Committee.

(3) Character and Fitness Committee. The Character and Fitness Committee shall serve as a permanent committee of the Supreme Court.

(a) Members. The Character and Fitness Committee shall consist of a minimum of seventeen volunteer members appointed by the Supreme Court. With the exception of the chair and vice-chair, members shall be appointed for one term of seven years. The chair and vice-chair may be appointed to serve an additional term of seven years, with such terms staggered. Diversity shall be a consideration in making the appointments. The terms of the members of the Character and Fitness Committee shall be staggered to provide, so far as possible, for the expiration each year of the term of one member. At least twelve of the members of the Character and Fitness Committee shall be attorneys, and at least five shall be non-attorneys (citizen members). Expertise in mental health shall be a consideration in making appointments of citizen members. All members, including the chair and vice-chair, serve at the pleasure of and may be dismissed at any time by the Supreme Court. A member of the Character and Fitness Committee may resign at any time.

(b) Chair and Vice-Chair. The Supreme Court shall designate two attorney members of the Character and Fitness Committee to serve as its chair and vice-chair for terms as set forth in subsection (a). The chair shall also be a member of the Advisory Committee.

(c) Committee Members Emeritus. A former member of the Character and Fitness Committee (f/k/a Bar Committee) may participate as a member of an inquiry panel or hearing board as provided in C.R.C.P. 208.4 and 209.2, when needed.

(d) Powers and Duties. The Character and Fitness Committee shall:

(i) Enforce the character and fitness standards set forth in C.R.C.P. 208 in the review of all applications for admission to the practice of law in Colorado;

(ii) Participate in inquiry panels as set forth in C.R.C.P. 208.4;

(iii) Participate on hearing boards empaneled by the Office of the Presiding Disciplinary Judge pursuant to C.R.C.P. 209.2;

(iv) Periodically report to the Advisory Committee on the operations of the Character and Fitness Committee;

(v) Make recommendations to the Advisory Committee regarding proposed changes or additions to rules that concern the functions of the Character and Fitness Committee; and

(vi) Adopt such practices as may from time to time become necessary to govern the internal operations of the Character and Fitness Committee.

Source: Entire rule added and effective September 1, 2014; (3)(a) and (3)(b) amended and effective April 11, 2019.

ANNOTATION

Law reviews. For article, ''The Colorado Character Investigation of Applicants to the Bar'', see 28 Dicta 333 (1951).

Rule 202.4. Attorney Regulation Counsel

The Attorney Regulation Counsel shall maintain and supervise a permanent office, hereinafter referred to as the Office of Attorney Admissions, to serve as a central office for (a) the filing and processing of all applications for admission, certification, and other authorization to practice law in Colorado; (b) the administration of the Colorado bar examination; (c) the investigation of all applicants' character and fitness; and d) the certification to the Supreme Court of applicants' qualifications to practice law in Colorado. The Attorney Regulation Counsel shall administer all attorney admission functions as part of a budget approved by the Supreme Court.

Source: Entire rule added and effective September 1, 2014.

Rule 202.5. Immunity

(1) **Committees, Staff, and Volunteers.** Persons performing official duties under the provisions of this chapter, including but not limited to the Advisory Committee and its

members, the Board of Law Examiners and its members, the Attorney Regulation Counsel and staff, the Presiding Disciplinary Judge and staff, members of hearing boards, and other enlisted volunteers are immune from suit for all conduct performed in the course of their official duties.

(2) **Other Participants in Admission Proceedings.** Testimony, records, statements of opinion and other information regarding an applicant for attorney admission communicated by any person or entity to the Advisory Committee or its members, the Board of Law Examiners or its members, the Attorney Regulation Counsel or staff, the Presiding Disciplinary Judge or staff, members of hearing boards, the Colorado Lawyer Assistance Program or staff, or other volunteers shall be absolutely privileged, and no lawsuit shall be predicated thereon. If the matter is confidential as provided in these rules, and if the person or entity who testified or otherwise communicated does not maintain confidentiality, then the testimony or communications shall be qualifiedly privileged, such that an action may lie against a person or entity who provided the testimony or communications in bad faith or with reckless disregard of its truth or falsity.

Source: Entire rule added and effective September 1, 2014.

Rule 203. Colorado License to Practice Law

Rule 203.1. General Provisions

(1) **Application Forms.** All applications for a license to practice law in Colorado shall be made on forms furnished by the Office of Attorney Admissions. The application forms shall require such information as is necessary to determine whether the applicant meets the requirements of these rules, together with such additional information as is necessary for the efficient administration of these rules. Applicants must answer all questions completely, and must provide all required documentation. The Office of Attorney Admissions may, in its discretion, reject an incomplete application or place an incomplete application on hold until all required information is produced.

(2) **Confidentiality.** Information contained on applications for a license to practice law in Colorado shall be deemed confidential and may be released only under the conditions for release of confidential information established by C.R.C.P. 211.1.

(3) **Duty to Supplement.**

(a) Applicants must immediately update the application with respect to all matters inquired of. This duty to supplement continues in effect up to the time an applicant takes the oath of admission. Updates must be reported in a manner consistent with the Office of Attorney Admissions' requirements.

(b) Failure to timely supplement a pending application may result in the denial of the application, a review of such failure as a character and fitness issue, or if the person has already been admitted to the practice of law in Colorado, discipline or revocation of the person's license to practice law.

(4) **Fees.** All applicants must pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted.

(5) **Admission to the Bar.** An applicant who qualifies for admission under this rule, and who meets the character and fitness requirements set forth in C.R.C.P. 208, shall be admitted to the practice of law in Colorado in the manner prescribed by these rules.

(6) **Disbarred Out-of-State Attorneys.** A person who has been disbarred from the practice of law in another jurisdiction, or who has resigned pending disciplinary proceedings in another jurisdiction, other than reciprocal action based upon a Colorado disbarment, is not eligible to apply for admission to the practice of law in Colorado until the person has been readmitted in the jurisdiction in which the person was disbarred or resigned.

(7) **Suspended Out-of-State Attorneys.** A person who has been suspended for disciplinary purposes from the practice of law in another jurisdiction, other than reciprocal discipline based upon Colorado discipline, is not eligible to apply for admission to the practice of law in Colorado until the period of suspension has expired and the person has been reinstated to the practice of law in the jurisdiction in which the person was suspended.

(8) **Mandatory Professionalism Course.** All applicants under these rules, unless otherwise exempted, must complete the required course on professionalism presented by the Office of Attorney Regulation Counsel in cooperation with the Colorado Bar Association - CLE. Continuing legal education credit will be applied to the attorneys' first compliance period pursuant to C.R.C.P. 250.2(1). Any fees received for the course shall be divided equally between the Colorado Bar Association - CLE and the Office of Attorney Regulation Counsel to pay for administering the course and to fund the attorney regulation system. Credit for completion of the professionalism course will be valid for eighteen months following completion of the course. Applicants under C.R.C.P. 205 temporary practice rules are not required to take this course.

Source: Entire rule added and effective September 1, 2014; (8) added and effective January 24, 2019.

ANNOTATION

Law reviews. For article, ''Notes on Proposed Amendments to Colorado Rules of Civil Procedure'', see 27 Dicta 165 (1950). For article, ''The Colorado Character Investigation of Applicants to the Bar'', see 28 Dicta 333 (1951).

Annotator's note. The following annotations include cases decided under former C.R.C.P. 201, which was repealed in 1982 and was similar to this rule.

The ban on the unauthorized practice of law is not unconstitutionally vague or overbroad and does not violate the first amendment. People v. Shell, 148 P.3d 162 (Colo. 2006).

Moral qualifications affidavit requires updating. Although the rules in effect in 1970 did not require formal updating of an applicant's moral qualifications, the affidavit is a continuing one which does require updating. People v. Mattox, 639 P.2d 397 (Colo. 1982) (decided under former C.R.C.P. 209).

Applied in People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980); Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Rule 203.2. Applications for Admission on Motion by Qualified Out-of-State Attorneys

(1) An applicant who meets the following requirements may, upon motion, be admitted by the Supreme Court to the practice of law in Colorado. An applicant under this rule shall:

(a) Have been admitted to practice law in another jurisdiction of the United States[1] that allows admission to licensed Colorado attorneys on motion without the requirement of taking that jurisdiction's bar examination;

(b) Hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;

(c) Have been primarily engaged in the active practice of law in one or more other jurisdictions in the United States for three of the five years immediately preceding the date upon which the application is filed;

(d) Establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

(e) Establish that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction, and is current with all continuing legal education requirements;

(f) Establish that the applicant possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208; and

(g) Pay the required application fee.

(2) For purposes of this rule, the ''active practice of law'' shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized

[1] For purposes of these rules, a ''jurisdiction of the United States'' is defined as another state or territory of the United States, or the District of Columbia.

to practice law, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities performed pursuant to any rule regarding the practice of law pending admission or in advance of bar admission in another jurisdiction be accepted toward the durational requirement:

(a) Representation of one or more clients in the private practice of law;

(b) Service as a lawyer with a local, state, territorial or federal agency, or governmental branch, including military service;

(c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judicial officer in a federal, state, territorial or local court of record;

(e) Service as a judicial law clerk; or

(f) Service as legal counsel to the lawyer's employer or its organizational affiliates.

(3) For purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

(4) Reserved - There is no subsection (4).

(5) For purposes of this rule, all applicants must pass the Multi-State Professional Responsibility Examination (MPRE) prior to admission. A passing score will be valid if it was achieved at an examination taken not more than two years before acceptance of the application for admission in Colorado. The Supreme Court shall review and determine the passing score for the MPRE.

(6) **Professionalism Course.** All applicants under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following admission.

Source: Entire rule added and effective July 1, 2014; (6) amended and effective May 11, 2017; (6) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 203.3. Applications for Admission on Motion Based upon UBE Score Transfer

(1) **Score Transfer, Generally.** An applicant who has taken the Uniform Bar Examination (UBE) in a jurisdiction other than Colorado, and who meets the following requirements may, upon motion, be admitted to the practice of law in Colorado based upon UBE score transfer. The applicant under this rule shall:

(a) Have earned a UBE score that is passing, based upon the general standards of performance set by the Supreme Court, in an administration of the UBE taken within the three years immediately preceding the date upon which the motion is filed;

(b) Hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(c) Establish that the applicant is currently a member in good standing in all jurisdictions where admitted, if any;

(d) Establish that the applicant is not currently subject to attorney discipline or the subject of a pending disciplinary matter in any jurisdiction;

(e) Establish that the applicant possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208; and

(f) Pay the required application fee.

(2) **Score Transfer, Three to Five Years.** If the transferred UBE score was earned more than three years but less than five years before the date upon which the motion was filed, the applicant may qualify for admission under this rule if the applicant also

establishes that the applicant has been primarily engaged in the active practice of law, as defined in C.R.C.P. 203.2(2), for at least two years immediately preceding the date of the application in another jurisdiction of the United States wherein the applicant is a member in good standing and authorized to practice law throughout the aforesaid two-year period.

(3) All Colorado UBE score transfer applicants must pass the Multi-State Professional Responsibility Examination (MPRE), as described in C.R.C.P. 203.2(5), prior to admission.

(4) **Professionalism Course.** All Colorado UBE score transfer applicants must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following admission.

Source: Entire rule added and effective September 1, 2014; (4) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 203.4. Applications for Admission by Colorado Bar Examination

(1) All applicants who are ineligible for admission on motion as a qualified out-of-state attorney as set forth in C.R.C.P. 203.2, or by UBE score transfer as set forth in C.R.C.P. 203.3, must, as a condition of admission, take and pass the Colorado bar examination.

(2) Colorado bar examination applications for the February 2015 Bar Examination must be received or postmarked on or before the first day of December, 2014. After December 1, 2014, Colorado bar examination applications must be received on or before the first day of November preceding the February bar examination; or on or before the first day of April preceding the July bar examination; or at such other times as may be designated by the Supreme Court.

(3) By the time of the examination, Colorado bar examination applicants must have received:

(a) a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(b) a J.D. or LL.B. degree from a state-accredited law school, provided that such applicant shall have been admitted in another jurisdiction of the United States and shall have been primarily engaged in the active practice of law, as defined by C.R.C.P. 203.2, for three of the five years immediately preceding application for bar examination admission in Colorado; or

(c) a first professional law degree from a law school in a common law, English-speaking nation other than the United States provided that such applicant shall:

i) have been admitted to the bar of the nation where the applicant received the first professional law degree or in another foreign or United States jurisdiction;

ii) establish that the applicant is currently a member in good standing in all jurisdictions where admitted; and

iii) have been primarily engaged in the active practice of law, as defined by C.R.C.P. 203.2, for three of the five years immediately preceding application for admission to the practice of law in Colorado.

(4) All Colorado bar examination applicants must pay the required application fee.

(5) All successful Colorado bar examination applicants must pass the Multi-State Professional Responsibility Examination (MPRE), as described in C.R.C.P. 203.2(5), prior to admission.

(6) **Professionalism Course.** All successful Colorado bar examination applicants must complete the course on professionalism, as described in C.R.C.P. 203.1(8), prior to and as a condition of admission. Credit for completion of the professionalism course will be valid for eighteen months following completion of the course.

(7) Any unsuccessful applicant may, upon request, obtain a copy of the applicant's answers to the essay portions of the examination. Such request shall be made on a form furnished by the Office of Attorney Admissions. This rule does not permit applicants to obtain any materials other than the applicant's written essay answers.

Source: Entire rule added and effective September 1, 2014; amended and effective May 11, 2017; (6) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 204. Certifications/Limited Admissions to Practice Law

Rule 204.1. Single-Client Counsel Certification

(1) General Statement and Eligibility. In its discretion, the Supreme Court may certify an attorney who is not licensed to practice law in Colorado, but who declares domicile in Colorado, to act as counsel for a single client if all of the following conditions are met:

(a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;

(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(c) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction;

(d) The attorney possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208; and

(e) The attorney's practice of law is limited to acting as counsel for such single client (which may include a business entity or an organization and its organizational affiliates).

The attorney shall notify the Clerk of the Supreme Court Office of Attorney Registration within twenty-eight days of any changed circumstance, including those listed in section (6) of this rule, that result in any of the conditions listed in this section no longer being met. An attorney who acts as a public employee or public official shall not be eligible for certification under this rule.

(2) Filing Requirements. An applicant under this rule shall file an application for single-client counsel certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The fee shall be made payable to the Clerk of the Supreme Court. The application shall include all of the following:

(a) A certification that the attorney's practice is limited to representation of the single client;

(b) A certification that the attorney has advised the single client that the attorney is not a licensed Colorado attorney;

(c) A certification by the client that the client is aware the attorney is not a licensed Colorado attorney and that the attorney will be exclusively employed by that client; and

(d) A certificate of good standing from all courts and jurisdictions in which the attorney is admitted to practice.

(3) Scope of Authority. An attorney certified under this rule has the authority to act on behalf of the single client for all purposes as if licensed in Colorado. The attorney may not act as counsel for the client until certified under this rule. Certification under this rule shall be solely for so long as the attorney engages in such limited practice on behalf of such single client.

(4) Pro Bono Practice. Notwithstanding the provisions of subsection (1)(e) above, an attorney certified under this rule may provide pro bono legal services under the auspices of an entity described in C.R.C.P. 250.9(2), in accordance with Colo. RPC 6.1.

(5) Discipline and Disability Jurisdiction. An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct and C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(6) Termination of Certification. Certification under this rule shall automatically terminate when the attorney:

(a) Ceases to be engaged in such limited practice on behalf of such client;

(b) Is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted;

(c) Is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter; or

(d) Fails to maintain active status in at least one jurisdiction where fully licensed.

The attorney shall notify in writing the Clerk of the Supreme Court Office of Attorney Registration of any change of status described in this section (6) within twenty-eight days of such change.

(7) Registration, Fees, and Continuing Legal Education. An attorney certified under this rule must pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as the mandatory legal education requirements of C.R.C.P. 250.

(8) Registration Number. An attorney certified under this rule shall be assigned a registration number, which shall be used to identify that attorney's certification status in Colorado in accordance with applicable rules of procedure.

(9) Subsequent Attorney Admission. If an attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's single-client certification shall be superseded by the Colorado license to practice law.

(10) Professionalism Course. All attorneys certified under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following certification.

Source: Entire rule added and effective September 1, 2014; (4) and (7) amended, and (10) added, effective January 24, 2019.

ANNOTATION

Law reviews. For article, "Colorado Adopts Rules Governing Out-of-State Attorneys", see 32 Colo. Law. 27 (February 2003).

Rule 204.2. Foreign Legal Consultant Certification

(1) General Statement and Eligibility. In its discretion, the Supreme Court may certify foreign legal consultants to practice law in Colorado if all of the following conditions are met:

(a) The applicant is, and for at least the past five years has been, a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) The applicant has been, for at least three of the five years immediately preceding his or her application, lawfully engaged in the active practice of law in the foreign country or another jurisdiction substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the foreign country;

(c) The applicant is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction;

(d) The applicant possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208; and

(e) The applicant intends to practice as a foreign legal consultant in Colorado and to maintain an office in Colorado for that purpose or to be employed as a foreign legal

consultant by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services.

(2) Filing Requirements. An applicant under this rule shall file an application for foreign legal consultant certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The application fee shall be made payable to the Clerk of the Supreme Court. The application shall include all of the following:

(a) A certificate from the professional body or public authority having ultimate jurisdiction over professional discipline in each foreign country in which the applicant is admitted, certifying the applicant's admission to practice, date of admission, and good standing as an attorney or counselor at law or the equivalent;

(b) A letter of recommendation from one of the members of the executive body of each such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction in each foreign country in which the applicant is admitted;

(c) Duly authenticated English translations of the certificate required by subsection (2)(a) of this rule and the letter required by subsection (2)(b) of this rule if they are not in English;

(d) If the applicant is employed by or intends to be employed by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services:

(i) A certification that the applicant has advised the organization that the applicant is not a licensed Colorado attorney; and

(ii) A certification by an officer, director, or general counsel of the organization that the organization is aware the applicant is not a licensed Colorado attorney;

(e) A certification that the applicant has advised or will advise all clients that the applicant is not a licensed Colorado attorney;

(f) A commitment that the applicant will abide by the Colorado Rules of Professional Conduct to the extent applicable to the provision of the legal services authorized under section (3) of this rule;

(g) Unless the foreign legal consultant is employed exclusively by an organization as defined in subsection (1)(e) of this rule, an undertaking or appropriate evidence of professional liability insurance, under terms acceptable to the Supreme Court Office of Attorney Registration, covering all legal services to be provided to Colorado clients;

(h) A duly acknowledged instrument in writing, providing the applicant's address in Colorado, and in any other U.S. jurisdiction or foreign country, and designating the Clerk of the Supreme Court Office of Attorney Registration as his or her agent for service of process; and

(i) Other evidence as the Supreme Court Office of Attorney Registration may require regarding the applicant's educational and professional qualifications, character and fitness, and satisfaction of the conditions of section (1) of this rule.

(3) Scope of Authority.

(a) A person certified to practice as a foreign legal consultant under this rule may render legal services in Colorado only with regard to matters authorized by the law of the foreign jurisdiction(s) in which the person is admitted to practice. Notwithstanding the foregoing, such person shall not be considered admitted to practice law in Colorado, or in any way hold himself or herself out as a Colorado attorney, or do any of the following:

(i) Appear as an attorney in Colorado on behalf of another person in any court, or before any magistrate or other judicial officer (except when admitted as a foreign attorney pro hac vice pursuant to C.R.C.P. 205.5);

(ii) Prepare:

(A) Any instrument effecting the transfer or registration of title to real estate located in the United States;

(B) Any will or trust instrument effecting the disposition on death of any property located and owned by a resident of the United States;

(C) Any instrument relating to the administration of a decedent's estate in the United States; or

(D) Any instrument in respect of the marital or parental relations, rights, or duties of a resident of the United States, or the custody or care of the children of such a resident; or

(iii) Render legal advice on the law of Colorado or of the United States (whether rendered incident to the preparation of legal instruments or otherwise).

(b) A person certified under this rule, other than one employed exclusively by an organization as described in subsection (1)(e), shall carry on a practice under, or utilize in connection with such practice, the following identifying information:

(i) The foreign legal consultant's own name;

(ii) The name of the law firm with which the foreign legal consultant is associated; and

(iii) The title ''foreign legal consultant,'' which shall be used in conjunction with the words ''admitted to the practice of law in [name of the foreign country of his or her admission to practice].''

(4) Rights and Obligations.

(a) Subject to the limitations listed in section (3) of this rule, a person certified under this rule shall be considered a Colorado certified foreign legal consultant and shall be entitled and subject to the rights and obligations of a Colorado attorney with respect to:

(i) Affiliation in the same law firm with one or more Colorado attorneys, including by:

(A) Employing one or more Colorado attorneys;

(B) Being employed by one or more Colorado attorneys or by any partnership, professional corporation, or other legal entity that includes Colorado attorneys or that maintains an office in Colorado; and

(C) Being a partner in any partnership, or member in any professional entity, that includes Colorado attorneys or that maintains an office in Colorado; and

(ii) Attorney-client privilege and work-product privilege.

(b) A person certified under this rule shall report to the Clerk of the Supreme Court Office of Attorney Registration within twenty-eight days any of the following events:

(i) Whether or not public, any change in the foreign legal consultant's license status in another jurisdiction, including the foreign legal consultant's resignation;

(ii) Whether or not public, any disciplinary charge, finding, or sanction concerning the foreign legal consultant by any disciplinary authority, court, or other tribunal in any jurisdiction;

(iii) Any change in the foreign legal consultant's good standing in another jurisdiction; and

(iv) Any changes to the professional liability insurance required under subsection (2)(g) of this rule.

(c) A person certified under this rule shall:

(i) Before providing any legal services, advise each prospective client that he or she is not licensed in Colorado and may not provide advice on the law of Colorado or the United States;

(ii) Before providing any legal services, provide each prospective client a letter disclosing the extent of the professional liability insurance required by subsection (2)(g) of this rule; and

(iii) Notify each existing client in writing of any change to the professional liability insurance required under subsection (2)(g) within twenty-eight days of such change.

(5) Practice by a Foreign Legal Consultant in Another United States Jurisdiction. A person licensed, certified, or otherwise authorized as a foreign legal consultant in another jurisdiction in the United States may provide foreign legal consulting services in Colorado on a temporary basis pursuant to the rule for temporary practice by foreign attorneys. A person licensed as a foreign legal consultant in another jurisdiction in the United States shall not establish an office or other place for the regular practice of law in Colorado or hold out to the public or otherwise represent that the foreign legal consultant is certified as a foreign legal consultant in Colorado.

(6) Discipline and Disability Jurisdiction. A person certified to practice law as a foreign legal consultant under this rule is subject to the Colorado Rules of Professional Conduct and C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and

Disability Proceedings). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(7) Service of Process.

(a) In any action or proceeding brought against the foreign legal consultant and arising out of or based upon any legal services rendered or offered to be rendered by the foreign legal consultant while present in Colorado or to residents of Colorado, service shall first be attempted upon the foreign legal consultant at the most recent Colorado address filed with the Clerk of the Office of Attorney Registration. Whenever after due diligence service cannot be made upon the foreign legal consultant at that address, service may be made upon the Clerk of the Office of Attorney Registration. Service in accordance with this provision is effective as if service had been made personally upon the foreign legal consultant.

(b) Service of process on the Clerk under subsection (7)(a) of this rule shall be made by personally delivering to the Clerk's office, and leaving with the Clerk, or with a deputy or assistant authorized by the Clerk to receive service, duplicate copies of the process together with a fee as set by the Supreme Court. The Clerk shall promptly send one copy of the process to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to the foreign legal consultant at the most recent Colorado and other address provided in accordance with subsection (2)(h) of this rule.

(c) The foreign legal consultant shall keep the Clerk advised in writing of any changes of address within the time period required by C.R.C.P. 227.

(8) Termination of Certification. If the Supreme Court determines that a person certified as a foreign legal consultant under this rule no longer meets the conditions for certification, it may summarily terminate the foreign legal consultant's certification.

(9) Registration and Fees. A person licensed as a foreign legal consultant shall pay annual attorney registration fees and comply with all other provisions of C.R.C.P. 227.

(10) Certification Number. A person certified under this rule shall be assigned a certification number, which shall be used to identify that person's certification status in Colorado. Whenever an initial pleading is signed by a person authorized under this rule, it shall also include thereon the person's certification number. Whenever an initial appearance is made in court without a written pleading, the person shall advise the court of the person's certification number. The number need not be on any subsequent pleadings unless required by rule of court or practice.

(11) Sanctions. A foreign legal consultant who fails to register under this rule shall be:

(a) Subject to professional discipline in Colorado;

(b) Ineligible for admission on motion in Colorado;

(c) Referred by the Office of Attorney Registration to the Office of Admissions; and

(d) Referred by the Office of Attorney Registration to the disciplinary authority of the jurisdictions of licensure, U.S. and/or foreign.

(12) Subsequent Attorney Admission. If a person certified as a foreign legal consultant under this rule is subsequently admitted to the practice of law in Colorado, that person's foreign legal consultant certification shall be superseded by the Colorado license to practice law.

(13) Professionalism Course. All attorneys certified under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following certification.

Source: Entire rule added and effective September 1, 2014; (13) added and effective January 24, 2019.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 204.3. Judge Advocate Certification

(1) General Statement and Eligibility. In its discretion, the Supreme Court may certify a full-time commissioned officer and judge advocate of the United States Uniformed Services stationed in Colorado to be temporarily admitted to the practice of law in Colorado if all of the following conditions are met:

(a) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(b) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction; and

(c) The attorney possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208.

(2) Filing Requirements. An applicant under this rule shall file an application for judge advocate certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The fee shall be made payable to the Clerk of the Supreme Court. The application shall include all of the following:

(a) A copy of the applicant's military orders reflecting a permanent change of station to a military installation in Colorado;

(b) A certification that the applicant has read and is familiar with the Colorado Rules of Professional Conduct; and

(c) A certificate of good standing from all courts and jurisdictions in which the applicant is admitted to practice.

(3) Scope of Authority. An attorney certified under this rule shall be entitled to all rights and privileges and subject to all duties, obligations, and responsibilities otherwise applicable to licensed Colorado lawyers for the limited period of authorized practice under this rule. The attorney may not act as counsel for a client until certified under this rule.

(4) Discipline and Disability Jurisdiction. An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct and C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(5) Termination of Certification. Certification under this rule shall automatically terminate when the attorney:

(a) Ceases to serve as a judge advocate in Colorado;

(b) Is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted;

(c) Is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter; or

(d) Fails to maintain active status in at least one jurisdiction.

The attorney shall notify the Clerk of the Supreme Court Office of Attorney Registration of any change of status described in this section (5) within twenty-eight days of such change.

(6) Required Action After Termination of Certification. Upon the termination of certification pursuant to section (5) of this rule, the attorney, within twenty-eight days, shall:

(a) Notify in writing all clients in pending matters, and co-counsel and opposing counsel in pending litigation, of the termination of the attorney's authority to practice law pursuant to this rule;

(b) Decline any new representation that would require the attorney to be admitted to practice law in Colorado; and

(c) Take all other necessary steps to protect the interests of the attorney's clients.

(7) Registration, Fees, and Continuing Legal Education. An attorney certified under this rule shall be required to pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as the mandatory legal education requirements of C.R.C.P. 250.

(8) Registration Number. An attorney certified under this rule shall be assigned a registration number, which shall be used to identify that attorney's status in Colorado in accordance with applicable rules of procedure.

(9) Subsequent Attorney Admission. If an attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's judge advocate certification shall be superseded by the Colorado license to practice law.

(10) Professionalism Course. All attorneys certified under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following certification.

Source: Entire rule added and effective September 1, 2014; (7) amended and (10) added, effective January 24, 2019.

Rule 204.4. Military Spouse Certification

(1) General Statement and Eligibility. Due to the unique mobility requirements of military families who support the defense of our nation, the Supreme Court in its discretion may certify an attorney who is a spouse, including a legally recognized domestic partner, (''spouse'') of a member of the United States Uniformed Services (''service member''), stationed within Colorado, to practice law pursuant to the terms of this rule if all of the following conditions are met:

(a) The attorney has been admitted to practice law and is on active status in another jurisdiction in the United States;

(b) The attorney holds a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;

(c) The attorney is currently a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(d) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction; and

(e) The attorney possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208.

(2) Filing Requirements. An applicant under this rule shall file an application for military spouse certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The fee shall be made payable to the Clerk of the Supreme Court. An applicant under this rule shall:

(a) Demonstrate presence in Colorado as a spouse of a service member by filing a copy of the certification of legal relationship, such as a marriage or civil union license, and a copy of the service member's military orders reflecting a permanent change of station to a military installation in Colorado;

(b) Certify that the applicant has read and is familiar with the Colorado Rules of Professional Conduct;

(c) Provide the Office of Attorney Registration with a certificate of good standing from all courts and jurisdictions in which the attorney is admitted to practice; and

(d) Within twenty-six weeks of being certified under this rule, complete the required course on professionalism described in C.R.C.P. 203.2.

(3) Scope of Authority. Except as provided in this rule, an attorney admitted under this rule shall be entitled to all rights and privileges and subject to all duties, obligations, and responsibilities otherwise applicable to licensed Colorado lawyers for the period of authorized practice under this rule. The attorney may not act as counsel for a client until certified under this rule.

(4) Discipline and Disability Jurisdiction. An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(5) Termination of Certification.

(a) Certification under this rule shall terminate when:

(i) The service member is no longer a member of the United States Uniformed Services;

(ii) The military spouse attorney is no longer a spouse of the service member;

(iii) The service member receives a permanent transfer outside Colorado, except that if the service member has been assigned to an unaccompanied or remote assignment with no dependents authorized, the military spouse attorney may continue to practice law pursuant to the provisions of this rule until the service member is assigned to a location with dependents authorized;

(iv) The military spouse is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted; or

(v) The military spouse is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter.

(b) If any of the events listed in subsection (5)(a) occur, the attorney certified under this rule shall notify the Clerk of the Supreme Court Office of Attorney Registration, as well as the Attorney Regulation Counsel, Office of Admissions, of the event in writing within fourteen days of the date upon which the event occurs. Termination shall occur twenty-eight days thereafter, allowing for a twenty-eight-day winding down period. If the event occurs because the service member is deceased or disabled, the attorney shall notify the above offices within twenty-six weeks of the date upon which the event occurs, and termination shall occur within twenty-eight days thereafter, allowing for a twenty-eight-day winding down period.

(6) Required Action After Termination of Certification. Upon the termination of certification pursuant to section (5) of this rule, the lawyer, within twenty-eight days, shall:

(a) Cease to occupy an office or other place for the regular practice of law in Colorado, unless authorized to do so pursuant to another rule;

(b) Notify in writing all clients in pending matters, and co-counsel and opposing counsel in pending litigation, of the termination of the attorney's authority to practice law pursuant to this rule;

(c) Decline any new representation that would require the attorney to be admitted to practice law in Colorado; and

(d) Take all other necessary steps to protect the interests of the attorney's clients.

(7) Registration, Fees, and Continuing Legal Education. An attorney certified under this rule shall be required to pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as the mandatory legal education requirements of C.R.C.P. 250.

(8) Registration Number. An attorney certified under this rule shall be assigned a registration number, which shall be used to identify that attorney's registration status in Colorado in accordance with applicable rules of procedure.

(9) Subsequent Attorney Admission. If an attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's military spouse certification shall be superseded by the Colorado license to practice law.

(10) Professionalism Course. All attorneys certified under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following certification.

Source: Entire rule added and effective September 1, 2014; (7) amended and (10) added, effective January 24, 2019.

Rule 204.5. Law Professor Certification

(1) General Statement and Eligibility. In its discretion, the Supreme Court may certify a law professor who has been admitted to practice law in another jurisdiction in the United States to practice law in Colorado if all of the following conditions are met:

(a) The attorney is a law school graduate who, as determined by the Attorney Regulation Counsel, Office of Admissions, is employed full-time as a dean or teacher of law at

a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association located in Colorado;

(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(c) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction; and

(d) The attorney possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208.

(2) Filing Requirements. An applicant under this rule shall submit an application for law professor certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The required application fee shall be made payable to the Clerk of the Supreme Court. The application shall include the following:

(a) A certification of employment by the law school; and

(b) A certificate of good standing from all courts and jurisdictions in which the attorney is admitted to practice.

(3) Scope of Authority. Except as provided in this rule, an attorney certified under this rule shall be entitled to all rights and privileges and subject to all duties, obligations, and responsibilities otherwise applicable to licensed Colorado lawyers for the period of authorized practice under this rule. The attorney may not act as counsel for a client until certified under this rule.

(4) Discipline and Disability Jurisdiction. An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(5) Termination of Certification. Certification under this rule shall automatically terminate when:

(a) The attorney no longer holds full-time status as a dean or teacher of law at the Colorado law school;

(b) The attorney is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted; or

(c) The attorney is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter.

The attorney admitted pursuant to this rule shall notify the Colorado Supreme Court Office of Attorney Registration of any change of status described in this section (5) within twenty-eight days of such change.

(6) Required Action After Termination of Certification. Upon the termination of certification pursuant to section (5) of this rule, the attorney, within twenty-eight days, shall:

(a) Notify in writing all clients in pending matters, and co-counsel and opposing counsel in pending litigation, of the termination of the attorney's authority to practice law pursuant to this rule;

(b) Decline any new representation that would require the attorney to be admitted to practice law in Colorado; and

(c) Take all other necessary steps to protect the interests of the attorney's clients.

(7) Registration, Fees, and Continuing Legal Education. An attorney certified under this rule shall be required to pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as the mandatory legal education requirements of C.R.C.P. 250.

(8) Registration Number. An attorney certified under this rule shall be assigned a registration number, which shall be used to identify that attorney's registration status in Colorado in accordance with applicable rules of procedure.

(9) Subsequent Attorney Admission. If an attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's law professor certification shall be superseded by the Colorado license to practice law.

(10) Professionalism Course. All attorneys certified under this rule must complete the course on professionalism as described in C.R.C.P. 203.1(8), within six months following certification.

Source: Entire rule added and effective September 1, 2014; (7) amended and (10) added, effective January 24, 2019.

Rule 204.6. Pro Bono Counsel Certification

(1) General Statement and Eligibility. In its discretion, the Supreme Court may certify attorneys not otherwise authorized to practice law in Colorado to provide pro bono legal services under the auspices of an entity described in C.R.C.P. 250.8(2), in accordance with Colo. RPC 6.1.

(a) To act in such a capacity, the applicant for pro bono counsel certification must be either:

(i) An attorney, including a retired attorney, admitted to practice law in Colorado who:

(A) Is now on inactive status;

(B) Is a member in good standing of the bar of all courts and jurisdictions in which he or she has been admitted to practice;

(C) Has no pending formal disciplinary or disability proceeding; and

(D) Limits his or her practice to acting as pro bono counsel as set forth in this rule and, notwithstanding the reduced fee provisions of Colo. RPC 6.1(b), will not receive or expect compensation or other direct or indirect pecuniary gain for the legal services rendered; or

(ii) An out-of-state attorney domiciled in Colorado but not admitted to practice law in Colorado who:

(A) Is licensed to practice law and is on active, inactive, or equivalent status in another jurisdiction in the United States;

(B) Is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(C) Has no pending formal disciplinary or disability proceeding;

(D) Agrees to be subject to the Colorado Rules of Professional Conduct and the Rules of Procedure Regarding Attorney Discipline and Disability Proceedings; and

(E) Limits his or her practice to acting as pro bono counsel as set forth in this rule and, notwithstanding the reduced fee provisions of Colo. RPC 6.1(b), will not receive or expect compensation or other direct or indirect pecuniary gain for the legal services rendered.

(b) This rule shall not preclude a nonprofit entity from receiving court-awarded attorney fees for representation provided by a certified pro bono counsel and shall not preclude a certified pro bono counsel from receiving reimbursement for otherwise recoverable costs, but not including fees, incurred in representing a pro bono client.

(2) Filing Requirements. An applicant under this rule shall file an application for pro bono counsel certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The fee shall be made payable to the Clerk of the Supreme Court. The application shall include a certification that the applicant agrees to the provisions of subsection (1)(a) above.

(3) Scope of Authority. An attorney certified under this rule has the authority to act as pro bono counsel for clients as defined in section (1) of this rule. The attorney may not act as counsel for a client until certified under this rule.

(4) Discipline and Disability Jurisdiction. An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

(5) Termination of Certification. Certification under this rule shall automatically terminate when:

(a) The attorney fails to file the registration statement or pay the registration fee described in section (6) of this rule;

(b) The attorney is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted; or

(c) The attorney is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter.

The attorney shall notify in writing the Clerk of the Supreme Court Office of Attorney Registration of any change of status described in this section (5) within twenty-eight days of such change.

(6) Registration and Fees.

(a) An attorney certified under this rule shall not be required to pay an annual registration fee if the attorney has provided pro bono legal services under this rule within the prior twelve-month period. In order to be exempt from paying an annual registration fee, the attorney shall file a registration statement on or before February 28, identifying the entity or entities, as described in section (1) of this rule, for which the attorney has volunteered in the prior twelve-month period.

(b) An attorney certified under this rule who has not provided pro bono legal services under this rule within the prior twelve-month period is not required to file the registration statement described in subsection (a) above, but the attorney must pay the registration fee that was applicable in the prior calendar year for registered inactive attorneys pursuant to C.R.C.P. 227(A). By paying that fee, the attorney may remain a certified pro bono counsel under this rule.

(c) Failure of an attorney certified under this rule to file a registration statement or pay the prior year's inactive attorney registration fee by February 28 of each year shall result in automatic termination of status as certified pro bono counsel and may result in suspension of the attorney's Colorado license, if applicable.

(d) All fees collected by the Office of Attorney Registration under this rule shall be used to fund the Attorney Regulation system.

(7) Certification Number. An attorney certified under this rule shall be assigned a certification number, which shall be used to identify that attorney's certification status in Colorado. Whenever an initial pleading is signed by an attorney authorized under this rule, it shall also include the attorney's certification number. Whenever an initial appearance is made in court without a written pleading, the attorney shall advise the court of the attorney's certification number. The number need not be on any subsequent pleadings unless otherwise required by rule of court or practice.

(8) Change of Attorney Status. If a Colorado attorney certified under this rule subsequently changes his or her status to active, that attorney's pro bono counsel certification shall be terminated. If an out-of-state attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's pro bono counsel certification shall be superseded by the Colorado license to practice law.

(9) Professionalism Course; Continuing Legal Education. All attorneys certified under this rule are exempt from taking the professionalism course described in C.R.C.P. 203.1(8) and are exempt from the continuing legal education requirements under C.R.C.P. 250.

Source: Entire rule added and effective September 1, 2014; IP (1) amended and (9) added, effective January 24, 2019.

ANNOTATION

Law reviews. For article, ''New Rule Allows Retired and Inactive Lawyers to Provide Pro Bono Legal Services'', see 36 Colo. Law. 75 (September 2007).

Rule 205. Other Authorizations to Practice Law

Rule 205.1. Temporary Practice by Out-of-State Attorney - Conditions of Practice

(1) Eligibility. An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule:

(a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;

(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(c) The attorney has not established domicile in Colorado; and

(d) The attorney has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.

(2) Scope of Authority. An out-of-state attorney may practice law in Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with C.R.C.P. 205.3 concerning pro hac vice admission and an out-of-state attorney who wishes to appear before any administrative tribunal must comply with C.R.C.P. 205.4 concerning pro hac vice admission before state agencies. An out-of-state attorney who engages in the practice of law in Colorado pursuant to this rule shall be deemed to have obtained a license for the limited scope of practice specified in this rule.

(3) Discipline and Disability Jurisdiction. An out-of-state attorney practicing law under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

Source: Entire rule added and effective September 1, 2014.

ANNOTATION

Law reviews. For article, ''Colorado Adopts Rules Governing Out-of-State Attorneys'', see 32 Colo. Law. 27 (February 2003).

Rule 205.2. Temporary Practice by Foreign Attorney - Conditions of Practice

(1) Eligibility. An attorney who meets the following conditions may practice as a temporary practice foreign attorney for the purpose of this rule:

(a) The attorney is admitted to practice law in a non-U.S. jurisdiction only;

(b) The attorney is a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as attorneys or counselors of law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(c) The attorney is a member in good standing to practice law in all courts and jurisdictions in which he or she is admitted to practice law;

(d) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter or the equivalent thereof in any jurisdiction;

(e) The attorney has not established domicile in Colorado; and

(f) The attorney has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing law.

(2) Scope of Authority. A foreign attorney who engages in the practice of law in Colorado pursuant to this rule shall be deemed to have obtained a license for the limited scope of practice specified in this rule. The privileges of a Colorado admitted attorney with

respect to attorney-client privilege and work-product privilege shall apply to temporary practice foreign attorneys. A foreign attorney may provide legal services in Colorado on a temporary basis under this rule that:

(a) Are undertaken in association with an attorney who is admitted to practice law in Colorado and who actively participates in the matter; or

(b) Are in or are reasonably related to a pending or potential proceeding before any Colorado state court of record or before the court of another jurisdiction, if the foreign attorney, or a person the foreign attorney is assisting, is authorized by law, order or rule to appear in such proceeding or reasonably expects to be so authorized; or

(c) Are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Colorado, if the services arise out of or are reasonably related to the attorney's practice of law in a jurisdiction in which the attorney is admitted to practice law; or

(d) Are not within subsections (2)(b) or (2)(c) of this rule and

(i) Are performed for a client who resides or has an office in a jurisdiction in which the attorney is authorized to practice law, to the extent of that authorization; or

(ii) Arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is authorized to practice law, to the extent of that authorization; or

(e) Are governed primarily by international law or the law of a non-U.S. jurisdiction.

(3) Foreign Legal Consultants. A temporary practice foreign attorney who wishes to provide legal services within the scope of C.R.C.P. 204.2 shall comply with the provisions of that rule.

(4) Pro Hac Vice Admission for Foreign Attorneys. A temporary practice foreign attorney who wishes to appear in any state court of record or administrative tribunal shall comply with C.R.C.P. 205.5 concerning pro hac vice admission.

(5) Discipline and Disability Jurisdiction. A foreign attorney providing legal services under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251 (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

Source: Entire rule added and effective September 1, 2014.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 205.3. Pro Hac Vice Authority Before State Courts - Out-of-State Attorney

(1) General Statement. An out-of-state attorney (as defined in Rule 205.1) may be permitted to appear in a particular matter in any state court of record under the conditions listed in this rule.

(2) Filing Requirements.

(a) In order to be permitted to appear as counsel in a Colorado trial court, the attorney must first:

(i) File a verified motion with the trial court requesting permission to appear;

(ii) Designate an associate attorney who is admitted and licensed to practice law in Colorado;

(iii) File a copy of the verified motion with the Clerk of the Supreme Court Office of Attorney Registration at the same time the verified motion is filed with the trial court;

(iv) Pay the required fee to the Clerk of the Supreme Court collected by the Office of Attorney Registration; and

(v) Obtain permission from the trial court for such appearance.

(b) In the verified motion requesting permission to appear, the attorney must include:

(i) A statement identifying all jurisdictions in which the attorney has been licensed;

(ii) A statement identifying by date, case name, and case number all other matters in Colorado in which the attorney has sought pro hac vice admission in the preceding five years, and whether such admission was granted or denied;

(iii) A statement identifying all jurisdictions in which the attorney has been publicly disciplined or placed on disability inactive status, in which pro hac vice admission was denied or revoked, or in which the attorney has any pending formal disciplinary or disability proceeding, including in any of the three instances described above the date of the action, the nature of the violation, and the penalty imposed;

(iv) A statement identifying the party or parties represented, and verifying that the attorney has notified the party or parties represented of the verified motion requesting permission to appear;

(v) A statement that the attorney acknowledges he or she is subject to the Colorado Rules of Professional Conduct, the Colorado Rules of Civil Procedure, and other court rules, that the attorney will follow those rules throughout the pro hac vice admission, and that the verified motion complies with those rules;

(vi) The name, address, and membership status of the licensed Colorado attorney associated for purposes of the representation;

(vii) A certificate indicating service of the verified motion upon all counsel of record and the attorney's client(s) in the matter in which leave to appear pro hac vice is sought;

(viii) The signature of the licensed Colorado associate attorney, verifying that attorney's association on the matter; and

(ix) Such other information as the Attorney Regulation Counsel may from time to time request.

(3) Names and Appearances. The name and address of the licensed Colorado associate attorney must be shown on all papers served and filed by the out-of-state attorney in a pro hac vice representation. The Colorado associate attorney shall appear personally and, unless excused, remain in attendance with the out-of-state attorney in all pro hac vice appearances.

(4) Frequency of Appearances. A separate petition, fee, and order granting permission are required for each action in which the attorney appears as pro hac vice counsel in Colorado.

(5) Trial Court's Ruling on Motion to Appear. The Attorney Regulation Counsel may provide information to the trial court that it believes relevant for the trial court's ruling on the pending motion to appear. Notwithstanding any other provision of this rule, the trial court retains full authority to approve or deny the motion or revoke the pro hac vice status as it deems appropriate.

(6) Appellate Matters and Other Forms of Review.

(a) If an attorney wants to appear in a proceeding before a Colorado appellate court, and the attorney obtained permission to appear in a proceeding involving the same action in a Colorado state trial court, the attorney only needs to file an updated affidavit with the Clerk of the Office of Attorney Registration. No additional filing fee is required.

(b) If an attorney wants to appear in a proceeding before a Colorado appellate court and the attorney did not obtain permission to appear in a proceeding involving the same action in a Colorado state trial court or administrative agency, the attorney shall file a motion and affidavit with the clerk of the Colorado appellate court, with a copy sent to the Clerk of the Office of Attorney Registration, requesting permission to appear. The motion, affidavit, and filing fee must be submitted as otherwise provided in section (2) of this rule.

(7) Discipline and Disability Jurisdiction. Any attorney authorized to appear under this rule shall be subject to all applicable provisions of the Colorado Rules of Professional Conduct, except for the provisions of Colo. RPC 1.15A through 1.15E that require an attorney to have a business account and a trust account in a financial institution doing business in Colorado; and the Colorado Rules of Civil Procedure, except C.R.C.P. 227 (general registration fees) and C.R.C.P. 250 (mandatory continuing legal education).

Source: Entire rule added and effective September 1, 2014; (7) amended and effective January 14, 2015; (7) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article, ''Colorado Adopts Rules Governing Out-of-State Attorneys'', see 32 Colo. Law. 27 (February 2003).

Criminal court may admit attorney pro hac vice. Although the criminal rules do not specifically authorize admission of an attorney pro hac vice, a court may apply the civil rules in a criminal case when the criminal rules do not specify a specific procedure. People v. Griffin, 224 P.3d 292 (Colo. App. 2009) (decided under former C.R.C.P. 221).

Rule 205.4. Pro Hac Vice Authority Before State Agencies - Out-of State Attorney

An out-of-state attorney (as defined in Rule 205.1) may, in the discretion of an administrative hearing officer in Colorado, be permitted to appear on a particular matter before any state agency in the hearings or arguments of any particular cause in which, for the time being, he or she is employed, under the same filing requirements as set forth in C.R.C.P. 205.3.

Source: Entire rule added and effective September 1, 2014.

ANNOTATION

Law reviews. For article, ''Colorado Adopts Rules Governing Out-of-State Attorneys'', see 32 Colo. Law. 27 (February 2003).

Rule 205.5. Pro Hac Vice Authority - Foreign Attorney

(1) General Statement and Eligibility. A foreign attorney, defined as a person admitted in a non-U.S. jurisdiction and who is a member of a recognized legal profession in that jurisdiction, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who is not disbarred, suspended, or on disability inactive status or the equivalent thereof in any jurisdiction, may be permitted to appear on a particular matter in any state court of record or state agency under the conditions listed in this rule.

(2) Filing Requirements.

(a) The requirements of C.R.C.P. 205.3 and 205.4 applicable to out-of-state attorneys shall apply to a foreign attorney. The foreign attorney shall file a verified motion with the trial court and the Clerk of the Supreme Court Office of Attorney Registration as described in C.R.C.P. 205.3(1). All documents submitted to a court or agency of this state, if not in English, shall be submitted with an English translation and satisfactory proof of the accuracy of the translation.

(b) In addition to the requirements of C.R.C.P. 205.3(1), the foreign attorney's verified application for admission pro hac vice shall include:

(i) The applicant's residence and business address, telephone number(s), and e-mail address(es);

(ii) The name, address, telephone number(s), and e-mail address(es) of each client sought to be represented;

(iii) The U.S. and foreign jurisdictions, agencies, and courts before which the applicant has been admitted to practice law, the contact information for each, and the respective period(s) of admission;

(iv) The name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear pro hac vice in Colorado within the preceding five years and the date of each application;

(v) A statement as to whether the applicant:

(A) Has been denied admission pro hac vice in any jurisdiction, U.S. or foreign, including Colorado;

(B) Has ever had admission pro hac vice revoked in any jurisdiction, U.S. or foreign, including Colorado;

(C) Has ever been disciplined or sanctioned by any court or agency in any jurisdiction, U.S. or foreign, including Colorado. If so, the applicant shall specify the nature of the allegations, the authority bringing such proceedings, the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings. A certified copy of the written findings or order shall be attached to the application. If the written findings or order is not in English, the applicant shall submit an English translation and satisfactory proof of the accuracy of the translation;

(D) Has ever been the subject of any formal disciplinary or disability proceeding brought against the applicant by a disciplinary counsel or analogous foreign regulatory authority in any jurisdiction within the last five years and, as to each such proceeding: the nature of the allegations; the date the proceedings were initiated; which, if any, of the proceedings are still pending, and for those proceedings that are not still pending, the dates upon which the proceedings were concluded; the caption of the proceedings; and the findings made and actions taken in connection with those proceedings, including exoneration from any charges. A certified copy of any written finding or order shall be attached to the application. If the written order or findings is not in English, the applicant shall submit an English translation and satisfactory proof of the accuracy of the translation;

(E) Has been held in contempt by any court in a written order in the last five years, and, if so: the nature of the allegations, the name of the court before which such proceedings were conducted, the date of the contempt order, the caption of the proceedings, and the substance of the court's rulings. A copy of the written order or transcript of the oral rulings shall be attached to the application. If the written order is not in English, the applicant shall submit an English translation and satisfactory proof of the accuracy of the translation;

(vi) A statement that the attorney acknowledges he or she is subject to the Colorado Rules of Professional Conduct, the Colorado Rules of Civil Procedure, and other court rules, that the attorney will follow those rules throughout the pro hac vice admission, and that the verified motion complies with those rules;

(vii) The name, address, telephone number(s), e-mail address(es), and bar number of the active member in good standing of the Colorado bar who supports the applicant's pro hac vice request, who shall appear of record together with the foreign attorney, and who shall remain ultimately responsible to the client as set forth in section (2)(a) of this rule;

(viii) An averment by the in-state attorney referred to in section (2)(a) and by the applicant that, if the application for pro hac vice admission is granted, service of any documents by a party, court, agency, or Regulation Counsel upon the applicant may be accomplished by service upon the in-state attorney or that in-state attorney's agent;

(ix) The applicant's prior or continuing representation in other matters of one or more of the clients the applicant proposes to represent and any relationship between such other matter(s) and the proceeding for which applicant seeks admission;

(x) Any special experience, expertise, or other factor deemed to make it particularly desirable that the applicant be permitted to represent the client(s) the applicant proposes to represent in the particular cause; and

(xi) Such other information as the Attorney Regulation Counsel Office of Admissions may from time to time request.

(3) Trial Court's Ruling on Motion to Appear.

(a) A Colorado court or agency may, in its discretion, admit a foreign attorney in a particular proceeding pending before such court or agency to appear pro hac vice in a defined role as an attorney, advisor, or consultant in that proceeding with an in-state attorney, provided that the in-state attorney is responsible to the client, responsible for the conduct of the proceeding, responsible for independently advising the client on the substantive law of a U.S. jurisdiction and procedural issues in the proceeding, and for advising the client whether the in-state attorney's judgment differs from that of the foreign attorney.

(b) The Attorney Regulation Counsel may provide information to the trial court that he or she believes relevant for the trial court's ruling on the pending motion to appear.

Notwithstanding any other provision of this rule, the trial court retains full authority to approve or deny the motion or revoke the pro hac vice status as it deems appropriate.

(c) In addition to the requirements and factors listed above, a court or agency in ruling on an application to admit a foreign attorney pro hac vice shall weigh other relevant factors, including:

(i) The legal training and experience of the foreign attorney including in matters similar to the matter before the court or agency;

(ii) The extent to which the matter will include the application of:

(A) The law of the jurisdiction in which the foreign attorney is admitted or

(B) International law or other law in which the foreign attorney has a demonstrated expertise;

(iii) The foreign attorney's familiarity with the law of a U.S. jurisdiction applicable to the matter before the court or agency;

(iv) The extent to which the foreign attorney's relationship and familiarity with the client or with the facts and circumstances of the matter will facilitate the fair and efficient resolution of the matter;

(v) The foreign attorney's English language ability; and

(vi) The extent to which it is possible to define the scope of the foreign attorney's authority in the matter as described in section (3)(a) so as to facilitate the fair and efficient resolution of the matter, including by a limitation on the foreign attorney's authority to advise the client on the law of a U.S. jurisdiction except in consultation with the in-state attorney.

(4) Names and Appearances. The name and address of the licensed Colorado associate attorney must be shown on all papers served and filed. The Colorado associate attorney shall appear personally and, unless excused, remain in attendance with the foreign attorney in all appearances.

(5) Frequency of Appearances. A separate petition, fee, and order granting permission are required for each action in which the foreign attorney appears in Colorado.

(6) Appellate Matters and Other Forms of Review.

(a) If a foreign attorney wishes to appear in a proceeding before a Colorado appellate court, and the foreign attorney obtained permission to appear in a proceeding involving the same action in a Colorado state trial court, the foreign attorney only needs to file an updated affidavit with the Clerk of the Office of Attorney Registration. No additional filing fee is required.

(b) If a foreign attorney wants to appear in a proceeding before a Colorado appellate court and the foreign attorney did not obtain permission to appear in a proceeding involving the same action in a Colorado state trial court or administrative agency, the foreign attorney shall file a motion and affidavit with the clerk of the Colorado appellate court, with a copy sent to the Clerk of the Office of Attorney Registration, requesting permission to appear. The motion, affidavit, and filing fee must be submitted as otherwise provided in section (1) of this rule.

(7) Discipline and Disability Jurisdiction. Any foreign attorney authorized to appear under this rule shall be subject to all applicable provisions of the Colorado Rules of Professional Conduct, except for the provisions of Colo. RPC 1.15A through 1.15E that require an attorney to have a business account and a trust account in a financial institution doing business in Colorado; and the Colorado Rules of Civil Procedure, except C.R.C.P. 227 (general registration fees) and C.R.C.P. 250 (mandatory continuing legal education).

Source: Entire rule added and effective September 1, 2014; (7) amended and effective January 14, 2015; (7) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article ''New Admissions and Practice Rules Regulating Foreign (non-U.S.) Attorneys in Colorado'', see 44 Colo. Law. 59 (June 2015).

Rule 205.6. Practice Pending Admission

(1) General Statement and Eligibility. An attorney who currently holds an active license to practice law in another jurisdiction in the United States, and who has been engaged in the active practice of law for three of the last five years, may provide legal services in Colorado through an office or other place for the regular practice of law in Colorado for no more than 365 days, provided that the attorney:

(a) Is a licensed attorney in good standing in all courts and jurisdictions in which he or she is admitted to practice;

(b) Is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability investigation in any jurisdiction;

(c) Has not previously been denied admission to practice law in Colorado, has not failed the Colorado bar examination within the last three years, and has never been denied admission on character and fitness grounds in any jurisdiction;

(d) Has first submitted a complete application for admission on motion by qualified out-of-state attorney (C.R.C.P. 203.2), on motion based upon UBE score transfer (C.R.C.P. 203.3), or by examination (C.R.C.P. 203.4);

(e) Reasonably expects to fulfill all of Colorado's requirements for that form of admission;

(f) Associates with and is supervised by an attorney who is admitted to practice law in Colorado, and discloses the name, address, and membership status of that attorney;

(g) Provides a signed verification form from the Colorado attorney certifying the applicant's association with and supervision by that attorney;

(h) Affirmatively states in all written communications with the public and clients the following language: ''Practice temporarily authorized pending admission under C.R.C.P. 205.6''; and

(i) Files an application for practice pending admission and pays a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee will be collected by the Office of Attorney Registration. The fee should be made payable to the Clerk of the Supreme Court.

(2) Foreign Legal Consultants. An attorney currently authorized as a foreign legal consultant in another jurisdiction in the United States may provide legal services in Colorado through an office or other place for the regular practice of law in Colorado for no more than 365 days, provided that the attorney:

(a) Provides services that are limited to those that may be provided in Colorado by foreign legal consultants;

(b) Is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(c) Is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction;

(d) Has first submitted an application for Foreign Legal Consultant certification pursuant to C.R.C.P. 204.2;

(e) Reasonably expects to fulfill all of Colorado's requirements for admission as a foreign legal consultant; and

(f) Meets the requirements of subsections 1(c) and (f) - (h) of this rule.

(3) Appearances. Prior to admission on motion as a qualified out-of-state attorney (C.R.C.P. 203.2), on motion based upon UBE transfer score (C.R.C.P. 203.3), by examination (C.R.C.P. 203.4), or as a foreign legal consultant (C.R.C.P. 204.2), the attorney may not appear before a court of record or tribunal in Colorado that requires pro hac vice admission unless the attorney is granted such admission pursuant to C.R.C.P. 205.3, 205.4, or 205.5.

(4) Notice of Disciplinary Investigation. The attorney must immediately notify the Office of Attorney Registration if the attorney becomes subject to a disciplinary or disability investigation, complaint, or sanctions in any other jurisdiction at any time during the 365 days of practice authorized by this rule. The Attorney Regulation Counsel, Office

of Admissions, shall take into account such information in determining whether to grant the attorney's application for admission to practice law in Colorado.

(5) Discipline and Disability Jurisdiction. Any attorney practicing under this rule shall be subject to all applicable provisions of the Colorado Rules of Professional Conduct, except for the provisions of Colo. RPC 1.15A through 1.15E that require an attorney to have a business account and a trust account in a financial institution doing business in Colorado; and the Colorado Rules of Civil Procedure, except C.R.C.P. 227 (general registration fees) and C.R.C.P. 250 (mandatory continuing legal education).

(6) Automatic Termination. The authority in this rule shall terminate immediately if the attorney:

(a) Withdraws the application for admission to practice law in Colorado;

(b) Fails to remain in compliance with section (1) of this rule;

(c) Is disbarred, suspended, or placed on disability inactive status in any other jurisdiction in which the attorney is licensed to practice law; or

(d) Fails to comply with the notification requirements of section (4) of this rule.

(7) Required Action After Termination of Authority. Upon termination of authority to practice law pursuant to this rule, the attorney must notify in writing all clients in pending matters, and opposing counsel and co-counsel in pending litigation, of the termination of authority, and immediately cease practicing law in Colorado.

(8) Plenary Authority. The Supreme Court, in its discretion, may extend the time limits set forth in this rule for good cause shown.

Source: Entire rule added and effective September 1, 2014; (5) amended and effective January 14, 2015; (1)(i) and (5) amended and effective January 24, 2019.

Rule 205.7. Law Student Practice

(1) Legal Aid Clinics. Students of any law school that maintains a legal aid clinic where poor or legally underserved persons receive legal advice and services shall, when representing the clinic and its clients, be authorized to advise clients on legal matters and appear in any court or before any administrative tribunals or arbitration panels in Colorado as if licensed to practice law.

(2) Law Student Externs.

(a) Practice by Law Student Extern. (formerly section 12-5-116.1)

(i) An eligible law student extern, as specified in subsection (2)(b), may appear and participate in any civil proceeding in any municipal, county, or district court (including domestic relations proceedings) or before any administrative tribunal in Colorado, or in any county or municipal court criminal proceedings, except when the defendant has been charged with a felony, or in any juvenile proceeding in any municipal, county, or district court, or before any magistrate in any juvenile or other proceeding or any parole revocation as if licensed to practice law under the following circumstances:

(A) If the person on whose behalf the extern is appearing has provided written consent to that appearance and the law student extern is under the supervision of a supervising lawyer, as specified in section (2)(d).

(B) When representing the office of the state public defender and its clients, if the person on whose behalf the extern is appearing has provided written consent to that appearance and the law student extern is under the supervision of the public defender or one of his or her deputies. In such case, the record shall reflect the name of a supervising lawyer, and a supervising lawyer must be available, but not necessarily physically present in the courtroom, if the person wants to consult with him or her. However, a supervising lawyer must be physically present in the courtroom if the proceeding is a testimonial motions hearing or trial.

(C) On behalf of the state or any of its departments, agencies, or institutions, a county, a city, or a municipality, with the written approval and under the supervision of the attorney general, attorney for the state, county attorney, district attorney, city attorney, or municipal attorney. A general approval for the law student extern to appear, executed by the appropriate supervising attorney pursuant to this paragraph (C), shall be filed with the

clerk of the applicable court/administrative tribunal and brought to the attention of the judge/presiding officer thereof.

(D) On behalf of a nonprofit legal services organization where poor or legally underserved persons receive legal advice and services if the person on whose behalf the student is appearing has provided written consent to that appearance and the law student extern is under the supervision of a supervising lawyer, as specified in section (2)(d).

(ii) The consent or approval referred to in subsection (2)(a)(i)(A), except a general approval, shall be made in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

(iii) In addition to the activities authorized in subsection (2)(a), an eligible law student extern may engage in other activities under the supervision of a supervising lawyer, including but not limited to the preparation of pleadings, briefs, and other legal documents, which must be approved and signed by the supervising lawyer. However, acknowledgments and advisements relating to pleas in criminal cases may be signed by the extern alone. Additionally, the eligible law student may, under the supervision of a supervising lawyer, assist indigent inmates of correctional institutions who have no attorney of record and who request such assistance in preparing applications and supporting documents for post-conviction relief.

(b) Eligibility requirements for law student extern practice. (formerly section 12-5-116.2)

(i) In order to be eligible to make an appearance and participate pursuant to section (2)(a), a law student must:

(A) Be duly enrolled in an ABA accredited law school, or a recent graduate of such a law school who has applied for admission to the Colorado Bar. For purposes of this rule, the ''law student's'' eligibility continues after graduation from law school and until the announcement of the results of the first bar examination following the student's graduation, provided that for anyone who passes that examination, eligibility shall continue in effect through the date of the first swearing-in ceremony following the examination.

(B) Have completed a minimum of two years of legal studies;

(C) Have the certification of the dean of such law school that the dean has no personal knowledge of and knows of nothing of record indicating that the student is not of good moral character and, in addition, that the law student has completed the requirements specified in subsection (2)(b)(i)(B) and is a student in good standing, or recently graduated. The dean of such law school has no continuing duty to certify the student's good moral character after the student has graduated from law school, at which point the law student/applicant to the Colorado Bar has obligations to maintain the integrity of the profession pursuant to Colo. RPC 8.1.

(D) Be introduced to the court or administrative tribunal in which the extern is appearing as a law student extern by an attorney authorized to practice law in Colorado;

(E) Neither ask for nor receive any compensation or remuneration of any kind for the extern's services from the person on whose behalf the extern renders services; but such limitation shall not prevent the law student extern from receiving credit for participation in the law school externship program upon prior approval of the law school, nor shall it prevent the law school, the state, a county, a city, a municipality, or the office of the district attorney or the public defender from paying compensation to the law school extern nor shall it prevent any agency from making such charges for its services as it may otherwise properly require; and

(F) State that the extern has read, is familiar with, and will be governed in the conduct of the extern's activities under subsection (2)(a) by the Colorado Rules of Professional Conduct.

(c) Certification of Law Student Extern by Law School Dean Filing Effective Period of Withdrawal by Dean or Termination. (formerly section 12-5-116.3)

(i) The certification by the law school dean, pursuant to subsection (2)(b)(i)(C), required in order for a law student extern to appear and participate in proceedings:

(A) Shall be filed with the Clerk of the Supreme Court Office of Attorney Registration, and unless it is sooner withdrawn, shall remain in effect until the student's graduation.

(B) May be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of the Supreme Court Office of Attorney Registration, and such withdrawal may be without notice or hearing and without any showing of cause; and

(C) May be terminated by the Supreme Court at any time without notice or hearing and without any showing of cause.

(d) Qualifications and Requirements of Supervising Lawyer. (formerly section 12-5-116.4)

(i) A supervising lawyer, under whose supervision an eligible law student extern appears and participates pursuant to section (2)(a), shall be authorized to practice law in the state and:

(A) Shall be a lawyer working for or on behalf of an organization identified in subsection (2)(a)(i)(B) - (D);

(B) Shall assume personal professional responsibility for the conduct of the law student extern; and

(C) Shall assist the law student extern in the extern's preparation to the extent the supervising lawyer considers it necessary.

Source: Entire rule added and effective September 1, 2014; IP (2)(a)(i), (2)(a)(i)(B), and (2)(a)(iii) amended and effective April 11, 2019.

ANNOTATION

It is a violation of this rule for the supervising lawyer not to be present during critical stages of a criminal case; such a violation constitutes structural error. People v. McGlaughlin, 2018 COA 114, 428 P.3d 691.

The sixth amendment requires that a licensed lawyer be present in the courtroom when a law student represents a criminal defendant during a critical stage of a criminal case. If the supervising lawyer is not in the courtroom during those critical stages, no licensed lawyer is present, and the defendant is denied his or her constitutional right to counsel guaranteed by the sixth amendment. Such a complete deprivation of counsel is a structural error, requiring reversal without regard to any showing of prejudice. People v. McGlaughlin, 2018 COA 114, 428 P.3d 691.

Issues of adequacy of representation involving violations of the rules governing student practice, other than the supervising attorney's presence, are properly analyzed under the test for ineffective assistance of counsel announced in Strickland. People v. McGlaughlin, 2018 COA 114, 428 P.3d 691.

Rule 206. Petitions to the Supreme Court for Waiver of Admissions Requirements

(1) Applicability. This rule applies only to petitions for waiver of specific attorney admissions eligibility requirements or restrictions set forth in C.R.C.P. 203 through C.R.C.P. 205.7 and C.R.C.P. 211.3. Nothing herein is deemed a limitation on the Supreme Court's plenary jurisdiction set forth in C.R.C.P. 202.1 and C.R.C.P. 212.

(2) Requirements for and Content of Petition. The petitioner must file a petition setting forth the relief sought, the specific admissions eligibility requirements or restrictions at issue with citations to applicable rules, and the grounds for relief. The petitioner has the burden of showing that the Supreme Court should grant the relief requested. The petition also must include: a statement that petitioner has conferred with the Office of Attorney Admissions; a recital of the position of the Office of Attorney Admissions as to the relief sought; and a certificate of service.

(3) Docketing of Petition, Caption and Fees. Petitions under this rule must be filed with the Supreme Court. Upon the filing of the petition, petitioner must pay to the clerk of the Supreme Court the docket fee as set by the Court. The petition caption must include the phrase ''Original Proceeding in Attorney Admissions pursuant to C.R.C.P. 206'' and the matter shall be docketed by the Clerk of the Supreme Court as:

SUPREME COURT, STATE OF COLORADO
Case No.
ORIGINAL PROCEEDING IN ATTORNEY ADMISSIONS

IN THE MATTER OF (name of Applicant), APPLICANT

(4) Service. The petition and all attachments must be served on the Office of Attorney Admissions. Such service must be accomplished by hand-delivery, express delivery, or first-class mail unless the Office of Attorney Admissions has consented to an alternative form of service.

(5) Petitions for Relief Relating to Underlying Character and Fitness Investigations. Any petition seeking relief relating to an eligibility requirement that is implicated by an underlying character and fitness investigation, including a request to extend the expiration time for bar exam scores under C.R.C.P. 211.3, is confidential and must be filed as a non-public document. This subsection does not apply to exceptions filed by an applicant under C.R.C.P. 209.5.

(6) Request for Protection of Other Confidential Information. A petition filed under this rule is not deemed an application for a license to practice law and is not confidential under C.R.C.P. 203.1. Instead, such a petition is presumed to be publicly available unless it is a petition filed under subsection (5) of this rule. A petitioner may request protection of confidential information contained in supporting documentation by filing a motion requesting that specific exhibits to the petition that contain confidential information not be made publicly available.

(7) Response by Office of Attorney Admissions. The Office of Attorney Admissions may respond to a petition under this rule pursuant to an order by the Supreme Court or at the discretion of the Office of Attorney Admissions. Any response must be filed within seven days of the date the petition was served on the Office of Attorney Admissions.

(8) Scope of Supreme Court Discretion. The Supreme Court may issue an order: denying the petition without explanation; requesting that the Petitioner address a specific issue in a supplemental filing; granting the relief requested with or without conditions; or granting modified relief with or without conditions.

Source: Entire rule added and effective May 30, 2019.

Rule 207. (Reserved)

[There is no Rule 207.]

Rule 208. Character and Fitness Determination

Rule 208.1. Character and Fitness Investigation

(1) Purpose. The purpose of a character and fitness investigation conducted before an individual is admitted to practice law in Colorado is to protect the public and safeguard the system of justice.

(2) Burden of Proof. The applicant shall bear the burden of proving the character and fitness necessary to practice law in Colorado.

(3) Expectations of A Lawyer's Responsibilities. Applicants should understand that a lawyer's professional responsibilities include the following minimum expectations set forth in the Preamble to the Colorado Rules of Professional Conduct:

(a) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice;

(b) A lawyer should be competent, prompt and diligent in all professional functions;

(c) A lawyer should maintain communication with a client concerning the representation;

(d) A lawyer should keep in confidence information relating to the representation of a

client except when disclosure is required or permitted by the Colorado Rules of Professional Conduct or other law;

(e) A lawyer's conduct should conform to the requirements of the law, both in professional services to clients and in the lawyer's business and personal affairs;

(f) A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others;

(g) A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials; and

(h) While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also the lawyer's duty to uphold the legal process.

(4) Standard of Character and Fitness. A Colorado lawyer should possess record of conduct that justifies the trust of clients, adversaries, courts and others with respect to the professional responsibilities owed to them. A basis for denial of an application arising from lack of character may exist when the applicant's record tends to show a deficiency in honesty, integrity, judgment, trustworthiness, diligence, reliability or capacity to practice law. A basis for denial of an application may exist where the applicant's record reveals a history of deceptiveness, criminality, fraud, negligence, irrational behavior, drug or alcohol dependence or abuse, emotional or mental instability, financial irresponsibility or violence.

(5) Essential Eligibility Requirements. Applicants must meet all of the following essential eligibility requirements for the practice of law:

(a) Honesty and candor with clients, lawyers, courts, regulatory authorities and others;

(b) The ability to reason logically, recall complex factual information, and accurately analyze legal problems;

(c) The ability to use a high degree of organization and clarity in communicating with clients, lawyers, judicial officers, and others;

(d) The ability to use good judgment on behalf of clients and in conducting one's professional business;

(e) The ability to conduct oneself with respect for and in accordance with the law;

(f) The ability to exhibit regard for the rights and welfare of others;

(g) The ability to comply with the Colorado Rules of Professional Conduct; state, local, and federal laws, regulations, statutes, and rules; and orders of a court or tribunal;

(h) The ability to act diligently and reliably in fulfilling obligations to clients, lawyers, courts, and others;

(i) The ability to be honest and use good judgment in financial dealings on behalf of oneself, clients, and others; and

(j) The ability to comply with deadlines and time constraints.

(6) Relevant Conduct. The following shall be treated as cause for scrutiny of whether the applicant possesses the character and fitness necessary to practice law in Colorado:

(a) Unlawful conduct;

(b) Academic misconduct;

(c) Misconduct in employment;

(d) Acts involving dishonesty, fraud, deceit, or misrepresentation;

(e) Acts that demonstrate disregard for the rights or welfare of others;

(f) Abuse of legal process, including the filing of vexatious or frivolous lawsuits or the raising of vexatious or frivolous defenses;

(g) Neglect of financial responsibilities;

(h) Neglect of professional obligations;

(i) Violation of a court order, including a child support order;

(j) Conduct evidencing current mental or emotional instability that may interfere with the ability to practice law;

(k) Conduct evidencing current drug or alcohol dependence or abuse that may interfere with the ability to practice law;

(l) Denial of admission to the bar in another jurisdiction on character and fitness grounds;

(m) Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction;

(n) Making false statements, including material omissions, on law school admission applications; or

(o) Making false statements, including material omissions, on bar applications in this state or any other jurisdiction.

The above is not an exhaustive list, but is instead illustrative of common causes for scrutiny of whether an applicant possesses the character and fitness necessary to practice law in Colorado.

(7) Considerations. The Character and Fitness Committee shall determine whether the applicant possesses the character and fitness necessary to practice law in Colorado. The factors the Committee may consider in assigning weight and significance to the applicant's prior conduct include, but are not limited to:

(a) The applicant's age at the time of the conduct;

(b) The recency of the conduct;

(c) The reliability of the information concerning the conduct;

(d) The seriousness of the conduct;

(e) The underlying circumstances of the conduct;

(f) The cumulative effect of the conduct, including its impact on others;

(g) Evidence of rehabilitation documented pursuant to subsection (8);

(h) Any positive social contributions the applicant has made after the conduct occurred;

(i) The applicant's candor in the admissions process;

(j) The materiality of any omissions or misrepresentations; and

(k) Evidence of mental or emotional instability.

(8) Rehabilitation. An applicant who affirmatively asserts rehabilitation from past conduct may provide evidence of rehabilitation by submitting one or more of the following:

(a) Evidence that the applicant has acknowledged the conduct was wrong and has accepted responsibility for the conduct;

(b) Evidence of strict compliance with the conditions of any disciplinary, judicial, administrative, or other order, where applicable;

(c) Evidence of lack of malice toward those whose duty compelled bringing disciplinary, judicial, administrative, or other proceedings against the applicant;

(d) Evidence of cooperation with the Office of Attorney Admissions investigation;

(e) Evidence that the applicant intends to conform future conduct to the standards of character and fitness necessary to practice law in Colorado;

(f) Evidence of restitution of funds or property, where applicable;

(g) Evidence of positive social contributions through employment, community service, or civic service;

(h) Evidence that the applicant is not currently engaging in misconduct;

(i) Evidence of a record of recent conduct that demonstrates that the applicant meets the essential eligibility requirements for the practice of law in Colorado and justifies the trust of clients, adversaries, courts and the public;

(j) Evidence that the applicant has changed in ways that will reduce the likelihood of future misconduct; or

(k) Other evidence that supports an assertion of rehabilitation, including medical or psychological testimony or opinion.

Source: Entire rule added and effective September 1, 2014.

ANNOTATION

Law reviews. For article, ''The Colorado Character Investigation of Applicants to the Bar'', see 28 Dicta 333 (1951).

Reinstatement after suspension from practice may be conditioned upon undergoing a psychiatric evaluation. People v. Fagan, 745 P.2d 249 (Colo. 1987).

Applied in People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980) (decided under former C.R.C.P. 209); People v. Roehl, 655 P.2d 1381 (Colo. 1983) (decided under former rule).

Rule 208.2. Character and Fitness General Requirements

(1) The Office of Attorney Admissions and the Character and Fitness Committee shall have the authority to require an applicant to provide any information that in their discretion is relevant to the applicant's character and fitness. Such information may include, without limitation:

(a) A current mental status examination;

(b) Fingerprints;

(c) Evidence of compliance with child support orders. Applicants must certify that they are in compliance with any child support order as defined by C.R.S. § 26-13-123(a); and

(d) Documentation evidencing anything referenced by the applicant in any application or supplementation thereof.

(2) Burden of Producing Required Information. The applicant bears the burden of producing all required information in a timely manner. The costs of any mental status examination or of obtaining any additional information required by the Office of Attorney Admissions or the Character and Fitness Committee shall be borne by the applicant. The character and fitness investigation will not proceed until all required information has been received.

(3) Continuing Obligation. The applicant has a continuing obligation to timely update the application with respect to all matters inquired of on the application. This obligation continues during the pendency of the application and until the applicant is sworn in as an attorney, including the period when the matter is undergoing review by a hearing board or the Supreme Court.

Source: Entire rule added and effective September 1, 2014.

Rule 208.3. Review of Applications

(1) Review of Applications. In accordance with the character and fitness standards set forth in C.R.C.P. 208.1, the Office of Attorney Admissions shall review all applications for information about the character and fitness of each applicant.

(2) Reserved.

(3) Further Investigation. The Office of Attorney Admissions may conduct further investigation into the character and fitness of each applicant, based upon information that it deems relevant to the character and fitness of the applicant.

(4) Certification. The Office of Attorney Admissions shall certify to the Supreme Court the names of all applicants who are found to have the character and fitness necessary to practice law in Colorado.

(5) Referral to Inquiry Panel. Those applicants not certified shall be referred for review by an inquiry panel of the Character and Fitness Committee.

Source: Entire rule added and effective September 1, 2014.

Rule 208.4. Inquiry Panel Review

(1) Review by Separate Inquiry Panels. The chair of the Character and Fitness Committee shall assign at least three members of the Character and Fitness Committee to one or more inquiry panels.

(2) Assignment of Inquiry Panel. If, after investigation conducted pursuant to these rules, the Office of Attorney Admissions recommends that an inquiry panel be assigned to determine whether the applicant has met his or her burden of establishing that the applicant possesses the character and fitness necessary for admission to the practice of law in Colorado, the chair of the Character and Fitness Committee shall assign an inquiry panel and designate one of the inquiry panel members as panel chair. In the discharge of an inquiry panel's duties, the panel chair may enlist the assistance of other persons approved by the Supreme Court, including alternative mental health professionals in the event a mental health professional committee member is unavailable for a particular inquiry panel. A quorum necessary for the panel to conduct business is three persons.

(3) Notice of Inquiry Panel Interview. The Office of Attorney Admissions shall notify the applicant in writing of the character and fitness matters in question and invite the applicant to appear for an interview with the inquiry panel. The notice shall advise the applicant that he or she may appear with counsel, and it shall be sent to the applicant at least fourteen days before the interview is scheduled. Notice is sufficient if sent to the most recent address on file with the Office of Attorney Admissions at the time of the notice.

(4) Failure to Appear. An applicant's failure to appear for an interview may be grounds to recommend denial of the application.

(5) Formal Rules of Evidence Do Not Apply. The inquiry panel is not bound by formal rules of evidence during the interview and may consider all documents, verified written statements or other matters brought to its attention.

(6) Determination by Inquiry Panel. The inquiry panel shall make a finding whether the applicant has established that he or she possesses the character and fitness necessary to practice law in Colorado. The applicant may be admitted, admitted with conditions, denied admission, or the inquiry panel may in its discretion postpone a determination to allow the applicant an opportunity to submit further documentation or undergo an independent medical examination. Such postponement does not toll the expiration of the bar exam scores pursuant to C.R.C.P. 211.3(2).

Source: Entire rule added and effective September 1, 2014.

Rule 208.5. Inquiry Panel Findings

(1) If the inquiry panel determines that the applicant has not established that he or she possesses the character and fitness necessary to practice law in Colorado:

(a) The panel shall set forth its findings in writing within thirty-five days after the meeting at which such determination is made;

(b) The findings shall state with particularity the specific reasons the applicant has failed to establish that he or she possesses the character and fitness necessary to practice law in Colorado;

(c) The Office of Attorney Admissions shall serve a copy of the inquiry panel's findings on the applicant by mail or through the Office of Attorney Admissions' web-based application management system, accompanied by a notice that the findings shall become the Character and Fitness Committee's recommendation to be filed with the Supreme Court, unless the applicant files with the Office of Attorney Admissions and the Office of the Presiding Disciplinary Judge a written request for a hearing pursuant to C.R.C.P. 209.1.

(2) Clearance for Admission. If the inquiry panel determines that the applicant should not be denied admission, the applicant shall be cleared for admission.

Source: Entire rule added and effective September 1, 2014.

Rule 209. Formal Hearing

Rule 209.1. Request for Hearing

(1) If the applicant chooses to contest the inquiry panel's finding that the applicant does not possess the character and fitness necessary to practice law in Colorado, the applicant must file a written request for a hearing. The inquiry panel findings shall be defended by the Office of Attorney Regulation Counsel, acting on behalf of the People of the State of Colorado. All cases shall be styled: In the Matter of _____, Applicant.

(a) Contents. The written request for a hearing must set forth the applicant's response to each of the specified matters in the inquiry panel finding, and set forth the factual basis for the applicant's position that he or she possesses the character and fitness necessary to practice law in Colorado. The inquiry panel findings must be attached as an appendix to the request.

(b) Deadline. The written request for a hearing must be filed with the Office of Attorney Admissions and the Office of the Presiding Disciplinary Judge within twenty-

eight days after service of the notice pursuant to C.R.C.P. 208.5(1)(c). Failure to file a timely request shall constitute an acceptance of the inquiry panel's findings.

(c) Withdrawal of Request. If an applicant files a written request for a hearing but voluntarily withdraws the request before the hearing, the inquiry panel's findings shall be the Character and Fitness Committee's final recommendation and shall be filed with the Supreme Court.

Source: Entire rule added and effective September 1, 2014.

Rule 209.2. Hearing Board

(1) Presiding Disciplinary Judge. The Presiding Disciplinary Judge, appointed by the Supreme Court pursuant to C.R.C.P. 251.16, shall have the duties and powers, in addition to those set forth in C.R.C.P. 251.16, to preside over hearings conducted pursuant to C.R.C.P. 209.

(2) Hearing Board Members. All hearings conducted pursuant to C.R.C.P. 209 shall be conducted by a hearing board consisting of the Presiding Disciplinary Judge and two members of the Character and Fitness Committee who did not participate in the inquiry panel interview of the applicant. The two Character and Fitness Committee members, at least one of whom shall be an attorney, are to be selected at random by the clerk for the Presiding Disciplinary Judge. If the Presiding Disciplinary Judge has been disqualified, then a presiding officer shall be selected by the clerk from among the attorneys on the Character and Fitness Committee who did not participate in the inquiry panel interview.

(3) Legal Rulings. The Presiding Disciplinary Judge or the presiding officer shall rule on all motions, objections and other matters of law presented after a request for a hearing is filed and during the course of the proceedings conducted pursuant to C.R.C.P. 209.2 through 209.4.

(4) Applicable Rules. The Colorado Rules of Civil Procedure shall apply when not inconsistent with these rules.

Source: Entire rule added and effective September 1, 2014.

Rule 209.3. Pre-Hearing Matters

(1) Issues to Be Presented. The issues at the hearing shall be limited to those in the inquiry panel findings and challenged in the applicant's request for a hearing unless, prior to the hearing, the Office of Attorney Regulation Counsel requests the inquiry panel to reopen its determination to consider additional information, and amend its findings. A request to reopen the inquiry panel's determination shall stay the proceeding before the hearing board until the inquiry panel has completed its review.

(2) Status Conference. The Presiding Disciplinary Judge or presiding officer shall order an initial status conference to be held within fourteen days after the filing of the request for a hearing. The purpose of the initial status conference is for the Presiding Disciplinary Judge or presiding officer and the parties to discuss any need for disclosures, discovery, or expert witnesses, and to manage all matters relating to the proceeding. After the initial status conference, the applicant shall be notified by written order of:

(a) The date, time, and place of the hearing;

(b) The right of the applicant to be represented by counsel at such hearing at the applicant's expense, to examine and cross-examine witnesses, to produce evidence bearing upon the applicant's character and fitness to practice law, and to make reasonable use of the subpoena powers of the Presiding Disciplinary Judge or the judge's clerk for the proceedings.

(3) Discovery.

(a) Purpose and Scope. C.R.C.P. 16 shall not apply to proceedings conducted pursuant to this rule except as otherwise provided in this rule. C.R.C.P. 26 shall apply to proceedings conducted pursuant to this rule except as otherwise provided in this rule.

(b) Limitations. Except upon order by the Presiding Disciplinary Judge or the presiding officer for good cause shown, discovery shall be limited as follows:

(i) The Office of Attorney Regulation Counsel may take the deposition of the applicant and two other persons, in addition to the depositions of experts as provided in C.R.C.P. 26. The applicant may take the deposition of three persons, in addition to the depositions of experts as provided in C.R.C.P. 26. The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28 through 32, and 45.

(ii) On motion of the Office of Attorney Regulation Counsel, and upon a showing of good cause, the Presiding Disciplinary Judge or presiding officer may require the applicant to submit to a mental status examination conducted by a psychiatrist or psychologist, or to submit to a substance abuse evaluation conducted by a qualified professional. The psychiatrist, psychologist or substance abuse evaluator shall be chosen by the Office of Attorney Regulation Counsel. The applicant shall bear the cost of the required mental status examination and/or substance abuse evaluation.

(c) Duty to Disclose Expert Testimony. The parties must disclose expert testimony as required by C.R.C.P. 26. The timing of any expert witness disclosures and supplementation shall be as directed by the written order of the Presiding Disciplinary Judge or presiding officer.

(4) Additional Conferences. The parties may request additional status conferences as needed.

Source: Entire rule added and effective September 1, 2014.

Rule 209.4. Hearing

(1) Issues. The issues under review at the hearing shall be limited to those in the inquiry panel findings and challenged in the applicant's request for a hearing, unless the parties otherwise stipulate or the findings were amended pursuant to the procedure described in C.R.C.P. 209.3(1).

(2) Confidential Hearing. The hearing shall be confidential unless the applicant requests in writing that the hearing be public. If such request is made, the entire matter shall become public, including any documents filed in the matter or issued by the Presiding Disciplinary Judge, presiding officer or the hearing board.

(3) Procurement of Evidence During Hearing.

(a) Subpoena. In the course of a hearing conducted pursuant to these rules, and upon the request of any party to the hearing, the Presiding Disciplinary Judge or his or her clerk may, for the use of a party, issue subpoenas to compel the attendance of witnesses and production of pertinent books, papers, documents, or other evidence. Such subpoenas shall be subject to the provisions of C.R.C.P. 45.

Witnesses to whom subpoenas are issued pursuant to this rule shall be entitled to reimbursement for mileage as provided by law for witnesses in civil actions.

(b) Quashing a Subpoena. Any challenge to the subpoena as exercised pursuant to this rule shall be directed to the Presiding Disciplinary Judge or the presiding officer.

(c) Contempt.

(i) Persons in Contempt. Any person who fails or refuses to comply with a subpoena issued pursuant to this rule may be cited for contempt of the Supreme Court. Any person who obstructs the hearing board or any part thereof in the performance of its duties may be cited for contempt of the Supreme Court. Any person having been duly sworn to testify who refuses to answer any proper questions may be cited for contempt of the Supreme Court.

(ii) Issuance of Contempt Citation. A contempt citation may be issued by the Presiding Disciplinary Judge or the presiding officer. A copy of the contempt citation, together with the findings of fact made by the Presiding Disciplinary Judge or the presiding officer concerning the contempt, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to issue a finding of contempt and impose sanctions.

(4) Admission of Evidence. The hearing board is not bound by formal rules of evidence. The hearing board in its discretion may consider evidence other than in testimonial form, and may rely upon records and other materials furnished by the parties. The Presiding Disciplinary Judge or presiding officer in his or her discretion may determine

whether to admit evidence and whether evidence to be taken in testimonial form shall be taken in person or upon deposition, but in either event all testimonial evidence shall be taken under oath.

(5) Privilege Against Self-Incrimination. An applicant may not be required to testify or produce records over his or her objection if to do so would be in violation of the applicant's constitutional privilege against self-incrimination. An adverse inference may be drawn from the applicant's failure or refusal to testify or produce records.

(6) Burden of Proof. The applicant bears the burden of showing by clear and convincing evidence that the applicant possesses the character and fitness necessary to practice law in Colorado.

(7) Record of Proceeding. A certified court reporter shall make a contemporaneous record of the hearing.

Source: Entire rule added and effective September 1, 2014.

Rule 209.5. Post-Hearing Procedures

(1) Hearing Board Report. Within twenty-eight days after the conclusion of the hearing, the hearing board shall prepare and file with the Supreme Court its report, including findings of fact, conclusions of law and recommendations as to admission. The hearing board shall serve a copy of its report on 1) the applicant, 2) the Office of Attorney Admissions, and 3) the Office of Attorney Regulation Counsel.

(2) Written Exceptions. Both the applicant and the Office of Attorney Regulation Counsel shall have the right to file written exceptions to the report. Except as otherwise provided by these rules, and to the extent practicable, the written exceptions shall contain a summary of all factual and legal arguments made by the party filing the written exceptions. Any written exceptions to the report must be filed with the Supreme Court within twenty-one days after issuance of the report and simultaneously served on the opposing party. An advisory copy of the written exceptions shall be served on the Office of the Presiding Disciplinary Judge or the presiding officer within the time for its filing with the Supreme Court. Written exceptions may be e-filed in accordance with C.A.R. 30.

(3) No Exceptions Filed. If no written exceptions are timely filed, the case shall stand submitted upon the hearing board's report.

(4) Proceedings Before the Supreme Court.

(a) Docketing. The matter shall be docketed by the Clerk of the Supreme Court as:

SUPREME COURT, STATE OF COLORADO
Case No.
ORIGINAL PROCEEDING IN ATTORNEY ADMISSIONS

IN THE MATTER OF (the name of the Applicant), APPLICANT

Once docketed, the matter no longer remains confidential and instead becomes a public proceeding.

(b) Record on Appeal.

(i) Composition of the Record. Unless the parties stipulate to a more limited record, the record shall consist of all pleadings, documents, and other materials filed or submitted in the proceedings before the inquiry panel and the hearing board; all written findings, orders, and judgments entered by the inquiry panel, Presiding Disciplinary Judge or presiding officer, and hearing board; all evidence presented to the hearing board, including depositions and exhibits; and a complete transcript of all hearings conducted by the hearing board.

(ii) Designation of the Record; Costs. Except as otherwise provided in this rule, the designation of the record on appeal shall be in accordance with C.A.R. 10. Within fourteen days after filing the written exceptions, the excepting party shall file a designation of record with the clerk of the Presiding Disciplinary Judge and the clerk of the Supreme

Court. The designation of record shall either: (1) indicate that all the items enumerated in section (b)(i) are desired; or (2) contain a more limited detailed list, arrived through stipulation of the parties, describing the specific items to be included in the record. The excepting party shall serve a copy of the designation of record on the opposing party and on the court reporter who reported the proceedings before the hearing board. Service on any court reporter of the excepting party's designation of record shall constitute a request for transcription of the specified proceedings. Each such court reporter shall provide the written notifications required by C.A.R. 10(b), and the designating party shall pay for the requested transcript(s) in accordance with that rule.

(iii) Certification of the Record. The records and files of the hearing board shall be certified by the clerk of the Presiding Disciplinary Judge.

(iv) Transmission of the Record. Except as otherwise provided in this rule, the transmission of the record on appeal shall be in accordance with C.A.R. 11. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the clerk of the Supreme Court within sixty-three days (nine weeks) after the filing of the written exceptions, unless the time is shortened or extended by an order entered under C.A.R. 11(d). The excepting party shall take any actions necessary to enable the clerk of the Presiding Disciplinary Judge to assemble and transmit the record. The clerk of the Presiding Disciplinary Judge shall assemble and transmit the record in accordance with C.A.R. 10(a)(4) and (5), and C.A.R. 11(b).

(c) Briefs. Except as otherwise provided in this rule, the form, filing, and service of briefs shall be in accordance with C.A.R. 28, 31, and 32.

(i) Titles, Content, Form, and Length of Briefs. No Requests for Attorney Fees Allowed. The brief of the excepting party shall be entitled ''opening brief,'' the brief of the opposing party shall be entitled ''answer brief,'' and the brief of the excepting party's reply brief, if any, shall be entitled ''reply brief.'' The content, form, and length of the briefs shall comply with C.A.R. 28 and 32, except that neither party may seek an award of attorney fees.

(ii) Time for Serving and Filing Briefs. The excepting party shall serve and file the opening brief within twenty-eight days after the date on which the record is filed. The objecting party shall serve and file the answer brief within twenty-eight days after service of the opening brief. The excepting party may serve and file a reply brief within fourteen days after service of the answer brief.

(d) Review. The Supreme Court, after reviewing the report of the hearing board, any exceptions filed thereto, the record, and the parties' briefs, may adopt, modify, or reject the report in whole or in part, or may receive further evidence prior to its decision to admit or decline to admit the applicant. The Supreme Court reserves the authority to review any determination made in the course of an admission proceeding and to enter any order with respect thereto, including an order that the Character and Fitness Committee, inquiry panel, and/or hearing board conduct further proceedings.

Source: Entire rule added and effective September 1, 2014.

Rule 210. Revocation of License

Rule 210.1. General Provisions

The Supreme Court may revoke a Colorado license to practice law if such license was obtained under false pretenses.

Source: Entire rule added and effective September 1, 2014.

Rule 210.2. Revocation Proceedings

(1) Petition for Revocation. If, after an applicant has been admitted to practice law in Colorado, the Office of Attorney Regulation Counsel learns that during the admissions process the applicant knowingly made a false statement of material fact, knowingly failed to disclose a fact necessary to correct a misapprehension known by the applicant to have

arisen in the matter, knowingly failed to supplement the application with details of any material changes in the information provided in the application, or engaged in knowing dishonest conduct during the application process in an attempt to induce the Office of Attorney Admissions, the Board of Law Examiners and/or the Supreme Court to grant a law license, or otherwise engaged in pre-admission conduct that if disclosed could have precluded the applicant from being admitted to the practice of law in Colorado, the Office of Attorney Regulation Counsel may file a petition with the Supreme Court within three (3) years that specifies the conduct and seeks an order requiring the attorney to show cause why the Colorado license to practice law should not be revoked. Such petition and any subsequent pleadings may be e-filed in accordance with C.A.R. 30. Such revocation proceedings shall be public.

(2) Caption. Revocation proceedings shall be commenced in the name of The People of the State of Colorado.

(3) Show Cause Order. The Supreme Court, on consideration of the petition filed, may issue an order directed to the attorney respondent commanding the respondent to show cause why the respondent's law license should not be revoked, and further requiring that the respondent file with the Supreme Court, within twenty-one days after service of the petition and show cause order, a written answer admitting or denying the matters stated in the petition. The show cause order, together with a copy of the petition, shall be served on the respondent and the Office of Attorney Regulation Counsel. Service shall be sufficient when made either personally upon the respondent or by certified mail sent to the respondent's registered or last known address.

(4) Supreme Court Order Based on Pleadings. If a response to the show cause order is not timely filed, the Supreme Court upon its own motion or the motion of any party shall decide the case, granting such relief and issuing such other orders as may be appropriate.

(5) Judgment on Pleadings. If the response to the show cause order raises no genuine issue of material fact, any party by motion may request a judgment on the pleadings and the Supreme Court may decide the case as a matter of law, granting such relief and issuing such other orders as may be appropriate.

(6) Referral to Hearing Board. Upon the Supreme Court's order or upon motion of any party, questions of fact raised in proceedings under this rule may be referred to a hearing board consisting of the Presiding Disciplinary Judge and two members of the Character and Fitness Committee for findings of fact, conclusions of law and recommendations for final disposition of the case. The two Character and Fitness Committee members, at least one of whom shall be an attorney, shall be randomly selected by the clerk for the Presiding Disciplinary Judge. If the Presiding Disciplinary Judge has been disqualified, an attorney on the Character and Fitness Committee shall be selected by the clerk to serve as the presiding officer.

(a) Burden of Proof. The Attorney Regulation Counsel has the burden of establishing by clear and convincing evidence that the respondent engaged in any of the conduct set forth in section (1) of this rule.

(b) Procurement of Evidence. The parties may procure the attendance of witnesses before the hearing board by issuance of subpoenas which shall be in the name of the Supreme Court and may be issued by the Presiding Disciplinary Judge or his or her clerk upon the request of a party. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Failure or refusal, without adequate excuse, to comply with any such subpoena shall constitute contempt of the Supreme Court and may be punished accordingly.

(c) Hearing Procedures. The Colorado Rules of Civil Procedure shall apply when not inconsistent with these rules. Subject to any limitations in the order of reference, the Presiding Disciplinary Judge or presiding officer shall have the powers generally reposed in a district court under the Colorado Rules of Civil Procedure. The Presiding Disciplinary Judge or presiding officer shall rule on all motions, objections and other matters of law presented during the course of proceedings conducted pursuant to the order of reference. At all hearings before a hearing board, witnesses shall be sworn in and a complete record made of all proceedings had and testimony taken.

(d) Findings. After the hearing, the hearing board shall report in writing to the Supreme Court in accordance with the order of reference, setting forth findings of fact, conclusions of law and recommendations for final disposition of the case.

(e) Exceptions. Exceptions to the report of the hearing board may be filed with the Supreme Court by any party within twenty-eight days after copies of the report have been mailed to the parties. If no exceptions are timely filed, the case shall stand submitted upon the hearing board's report.

(f) Record on Appeal.

(i) Composition of the Record. Unless the parties stipulate to a more limited record, the record shall consist of all pleadings, documents, and other materials filed or submitted in the proceedings before the hearing board; all written findings, orders, and judgments entered by the hearing board; all evidence presented to the hearing board, including depositions and exhibits; and a complete transcript of all hearings conducted by the hearing board.

(ii) Designation of the Record; Costs. Except as otherwise provided in this rule, the designation of the record on appeal shall be in accordance with C.A.R. 10. Within fourteen days after filing the written exceptions, the excepting party shall file a designation of record with the clerk of the Presiding Disciplinary Judge and the clerk of the Supreme Court. The designation of record shall either: (1) indicate that all the items enumerated in section (f)(i) are desired; or (2) contain a more limited detailed list, arrived through stipulation of the parties, describing the specific items to be included in the record. The excepting party shall serve a copy of the designation of record on the opposing party and on the court reporter(s) who reported the proceedings before the hearing board. Service on any court reporter of the excepting party's designation of record shall constitute a request for transcription of the specified proceedings. Each such court reporter shall provide the written notifications required by C.A.R. 10(b), and the designating party shall pay for the requested transcript(s) in accordance with that rule.

(iii) Certification of the Record. The records and files of the hearing board shall be certified by the clerk of the Presiding Disciplinary Judge.

(iv) Transmission of the Record. Except as otherwise provided in this rule, the transmission of the record on appeal shall be in accordance with C.A.R. 11. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the clerk of the Supreme Court within sixty-three days (nine weeks) after the filing of the written exceptions, unless the time is shortened or extended by an order entered under C.A.R. 11(d). The excepting party shall take any action necessary to enable the clerk of the Presiding Disciplinary Judge to assemble and transmit the record. The clerk of the Presiding Disciplinary Judge shall assemble and transmit the record in accordance with C.A.R. 10(a)(4) and (5), and C.A.R. 11(b).

(g) Briefs. Except as otherwise provided in this rule, the form, filing, and service of briefs shall be in accordance with C.A.R. 28, 31, and 32.

(i) Titles, Content, Form, and Length of Briefs. No Requests for Attorney Fees Allowed. The brief of the excepting party shall be entitled ''opening brief,'' the brief of the opposing party shall be entitled ''answer brief,'' and the excepting party's reply brief, if any, shall be entitled ''reply brief.'' The content, form, and length of the briefs shall comply with C.A.R. 28 and 32, except that neither party may seek an award of attorney fees.

(ii) Time for Serving and Filing Briefs. The excepting party shall serve and file the opening brief within twenty-eight days after the date on which the record is filed. The objecting party shall serve and file the answer brief within twenty-eight days after service of the opening brief. The excepting party may serve and file a reply brief within fourteen days after service of the answer brief.

(h) Order of Revocation. After review of the report of the hearing board, together with any exceptions, briefs, and the record, the Supreme Court may adopt, modify, or reject the report in whole or in part and shall determine as a matter of law whether the respondent engaged in any of the conduct set forth in section (1) of this rule. If the Supreme Court finds that the respondent did engage in any of the conduct set forth in section (1) of this rule, the Supreme Court may enter an order revoking the respondent's license to practice law in Colorado and may issue such further orders as it deems

appropriate, including orders for restitution to any affected agency or client, and the assessment of costs.

(7) Immediate Suspension. Nothing in this rule shall be construed to limit the power of the Supreme Court, upon proper application, to immediately suspend an attorney at any stage of the revocation proceeding in order to prevent public harm.

(8) Not Exclusive Remedy. In addition to or in lieu of initiating revocation proceedings, the Office of Attorney Regulation Counsel may in its discretion choose to institute disciplinary proceedings against the respondent for conduct described in subparagraph (1) of this rule, and a C.R.C.P. 251.18 hearing board may order revocation of the law license as an alternative to discipline. Nothing in this rule precludes the Office of Attorney Regulation Counsel from pursuing disciplinary proceedings against the respondent attorney if the Supreme Court does not order revocation of the attorney's law license pursuant to this rule.

Source: Entire rule added and effective September 1, 2014.

Rule 211. Other Provisions

Rule 211.1. Access to Information Concerning Proceedings Under Chapter 18

(1) Except as otherwise authorized by C.R.C.P. 209.4(2) or order of the Supreme Court, all other information contained in the application, and all admissions proceedings conducted pursuant to C.R.C.P. 208 through 209 prior to the filing of any written exceptions with the clerk of the Supreme Court, shall be confidential and requests for such information shall be denied by the Office of the Presiding Disciplinary Judge and the Office of Attorney Regulation Counsel, hearing boards, inquiry panels, and committees, unless the request is made by:

(a) An agency authorized to investigate the qualifications of persons for admission to practice law;

(b) An agency authorized to investigate the qualifications of persons for government employment;

(c) An attorney regulation or discipline enforcement agency;

(d) A law enforcement agency;

(e) An agency authorized to investigate the qualifications of judicial candidates; or

(f) The Colorado Lawyer Assistance Program, or another jurisdiction's similar program.

Upon a showing of good cause, the Supreme Court may enter an order that seals all or part of the record of proceedings at the Supreme Court level.

(2) Public Proceedings. Except as otherwise provided by the Supreme Court, the record, pleadings and all proceedings before the Supreme Court shall become public upon the filing of written exceptions.

Source: Entire rule added and effective September 1, 2014.

Rule 211.2. Reapplication for Admission

(1) Unless otherwise ordered by the Supreme Court, an applicant who has been rejected by the Supreme Court as not possessing the character and fitness necessary to practice law in Colorado, or whose license to practice law has been revoked pursuant to proceedings under C.R.C.P. 210, may not reapply for admission for five years after the date of the Supreme Court's ruling.

(2) Repealed.

Source: Entire rule added and effective September 1, 2014; (2) repealed and effective January 24, 2019.

Rule 211.3. Oath of Admission

(1) Oath of Admission. No applicant shall be admitted as a licensed attorney in Colorado until such time as he or she has taken the oath of admission prescribed by the Supreme Court.

(2) Length of Time to Take Oath. No on-motion applicant pursuant to C.R.C.P. 203.2 or 203.3 will be permitted to take the oath more than eighteen months after the date on which the Supreme Court approved his or her application. No written examination applicant pursuant to C.R.C.P. 203.4 shall be permitted to take the oath more than eighteen months after the date of the announcement by the Supreme Court that he or she has passed the examination. Nothing herein shall preclude reapplication for admission.

(3) Certificates of Admission. Admission of all applicants shall be by order of the Supreme Court, en banc, and certificates of admission issued to applicants shall be signed by the Clerk of the Supreme Court. An applicant shall not receive a certificate of admission until after the applicant has signed an oath before the Clerk of the Supreme Court or other designated offices and has paid a license fee in an amount set by the Supreme Court. The portion of the license fee necessary to cover the cost of the license shall be remitted to the Clerk of the Supreme Court.

Source: Entire rule added and effective September 1, 2014; (2) amended and effective January 24, 2019.

ANNOTATION

Law reviews. For article, ''The Colorado Character Investigation of Applicants to the Bar'', see 28 Dicta 333 (1951).

Annotator's note. The following annotations include cases decided under former C.R.C.P. 220, which was similar to this rule.

Representation by one who fails to take oath of admission. Representation of a criminal defendant by one who is otherwise qualified to practice law but who fails to take the mandatory oath of admission does not constitute a per se denial of the accused's right to counsel. Wilson v. People, 652 P.2d 595 (Colo. 1982), cert. denied, 459 U.S. 1218, 103 S. Ct. 1221, 75 L. Ed. 2d 457 (1983).

Applied in People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Rule 212. Plenary Power of the Supreme Court

The Supreme Court reserves the authority to review any determination made in the course of the admissions process or in the operation of these rules and to enter any order with respect thereto, including an order directing that further proceedings be conducted as provided by these rules.

Source: Entire rule added and effective September 1, 2014.

Rule 220. Out-of-State Attorney — Conditions of Practice

Repealed, effective September 1, 2014.

Rule 221. Out-of-State Attorney — Pro Hac Vice Admission

Repealed, effective September 1, 2014.

Rule 221.1. Out-of-State Attorney — Pro Hac Vice — Admission Before State Agencies

Repealed, effective September 1, 2014.

Rule 222. Single-Client Counsel Certification

Repealed, effective September 1, 2014.

Rule 223. Pro Bono/Emeritus Attorney

Repealed, effective September 1, 2014.

Rule 224. Provision of Legal Services Following Determination of a Major Disaster

(1) Determination of Major Disaster. Solely for purposes of this rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(a) The state of Colorado, and whether the emergency caused by the major disaster affects the entirety or only a part of this state, or

(b) Another jurisdiction in the United States, but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction.

(2) Temporary Practice in Colorado Following a Major Disaster in Colorado. Following the determination of an emergency in Colorado pursuant to paragraph (1) of this rule, an out-of-state attorney who meets the conditions of C.R.C.P. 205.1(a) and (b) may be allowed to establish a place for the temporary practice of law from which the attorney may provide legal services not otherwise authorized by Rule 205.1. The terms and conditions of such temporary practice will be set forth in the Supreme Court's emergency order, and will depend upon the nature and extent of the emergency affecting the justice system, and the needs for legal services resulting from such emergency.

(3) Temporary Practice in Colorado Following A Major Disaster in Another Jurisdiction. Following the determination of a major disaster in another jurisdiction in the United States, pursuant to paragraph (1) of this rule, an out-of-state attorney who meets the conditions of C.R.C.P. 205.1(a) and (b) may establish a place for the temporary practice of law in Colorado not otherwise authorized by C.R.C.P. 205.1, from which such attorney may provide legal services related to that attorney's practice of law in the licensing jurisdiction or the area of such licensing jurisdiction where the major disaster occurred.

(4) Duration of Authority for Temporary Practice. The authority for an out-of-state attorney to maintain a place for the practice of law in Colorado as described in paragraphs (2) and (3) shall end when the Supreme Court determines that the conditions caused by the major disaster have ended. The Supreme Court may allow a winding down period for such temporary practice offices.

(5) Court Appearances. The authority granted by this rule does not include appearances in Colorado state courts of record or administrative tribunals, except:

(a) When the out-of-state attorney files a motion for *pro hac vice* admission pursuant to C.R.C.P. 205.3 and 205.4, and obtains permission from the trial court for such appearance (the Supreme Court may waive *pro hac vice* admission fees at the time of the determination of the major disaster as described in paragraph (1) or at any time thereafter while the determination remains in effect); or

(b) When the Supreme Court, in any determination made under paragraph (1), grants blanket permission to attorneys providing legal services pursuant to paragraph (2) to appear in all or designated Colorado courts or administrative tribunals, thereby suspending the *pro hac vice* application and fee requirements set forth in C.R.C.P. 205.3 and 205.4.

(6) Disciplinary Authority and Registration Requirement. Out-of-state attorneys who establish a place for the temporary practice of law in Colorado pursuant to paragraphs (2) or (3) are subject to this Supreme Court's disciplinary authority and the Colorado Rules of Professional Conduct as provided in C.R.C.P. 205.1(3) and Colo. RPC 8.5. Prior to opening such place for the temporary practice of law in Colorado, these out-of-state attorneys shall file a registration statement with the Colorado Supreme Court Office of Attorney Registration. The registration statement shall be in a form prescribed by the Supreme Court. Any out-of-state attorney who provides legal services pursuant to this rule shall not be considered to be engaged in the unauthorized practice of law in Colorado, and shall be deemed, for the purposes of Colorado Revised Statutes, Title 12, Article 5, Sections 101, 112 and 115, to have obtained a license for the limited scope of practice specified in this rule.

(7) Notification to Clients. Out-of-state attorneys who establish a place for the temporary practice of law in Colorado pursuant to paragraph (2) shall inform Colorado clients in writing, at the time the relationship commences, of the jurisdiction(s) in which the attorney is licensed or otherwise authorized to practice law, any limits on that authorization, and that the attorney is not authorized to practice law in Colorado except as permitted by this rule and the Court's emergency order.

Source: Entire rule added and effective June 16, 2011; (2), (3), (5)(a), (5)(b), and (6) amended and effective January 14, 2015.

Rule 226. Legal Aid Dispensaries; Law Students Practice

Repealed July 12, 2011, nunc pro tunc June 16, 2011, effective immediately.

Rule 226.5. Legal Aid Dispensaries and Law Student Externs

Repealed, effective September 1, 2014.

Rule 227. Registration Fee

A. Registration Fee of Attorneys and Attorney Judges

(1) General Provisions.

(a) Fees. On or before February 28 of each year, every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall annually file a registration statement and pay a fee as set by the Colorado Supreme Court. As of 2014, the fees set by the court are as follows: the fee for active attorneys is $325.00; the fee of any attorney whose first admission to practice is within the preceding three years is $190.00; the fee for attorneys on inactive status is $130.00. All persons first becoming subject to this rule shall file a statement required by this rule at the time of admission, but no annual fee shall be payable until the first day of January following such admission. As necessary to defray the costs of regulating attorneys, judges and those engaged in unauthorized practice of law, the Supreme Court will authorize periodic increases to the annual fee for every Colorado attorney.

(b) Collection of Fee. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive the notices and statements provided for hereafter.

(c) Application of Fees. The fee shall be divided. Twenty-five dollars shall be used to maintain an Attorneys' Fund for Client Protection. The remaining portion of the fee, and the entire fee of those on inactive status, shall be used only to defray the costs of the Office of Attorney Regulation Counsel (admissions, registration, mandatory continuing legal and judicial education, attorney diversion and discipline counsel to Commission on Judicial Discipline, unauthorized practice of law and inventory counsel functions), the Office of the Presiding Disciplinary Judge, the Commission on Judicial Discipline, the Colorado Lawyers Assistance Program, the Colorado Attorney Mentoring Program, the Advisory and other regulatory committees and any other practice of law function deemed appropriate by the Supreme Court.

(2) Statement.

(a) Contents. The annual registration statement shall be on a form prescribed by the Clerk, setting forth:

(1) date of admission to the Bar of the Colorado Supreme Court;

(2) registration number;

(3) current residence and office addresses and, if applicable, a preferred mailing address for the Colorado Courts, along with current telephone numbers and email addresses;

(4) certification as to (a) whether the attorney has been ordered to pay child support and, if so, whether the attorney is in compliance with any child support order, (b) whether the attorney or the attorney's law firm has established one or more interest-bearing

accounts for client funds as provided in Colo. RPC 1.15B and if so, the name of the financial institution, account number and location of the financial institution, or, if not, the reason for the exemption, and (c) with respect to attorneys engaged in the private practice of law, whether the attorney is currently covered by professional liability insurance and, if so, whether the attorney intends to maintain insurance during the time the attorney is engaged in the private practice of law; and

(5) such other information as the Clerk may from time to time direct.

(b) Notification of Change. Every attorney shall file a supplemental statement of change in the information previously submitted, including home and business addresses, within 28 days of such change. Such change shall include, without limitation, the lapse or termination of professional liability insurance without continuous coverage.

(c) Availability of Information. The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.

(3) Compliance.

(a) Late Fee. Any attorney who pays the annual fee or files the annual registration statement after February 28 but on or before March 31 shall pay a late fee of $50.00 in addition to the registration fee. Any attorney who pays the annual fee or files the annual registration statement after March 31 shall pay a late fee of $150.00 for each such year, in addition to the registration fee.

(b) Receipt - Demonstration of Compliance. Within 28 days of the receipt of each fee and of each statement filed by an attorney in accordance with the provisions of this rule, receipt thereof shall be acknowledged on a form prescribed by the Clerk in order to enable the attorney on request to demonstrate compliance with the requirement of registration pursuant to this rule.

(c) Initial Pleading Must Contain Registration Number. Whenever an initial pleading is signed by an attorney, it shall also include thereon the attorney's registration number. Whenever an initial appearance is made in court without a written pleading, the attorney shall advise the court of the registration number. The number need not be on any subsequent pleadings.

(4) Suspension.

(a) Failure to Pay Fee or File Statement - Notice of Delinquency. An attorney shall be summarily suspended if the attorney either fails to pay the fee or fails to file a complete statement or supplement thereto as required by this rule prior to May 1, provided a notice of delinquency has been issued by the Clerk and mailed to the attorney addressed to the attorney's last known mailing address at least 28 days prior to such suspension, unless an excuse has been granted on grounds of financial hardship.

(b) Failure of Judge to Pay Fee or File Statement. Any judge subject to the jurisdiction of the Commission on Judicial Discipline or the Denver County Court Judicial Discipline Commission who fails to timely pay the fee or file a complete statement or supplement thereto as required by this rule shall be reported to the appropriate commission, provided a notice of delinquency has been issued by the Clerk and mailed to the judge addressed to the judge's last known business address at least 28 days prior to such reporting, unless an excuse has been granted on grounds of financial hardship.

(5) Reinstatement.

(a) Application - Reinstatement Fee. Any attorney suspended under the provisions of section (4)(a) above shall not be reinstated until application for reinstatement is made in writing and the Clerk acts favorably on the application. Each application for reinstatement shall be accompanied by a reinstatement fee of $100.00 and payment of all arrearages and late fees to the date of the request for reinstatement.

(b) Report Judge's Payment. If any judge who is reported to a commission under the provisions of section (4)(b) above subsequently makes payment of all arrearages, such payment shall be reported to the commission by the Clerk.

(6) Inactive Status.

(a) Notice. An attorney who has retired or is not engaged in practice shall file a notice in writing with the Clerk that he or she desires to transfer to inactive status and discontinue the practice of law.

(b) Payment of Fee - Filing of Statement. Upon the filing of the notice to transfer to inactive status, the attorney shall no longer be eligible to practice law but shall continue to pay the fee required under section (1)(a) above and file the statements and supplements thereto required by this rule on an annual basis.

(c) Exemption - Age 65. Any registered inactive attorney over the age of 65 is exempt from payment of the annual fee.

(7) Transfer to Active Status.

Upon the filing of a notice to transfer to inactive status and payment of the fee required under section (1)(a) above and any arrearages, if owed, an attorney shall be removed from the roll of those classified as active until and unless a request for transfer to active status is made and granted. Transfer to active status shall be granted, unless the attorney is subject to an outstanding order of suspension or disbarment, upon the payment of any assessment in effect for the year the request is made and any accumulated arrearages for non-payment of inactive fees.

(8) Resignation.

An attorney may resign from the practice of law in Colorado upon order of the Supreme Court and thereby be excused from paying the annual registration fee provided that no disciplinary or disability matter or order is pending against the attorney. Any attorney who wishes to resign must petition the Supreme Court pursuant to this Rule and tender the attorney's certificate of admission with the petition. Any attorney who so resigns is not eligible for reinstatement or transfer to active or inactive status and may be admitted to the practice of law in Colorado only by complying with the rules governing admission to the practice of law. Any attorney who so resigns remains subject to the jurisdiction of the Supreme Court as set forth in Rule 251.1(b) with respect to the attorney's practice of law in Colorado.

B. Registration Fee of Non-Attorney Judges

(1) Every non-attorney judge who is subject to the jurisdiction of the Commission on Judicial Discipline shall pay an annual fee of $10.00. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive, or cause to be sent and received, the notices and fees provided for hereafter. The ten-dollar fee shall be used to pay the costs of establishing and administering the mandatory continuing legal education requirement. The clerk shall account for and forward these receipts to the Office of Continuing Legal and Judicial Education.

(2) Any non-attorney judge who fails to timely pay the fee required under subparagraph (1) above shall be reported to the Commission on Judicial Discipline, provided a notice of delinquency has been issued by the Clerk and mailed to the non-attorney judge by certified mail addressed to the county court in the respective county seat at least 28 days prior to such reporting, unless an excuse has been granted on grounds of financial hardship.

(3) If any non-attorney judge who is reported to the Commission on Judicial Discipline under the provisions of subparagraph (2) above subsequently makes payment of arrearages, such payment shall be reported to the Commission by the Clerk.

(4) On or before January 31 of each year, all non-attorney judges shall file any affidavit required by Rule 250.7 and shall pay the annual fee required by this rule.

(5) Within 21 days after the receipt of each fee in accordance with the provisions of subparagraph (4) above, receipt thereof shall be acknowledged on a form prescribed by the Clerk.

Source: A.(1)(a) amended October 17, 1991, effective January 1, 1992; A.(8) added and effective October 15, 1992; A.(1)(c) amended June 25, 1998, effective June 30, 1998; A.(2)(a) and A.(3)(a) amended June 25, 1998, effective July 1, 1998; A.(1)(a) amended June 25, 1998, effective January 1, 1999; entire rule amended November 22, 2000, effective January 1, 2001; A.(1)(c) amended June 7, 2001, effective July 1, 2001; A.(1)(a) amended April 14, 2005, effective January 1, 2006; A.(1) amended and effective March 16, 2006; A.(4)(a) amended and effective April 27, 2006; A.(1)(c) amended and effective June 22, 2006; A.(1), A.(2), A.(3), A.(4), and A.(5) amended and Comment added September 10,

2008, effective January 1, 2009; A.(2)(b), A.(3)(b), A.(4), B.(2), and B.(5) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); A.(1), A.(2)(a)(3), A.(4)(b), A.(8), and B. amended and adopted June 27, 2013, effective September 1, 2013; A.(1)(c) amended and effective January 16, 2014; (2)(a)(4) and comment amended and effective January 14, 2015; B.(1) and B.(4) amended and effective January 24, 2019.

COMMENT

The Supreme Court sets the annual attorney registration fee. The annual attorney registration fee includes both attorneys on active status and attorneys on inactive status. Attorneys admitted under C.R.C.P. 204 annually pay the active attorney fee as required by C.R.C.P. 204.1 through 204.6. The Supreme Court apportions the active attorney fee to the various attorney regulation and registration offices; the continuing legal education office; the Attorneys' Fund for Client Protection; and the Colorado Attorney Assistance Program.

To cover the operating costs of the various programs the court increased the annual attorney registration fee every six to eight years. In 2006, the court increased the active attorney registration fee fifteen percent. In 1998, to fund major changes to the attorney regulation system the court increased the fee seventy percent. The infrequent increases resulted in a surplus in the attorney registration/regulation fund for a period of years. In an effort to reduce the impact of a substantial fee increase every six to eight years the court adopted a more modest and consistent way of determining attorney registration fees. The court will authorize smaller but more frequent fee increases as necessary to cover operating expenses related to the costs of the Attorneys' Fund for Client Protection, attorney regulation, unauthorized practice of law matters, and administration of this rule.

ANNOTATION

Law reviews. For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, ''Colorado's New Rule on Mandatory Professional Liability Insurance Disclosure'', see 38 Colo. Law. 69 (February 2009). For article, ''Attorney-Client Communications in Colorado'', see 38 Colo. Law. 59 (April 2009).

Constitutionality. The difference in treatment accorded lawyers who pay the fee under this rule and those who do not pay the fee does not constitute invidious discrimination against those who do not pay the fee as it is not in violation of due process or equal protection of the law. May v. Supreme Court of Colo., 508 F.2d 136 (10th Cir. 1974), cert. denied, 422 U.S. 1008, 95 S. Ct. 2631, 45 L. Ed. 2d 671 (1975).

Attorney currently under suspension for failure to comply with registration requirements is still subject to jurisdiction of the court for additional violations of Colorado rules of civil procedure and failure to comply with the code of professional responsibility. People v. Richards, 748 P.2d 341 (Colo. 1987).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 757 P.2d 628 (Colo. 1988); People v. Newman, 925 P.2d 783 (Colo. 1996).

Disbarment is warranted for driving while impaired, marihuana possession, improperly executing agreement without permission, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Woodrum, 911 P.2d 640 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Craig, 653 P.2d 1115 (Colo. 1982).

Conduct violating this rule sufficient to justify disbarment. People v. Greene, 773 P.2d 528 (Colo. 1989).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997).

Facts supported finding of direct contempt when defendant admittedly made offensive statement during the course of proceedings even though obscenity was directed toward counsel for the People and merely overheard by the court. There was no abuse of discretion by the trial court given the fact that the defendant admitted it was inappropriate and an affront to

the dignity of the court and its proceedings, and given the fact that defendant was an attorney admitted to the Bar. People v. Holmes, 967 P.2d 192 (Colo. App. 1998).

Applied in People v. Whiting, 189 Colo. 253, 539 P.2d 128 (1975).

NOTE: Rules 201 to 227 are a part of the Colorado Rules of Civil Procedure. Rule 110(b), Use of Terms, provides that the ''masculine shall include the feminine.''

(The above footnote was added to Rules 201 to 227 by the Supreme Court, April 3, 1978.)

CHAPTER 19

Unauthorized Practice of Law Rules

ANALYSIS BY RULE

CHAPTER 19

UNAUTHORIZED PRACTICE OF LAW RULES

Rule 228. Jurisdiction

The Supreme Court of Colorado, in the exercise of its exclusive jurisdiction to define the practice of law and to prohibit the unauthorized practice of law within the State of Colorado, adopts the following rules, which shall govern proceedings concerning the unauthorized practice of law.

ANNOTATION

Law reviews. For article, ''Proposed Amendments to C.R.C.P. 228 and the Cross-Border Practice of Law'', see 31 Colo. 21 (January 2002).

Granting person permission to practice law is sole prerogative of supreme court of Colorado. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Purpose of the bar and the admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982); Unauthorized Practice of Law Comm. v. Prog, 761 P.2d 1111 (Colo. 1988).

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

The counseling and sale of living trusts by nonlawyers constitutes the unauthorized practice of law. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Assignee's action in filing adversary proceedings contesting discharge of debts assigned to him by various subcontractors constitutes the unauthorized practice of law. As long as the subcontractors are not selling their claims for present consideration but instead are retaining an interest in the proceeds of the claims, assignee is acting partially on their behalf in a representative capacity. By pursuing litigation to recover on the claims, assignee is arguably taking actions amounting to the practice of law. In re Thomas, 387 B.R. 808 (D. Colo. 2008).

Suspended attorney must demonstrate rehabilitation for readmittance to bar. Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that: (1) He has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Rule 229. Appointment and Organization of Unauthorized Practice of Law Committee

(a) There is hereby established a committee to be known as the Unauthorized Practice of Law Committee of the Supreme Court of the State of Colorado (Committee) and which shall be an adjunct to the Supreme Court. The Committee shall be composed of nine members, six of whom shall be members of the Bar of Colorado. The members of the Committee shall be appointed by the Supreme Court for terms of three years, beginning on the 1st day of January, and the terms of three members shall commence each year; provided, that terms may be for shorter periods to accommodate changes in the size of the Committee by amendments to this rule. Membership on the Committee may be terminated by the Supreme Court at its pleasure, and members may resign at any time. Any vacancies shall be filled by appointment by the Supreme Court for the unexpired term. The Committee and members thereof shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) The Supreme Court shall designate a member of the Committee as Chair.

(c) The Committee may adopt rules providing for the time and place of its meetings, the selection of a Vice-Chair and other officers, and such other rules not in conflict with the rules of the Supreme Court as may be deemed necessary or expedient for the conduct of the Committee's business. The Clerk of the Supreme Court shall have copies of the rules for interested persons.

(d) The Committee may enlist the assistance of other duly licensed members of the Bar of Colorado in the performance of the activities of the Committee.

Source: (d) amended and adopted December 14, 1995, effective January 1, 1996; (b) and (c) amended and adopted October 29, 1998, effective January 1, 1999.

Rule 230. Committee Jurisdiction

(a) The Committee shall have jurisdiction over and inquire into and consider complaints or reports made by any person, including Regulation Counsel, or other entities alleging the unauthorized practice of law. Moreover, the Committee, on its own motion, may inquire into any matter pertaining to the unauthorized practice of law.

(b) Nothing contained in these rules shall be construed as a limitation upon the authority or jurisdiction of any court or judge thereof to punish for contempt any person or legal entity not having a license from this court who practices law or attempts or purports to practice law in any matter which comes within the jurisdiction of that court nor shall these rules be construed as a limitation upon any civil remedy or criminal proceeding which may otherwise exist with respect to the unauthorized practice of law.

Source: (a) amended and adopted October 29, 1998, effective January 1, 1999.

ANNOTATION

Trial court has jurisdiction under subsection (b) of this rule to conduct punitive contempt proceedings in which the sole allegation is that an individual is engaged in the unauthorized practice of law in violation of rules adopted by the Colorado Supreme Court. Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guaranty Co., 847 P.2d 170 (Colo. App. 1992).

Because a partnership is not a separate legal entity, but is only treated as such under partnership statutes for certain limited purposes, trial court should reconsider its finding of contempt based on theory that a Virginia partnership and individuals representing it in Colorado courts were engaged in the unauthorized practice of law. Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guaranty Co., 847 P.2d 170 (Colo. App. 1992).

Rule 231. Regulation Counsel; Duties and Powers

Regulation Counsel, appointed by the Supreme Court pursuant to C.R.C.P. 251.3, shall have the following duties and powers, in addition to those set forth in C.R.C.P. 251.3:

(a) (1) To investigate and to assist with the investigation of all matters within the jurisdiction of the Committee, upon the request and at the direction of members of the Committee; to dismiss allegations as provided in C.R.C.P. 232.5(c); and to report to the Committee as provided in C.R.C.P. 232.5(d).

(2) To prepare and prosecute, or assist in the preparation and prosecution of, civil-injunction proceedings as provided in C.R.C.P. 234 to 237.

(3) To prepare and prosecute, or assist in the preparation and prosecution of, contempt proceedings as provided in C.R.C.P. 238 and 239.

(b) To maintain records in the office of the Committee, in an appropriately cataloged manner, of all matters coming within the jurisdiction of the Committee.

(c) To provide facilities for the administration of proceedings under these rules and for receiving and filing all requests of investigation and all complaints concerning matters within the jurisdiction of the Committee.

(d) To employ such staff, including investigative and clerical personnel, subject to approval of the Committee, as may be necessary to carry out the duties under these rules.

(e) To perform such other duties as the Chair or the Supreme Court may require.

Source: IP amended and effective May 14, 1992; (a) amended and adopted December 14, 1995, effective January 1, 1996; IP and (e) amended and adopted October 29, 1998, effective January 1, 1999; IP, (a), and (d) amended and effective October 29, 2001.

Rule 232. Investigations; General, Subpoenas

Repealed, effective October 29, 2001.

Rule 232.5. Investigation; Procedure; Subpoenas

(a) All matters within the jurisdiction of the Committee shall be referred to the Regulation Counsel who shall either conduct an investigation or, if the Chair concurs, refer the matter to a member of the Committee pursuant to this rule or to an enlisted member of the Bar pursuant to C.R.C.P. 229(d) for investigation. Unless excused by the Regulation Counsel, the complainant shall be required to submit the complaint in writing and subscribe the same.

(b) (1) Promptly after receiving a written request for investigation or complaint, the Regulation Counsel shall determine whether to proceed with an investigation. In making such determination, the Regulation Counsel may make such inquiry regarding the underlying facts as the Regulation Counsel deems appropriate.

(2) If the Regulation Counsel determines to proceed with an investigation or refers the matter to a member of the Committee or an enlistee for investigation pursuant to C.R.C.P. 232.5(a), the respondent shall be: notified that the investigation is underway; provided with a copy of the complaint and of the rules governing the investigation; and asked to file with the Regulation Counsel or the person conducting the investigation a written answer to the complaint within 21 days after notice of the investigation is given.

(c) When the investigation is concluded, the Regulation Counsel shall either dismiss the allegations or report to the Committee for a determination as provided in paragraph (d) of this rule. If the Regulation Counsel dismisses the allegations, the person making the allegations may request review of the Regulation Counsel's decision by the Committee. If such review is requested, the Committee shall review the matter and make a determination as provided in paragraph (d). The Committee shall sustain the dismissal unless it finds that the Regulation Counsel's action constituted an abuse of discretion. If the Committee sustains a dismissal, it shall furnish the person making the allegations with a written explanation of its decision.

(d) If, after conducting an investigation, the Regulation Counsel believes that the Committee should authorize an informal disposition, civil-injunction proceedings, or contempt proceedings, the Regulation Counsel shall submit a report of the investigation and a recommendation to the Committee. The Committee shall then decide whether to:

(1) dismiss the matter; provided that the dismissal may be either with or without a finding of the unauthorized practice of law, and the letter of dismissal may contain cautionary language if appropriate; and provided that the person making the allegation shall be furnished a written explanation of the Committee's decision;

(2) conduct further investigation;

(3) enter into an informal disposition with the respondent consisting of a written agreement by the respondent to refrain from the conduct in question, to refund any fees collected, to make restitution and/or to pay a fine that may range from $100 to $250 per incident; such informal dispositions are to be encouraged;

(4) commence civil-injunction proceedings as provided in C.R.C.P. 234 to 237; or

(5) commence contempt proceedings as provided in C.R.C.P. 238 and 239.

(e) At least three Committee members must be present for the Committee to act upon said reports, findings, and recommendations.

(f) In connection with an investigation of the unauthorized practice of law, the Chair or the Regulation Counsel may issue subpoenas to compel the attendance of respondents and other witnesses or to compel the production of books, papers, documents, or other evidence. All such subpoenas are subject to the provisions of C.R.C.P. 45.

(g) Any person subpoenaed to appear and give testimony, or to produce books or records, who refuses to appear and give testimony, or to produce the books or records; and any person having been sworn to testify and who refuses to answer any proper questions, may be cited for contempt of the Supreme Court, as provided in C.R.C.P. 107.

(h) Any person investigating a matter pursuant to these rules shall have the power to administer oaths and affirmations, and to take and have transcribed the testimony and evidence of witnesses.

(i) Any person who knowingly obstructs the Regulation Counsel or the Committee, or any part thereof, in the performance of their duties may be cited for contempt of the Supreme Court, as provided in C.R.C.P. 107.

Source: Entire rule added and effective October 29, 2001; (d)(3) amended and adopted December 14, 2006, effective January 1, 2007; (b)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 233. Investigation; Procedure

Repealed, effective October 29, 2001.

Rule 234. Civil Injunction Proceedings; General

(a) If the Committee determines that civil injunction proceedings shall be instituted against a respondent, such proceedings may be commenced in the name of the People of the State of Colorado by a petition filed in the Supreme Court by the Regulation Counsel or by a member of the Bar appointed by the Supreme Court for the purpose of conducting such proceedings.

(b) The petition shall be in writing and shall set forth the facts and charges in plain language and with sufficient particularity to inform the respondent of the acts complained of. The petition shall specify requested relief which may include, without limitation, injunction, refund, restitution, a fine, and assessment of costs of the proceeding.

(c) The Supreme Court, upon consideration of the petition so filed, may issue its order directed to the respondent commanding the respondent to show cause why the respondent should not be enjoined from the alleged unauthorized practice of law, and further requiring the respondent to file with the Supreme Court within 21 days after service of the petition and show cause order, a written answer admitting or denying the matter stated in the petition. The show cause order, together with a copy of the petition, shall be served upon the respondent. Service of process shall be sufficient when made either personally upon the respondent or by certified mail sent to the respondent's last known address.

(d) If no response or defense is filed within the time permitted, the Supreme Court, upon its motion or upon motion of any party, shall decide the case, granting such relief and issuing such other orders as may be appropriate.

(e) If a response or defense raises no genuine issue of material fact, any party by motion may request a judgment on the pleadings and the Supreme Court may decide the case as a matter of law, granting such relief and issuing such orders as may be appropriate.

(f) Upon the Supreme Court's motion or upon motion of any party, questions of fact raised in proceedings under this rule shall be referred to a hearing master for determination.

Source: (a) to (c) amended and adopted December 14, 1995, effective January 1, 1996; (a) amended and adopted October 29, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2006, effective January 1, 2007; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Representation by non-attorneys allowed. Persons entitled to a hearing regarding the appeal of a deputy's decision may be represented by a non-lawyer, even though such representation constitutes practicing law. Unauthorized Prac. of Law v. Employers Unity, 716 P.2d 460 (Colo. 1986).

It is within the authority of the Supreme Court to promulgate rules governing the admission and regulation of lawyers. An attorney licensed to practice in another state may not engage in the practice of law in Colorado without obtaining a license or authorization from the Colorado supreme court. Unauthorized Pract. of Law v. Bodhaine, 738 P.2d 376 (Colo. 1987).

Applied in People v. Love, 775 P.2d 26 (Colo. 1989).

Rule 235. Civil Injunction Proceedings; Hearing Master, Powers, Procedure

(a) Civil injunction proceedings before a hearing master shall be held in any county designated by the hearing master that is convenient to the participants.

(b) The People of the State of Colorado may be represented in proceedings before the hearing master by the Regulation Counsel, or by a member of the Bar appointed pursuant to Rule 234. Upon receipt of the order of reference, the hearing master shall set a date, time, and place for a first meeting of the parties which shall be within 28 days after the date notice thereof is given and notify the parties accordingly. At such meeting, a date, time, and place for hearing shall be set, and any matters which may expedite the proceedings shall be considered. A complete record of this meeting shall be made unless jointly waived by the parties. After the first meeting, the hearing master shall issue a notice of hearing to the parties. The notice shall be in writing and shall designate the date, time, and place of the hearing. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the hearing, to cross-examine witnesses, and to present evidence in the respondent's own behalf. The giving of notice shall be sufficient when made by certified mail sent to the respondent at the respondent's last known address.

(c) The parties may procure the attendance of witnesses before the hearing master by the issuance of subpoenas which shall run in the name of the Supreme Court and may be issued by the hearing master or Clerk of the Supreme Court upon the request of a party. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Failure or refusal, without adequate excuse, to comply with any such subpoena shall be a contempt of the Supreme Court and may be punished accordingly.

(d) The Colorado Rules of Civil Procedure shall be applicable when not inconsistent with these rules. Subject to any limitations in the order of reference, the hearing master shall have the powers generally reposed in a ''Court'' under the Colorado Rules of Civil Procedure. At all hearings before a hearing master witnesses shall be sworn and a complete record made of all proceedings had and testimony taken.

Source: (a) and (b) amended and adopted December 14, 1995, effective January 1, 1996; (b) amended and adopted October 29, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 236. Civil Injunction Proceedings; Report of Hearing Master; Objections

(a) After the hearing, the hearing master shall report in writing to the Supreme Court in accordance with the order of reference, setting forth findings of fact, conclusions of law, and recommendations for final disposition of the case. If the hearing master makes a finding of unauthorized practice of law in the report, then the hearing master shall also recommend that a fine be imposed for each incident of unauthorized practice of law; the minimum fine for each incident shall be not less than $250 and not more than $1000. A report from the Presiding Disciplinary Judge approving the parties' stipulation to injunc-

tion, may be exempt from a fine. Promptly after the report is filed with the Supreme Court, the Clerk shall mail copies thereof to all parties.

(b) Objections to the report of the hearing master may be filed with the Supreme Court by any party, within 28 days after copies of the report have been mailed to the parties.

(c) If no objections are filed, the case shall stand submitted upon the hearing master's report.

(d) If objections are filed, the objecting party shall within 14 days thereafter request the reporter to prepare a transcript of the proceedings before the hearing master, or any portion of such transcript thereof as is deemed necessary for the consideration of the case. The objecting party shall file with the Supreme Court and serve on the opposing party a designation of those portions of the transcript and of the record before the hearing master which the party wishes added to the record before the Supreme Court.

The opposing party may within 14 days after service of the designation file and serve a cross-designation of any additional portions of the transcript and additional parts of the record before the hearing master as is deemed necessary for a proper consideration of the case. The objecting party is responsible for the expense of preparing the record, including the transcript or portions thereof.

The reporter shall prepare the transcript and file it, properly certified, with the Supreme Court within 63 days (9 weeks) after the filing of the objections.

(e) An objecting party shall have 28 days after the filing with the Supreme Court of the transcript and other additions to the record within which to file an opening brief. The opposing party shall have 28 days after the filing of the objecting party's opening brief within which to file an answer brief. The objecting party shall have 14 days after the filing of the answer brief within which to file a reply brief.

(f) A brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or by the request of the Court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; (e) amended and adopted October 29, 1998, effective January 1, 1999; (a) amended and adopted December 14, 2006, effective January 1, 2007; (b), (d), and (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 237. Civil Injunction Proceedings; Determination by Court

(a) After review of the report of the hearing master, together with any objections and briefs, the Supreme Court may adopt the report or modify or reject it in whole or in part and shall determine as a matter of law whether the respondent has been engaged in the unauthorized practice of law. If the Supreme Court finds that the respondent was engaged in the unauthorized practice of law, the Supreme Court may enter an order enjoining the respondent from further conduct found to constitute the unauthorized practice of law, and make such further orders as it may deem appropriate, including restitution and the assessment of costs.

(b) Nothing in this rule shall be construed to limit the power of the Supreme Court, upon proper application, to issue an injunction at any stage of the proceeding in order to prevent public harm.

ANNOTATION

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Applied in Unauthorized Practice of Law Comm. v. Prog, 761 P.2d 1111 (Colo. 1988); People v. Adams, 243 P.3d 256 (Colo. 2010).

Rule 238. Contempt Proceedings; General

(a) If the Committee determines that contempt proceedings shall be instituted against a respondent, such proceedings shall be commenced in the name of the People of the State of Colorado by a petition filed in the Supreme Court by the Regulation Counsel or by a member of the Bar appointed by the Supreme Court for the purpose of conducting such proceedings.

(b) The petition shall allege facts indicating that the respondent is engaged in the unauthorized practice of law and shall contain a prayer for the issuance of a contempt citation.

(c) Upon the filing of a petition, the Supreme Court may issue a citation directing the respondent to show cause why he should not be held in contempt of the Supreme Court for the unauthorized practice of law, or the Supreme Court may, in the alternative, issue a show cause order in civil injunctive proceedings which shall be governed by Rules 234 to 237. If a citation is issued, the citation shall state that a fine of not less than $2000 per incident or imprisonment may be imposed to vindicate the dignity of the Supreme Court.

(d) If a contempt citation is issued, it shall be served upon the respondent, together with a copy of the petition, as provided in Rule 4, C.R.C.P., and the citation shall specify the time for response. If a response is filed, the Supreme Court shall appoint a hearing master who shall set a date, time, and place for the appearance of the respondent, and shall give notice thereof. The notice shall be in writing. The notice shall designate the date, time, and place of the appearance. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the appearance, to cross-examine witnesses, and to present evidence in the respondent's own behalf. The giving of notice shall be sufficient when made by certified mail sent to the respondent at the respondent's last known address.

(e) Proceedings for the hearing of a contempt citation before a hearing master shall be held in any county designated by the hearing master that is convenient to the participants.

(f) If the respondent has been served with a citation and fails to respond to the citation or appear before the hearing master at the time and place designated in the notice issued by the hearing master, a warrant for the arrest of the respondent may be issued by the hearing master without prior approval of the Supreme Court. The warrant shall fix the time and place for the production of the respondent before the hearing master. The hearing master shall direct by endorsement on the warrant the amount of bail required, and the respondent shall be discharged upon the delivery to and approval by the sheriff or the Clerk of the Supreme Court of a written undertaking executed by a sufficient surety, to the effect that the respondent will appear at the time and place designated in the warrant and at any time thereafter to which the hearing on the citation may be continued, or pay the sum specified. Any funds surrendered as bail shall be deposited with the Clerk of the Supreme Court or with the Clerk of the District court in the county where the proceedings are to be held. If the respondent fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the undertaking may be forfeited upon order of the hearing master. If the respondent fails to make bond, the sheriff shall keep the respondent in custody and produce the respondent before the hearing master at the time and place fixed by the warrant.

(g) At all hearings before the hearing master, witnesses shall be sworn and a complete record made of all proceedings had and testimony taken. The citation shall be prosecuted by the Regulation Counsel of the State of Colorado or by such duly licensed and registered members of the Bar as may be designated by this Court.

(h) The Colorado Rules of Civil Procedure shall be applicable when not inconsistent with these rules. Subject to any limitations in the order of reference, the hearing master shall have the powers generally reposed in a ''court'' under the Colorado Rules of Civil Procedure.

(i) The parties may procure the attendance of witnesses before the hearing master by the issuance of subpoenas in the name of the Supreme Court, which may be issued by the hearing master or Clerk of the Supreme Court upon the request of a party. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Failure or refusal, without adequate excuse, to comply with any such subpoena shall be a contempt of the Supreme Court and may be punished accordingly. The parties shall have the right to be present at all times during the hearings before the hearing master and to examine and cross-examine witnesses.

Source: (a) and (d) to (i) amended and adopted December 14, 1995, effective January 1, 1996; (a) and (g) amended and adopted October 29, 1998, effective January 1, 1999; (c) amended and adopted December 14, 2006, effective January 1, 2007.

ANNOTATION

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Rule 239. Contempt Determination by Court Proceedings; Report of Hearing Master; Objections

(a) After the conclusion of the hearing, the hearing master shall report in writing to the Supreme Court, setting forth the hearing master's findings of fact, conclusions of law, and, upon a finding of contempt, recommendations for punishment. If the matter proceeds to trial and the hearing master makes a finding of contempt but does not recommend imprisonment, then the hearing master shall recommend that a fine be imposed for each incident of contempt; the minimum fine for each incident shall be not less than $2000 and not more than $5000. Promptly after the report is filed with the Supreme Court, the Clerk of the Supreme Court shall mail copies thereof to the parties.

(b) Objections to the report of the hearing master may be filed with the Supreme Court by either party within 28 days after the filing of the report.

(c) If no objections are filed, the case shall stand submitted upon the hearing master's report.

(d) If objections are filed, the objecting party shall within 14 days thereafter request the reporter to prepare a transcript of the proceedings before the hearing master, or any portion of such transcript thereof as is deemed necessary for the consideration of the case. The objecting party shall file with the Supreme Court and serve on the opposing party a designation of those portions of the transcript and of the record before the hearing master which the party wishes added to the record before the Supreme Court.

The opposing party may within 14 days after service of the designation file and serve a cross-designation of any additional portions of the transcript and additional parts of the record before the hearing master as is deemed necessary for a proper consideration of the case. The objecting party is responsible for the expense of preparing the record, including the transcript or portions thereof.

The reporter shall prepare the transcript and file it, properly certified, with the Supreme Court within 63 days (9 weeks) after the filing of the objections.

(e) An objecting party shall have 28 days after the filing with the Supreme Court of the transcript and other additions to the record within which to file an opening brief. The opposing party shall have 28 days after the filing of the objecting party's opening brief within which to file an answer brief. The objecting party shall have 14 days after the filing of the answer brief within which to file a reply brief.

(f) A brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or by the request of the Court. The brief may be conditionally filed with

the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer.

(g) After review of the report of the hearing master any objections thereto and briefs, the Supreme Court may adopt the report or modify or reject it in whole or in part and shall determine whether the respondent is guilty of contempt of the Supreme Court and shall, by order, prescribe the punishment therefor, including the assessment of costs, expenses and reasonable attorney's fees.

(h) Nothing in this rule shall be construed to limit the power of the Supreme Court, upon proper application, to issue an injunction at any stage of contempt proceedings in order to prevent public harm, or to limit the power of the Supreme Court to issue an injunction in lieu of or in addition to the imposition of a fine or any other remedy under these rules.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; (a) amended and adopted December 14, 2006, effective January 1, 2007; (b), (d), and (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 240. General Provisions; Qualifications of Hearing Master; Access to Information Concerning Proceedings Under these Rules

(a) A hearing master to whom matters are referred pursuant to these rules shall be a person who is duly licensed to practice law in Colorado.

(b) All civil injunction proceedings and contempt proceedings filed in the Supreme Court pursuant to Rules 234 and 238, including proceedings before a hearing master, shall be public proceedings.

(c) Except as otherwise provided by these rules or by order of the Supreme Court, all proceedings conducted pursuant to these rules shall be confidential, and the files and records of the Committee shall be confidential and shall not be made public.

Except as otherwise provided by these rules, any person who wishes to disclose or to make public the pendency, subject matter, or status of proceedings which are otherwise confidential or to disclose or to make public the files and records of the Committee which are otherwise confidential or to gain access to the files and records of the Committee which are otherwise confidential shall file a petition with the Supreme Court setting forth the specific reasons why the existence of the particular proceedings should not remain confidential or the specific reasons why the disclosure of particular files and records or access to them should be permitted.

Upon final determination of any proceedings conducted pursuant to these rules, notice of the disposition of the matter shall be given by Regulation Counsel or the Clerk of the Supreme Court to the respondent, the complainant, and their counsel of record. Any person having received notice that a written agreement has been entered pursuant to C.R.C.P. 232.5(d)(3) shall treat such information as confidential and shall not disclose such information to anyone, except by order of the Supreme Court. Any person who makes a disclosure other than as permitted by these rules or by order of the Supreme Court may be subject to punishment for contempt of the Supreme Court.

(d) Exceptions to Confidentiality. The pendency, subject matter, and status of the proceedings conducted pursuant to these rules may be disclosed by the Committee or Regulation Counsel to:

(1) An entity authorized to investigate the qualifications of persons for admission to practice law;

(2) An entity authorized to investigate the qualifications of judicial candidates;

(3) A lawyer discipline enforcement agency;

(4) Any person or agency requesting such information, provided that the respondent has waived confidentiality and the request is within the scope of the waiver;

(5) An enlistee who, pursuant to Rule 229(d), was enlisted to assist the Committee;
(6) An agency authorized to investigate violations of the criminal laws or the consumer protection laws of this state or any other state, or of the United States; or
(7) Any person or agency, provided the proceeding is predicated either upon allegations that have become generally known to the public through printed or broadcast news accounts or upon acts of the respondent which are public or generally known.
(d.5) Access to the files and records of the Committee may be granted by the Committee or the Regulation Counsel, provided a request for disclosure or access is made in writing by:
(1) An entity authorized to investigate the qualifications of persons for admission to practice law;
(2) An entity authorized to investigate the qualifications of persons for government employment;
(3) An agency authorized to investigate allegations of unauthorized practice of law;
(4) An entity authorized to investigate the qualifications of judicial candidates;
(5) A lawyer discipline enforcement agency;
(6) An agency authorized to investigate violations of the criminal laws or the consumer protection laws of this state or any other state, or of the United States; or
(7) A state or federal judicial or administrative court or agency with which the respondent has had previous contact.
If the Regulation Counsel discloses confidential information to a judicial nominating commission of the State of Colorado or grants a judicial nominating commission access thereto, the Regulation Counsel shall give written notice to the respondent that specified confidential information has been so disclosed or that access has been granted.
(e) Repealed.

Source: (c) to (e) amended and adopted December 14, 1995, effective January 1, 1996; (c) and (d) amended and adopted and (e) repealed October 29, 1998, effective January 1, 1999; (c) and (d.5) amended and effective October 29, 2001.

Rule 240.1. Immunity

Persons performing official duties under the provisions of this chapter, including but not limited to members of the Committee and its staff; the Regulation Counsel and the Regulation Counsel's staff; the members of the Bar and enlistees working under the direction of the Committee; and the hearing masters, shall be immune from suit for all conduct in the course and scope of their official duties.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; entire rule amended and adopted October 29, 1998, effective January 1, 1999.

Rule 240.2. Expunction of Records

(a) Expunction — Self-Executing. Except for records relating to proceedings that have 1) become public pursuant to C.R.C.P 234, et seq., 2) resulted in a finding of unauthorized practice of law, or 3) resulted in agreements, all records relating to proceedings that were dismissed without a finding of unauthorized practice of law shall be expunged from the files of the committee, the Presiding Disciplinary Judge, and Regulation Counsel three years after the end of the year in which the dismissal occurred.
(b) Definition. The terms ''expunge'' and ''expunction'' shall mean the destruction of all records or other evidence of any type, including but not limited to, the request for investigation, the response, the investigator's notes, and the report of investigation.
(c) Notice to Respondent. If proceedings conducted pursuant to these Rules (or their predecessor) were commenced, the attorney in question shall be given prompt notice of the expunction.
(d) Effect of Expunction. After expunction, the proceedings shall be deemed never to have occurred. Upon either general or specific inquiry concerning the existence of proceedings which have been expunged, the committee or the Regulation Counsel shall

respond by stating that no record of the proceedings exists. The respondent in question may properly respond to any general inquiry about proceedings which have been expunged by stating that no record of the proceedings exists. The respondent in question may properly respond to any inquiry requiring reference to a specific proceeding which has been expunged by stating only that the proceeding was dismissed with no finding of unauthorized practice of law and that the record of the proceeding was expunged pursuant to this Rule. After a response is provided and is given to an inquirer, no further response to an inquiry into the nature or scope of the proceedings which have been expunged needs be made.

(e) Retention of Records. Upon written application to the committee, for good cause and with written notice to the respondent in question and opportunity to such respondent to be heard, the Regulation Counsel may request that records which would otherwise be expunged under this Rule be retained for such additional period of time, not to exceed three years, as the committee deems appropriate. The Regulation Counsel may seek further extensions of the period for which retention of the records is authorized whenever a previous application has been granted.

Source: Entire rule added and adopted December 14, 2006, effective January 1, 2007.

CHAPTER 20

Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Colorado Attorneys' Fund for Client Protection, and Mandatory Continuing Legal Education and Judicial Education

ANALYSIS BY RULE

CHAPTER 20

COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT PROTECTION, AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION

Editor's note: (1) Rules 251.1 through 252.16 replace Rules 241.1 through 241.26 on July 1, 1998 or January 1, 1999, as indicated in the source note following the rule. For an explanation of the implementation of these rules, see the order from the Office of the Chief Justice following this editor's note.

(2) Rules 260.1 to 260.5 and 260.7 and 260.8 were repealed, replaced, and relocated to Rules 250.1 to 250.10, effective July 1, 2018, in accordance with Rule Change 2018(04).

Law reviews: For article, ''How the New Attorney Regulation System Will Work'', see 28 Colo. Law. 57 (February 1999); for article, ''Colorado's Attorney Regulation System: An Update'', see 35 Colo. Law. 25 (April 2006); for article, ''Attorney Discipline and Disability Process and Procedure—Part I'', see 36 Colo. Law. 23 (February 2007); for article, ''Attorney Discipline and Disability Process and Procedure—Part II'', see 36 Colo. Law. 41 (March 2007).

ORDER

The Supreme Court of the State of Colorado has adopted a series of changes to the attorney grievance system. Most of the reforms are incorporated into Rules that have been adopted effective January 1, 1999. However, a number of the reforms will come into effect over the course of the next six months. Hence, the Court enters this Order to permit immediate implementation of some programs and to insure an orderly transition to the new system.

IT IS ORDERED:

1. The following reorganization of the attorney regulation system has been adopted and will be implemented as set forth in this order;

a. We hereby adopt an alternatives to discipline program to permit the diversion of certain cases of minor misconduct to various agencies that will provide concrete assistance to attorneys and better protect the public. Therefore, C.R.C.P. 251.9, 251.10, 251.11, 251.12, and 251.13, shall become effective July 1, 1998, and shall be applicable to all cases pending in the Office of Disciplinary Counsel or before an Inquiry Panel, a Hearing Board, or a Hearing Panel of the Grievance Committee as of June 30, 1998, and to all cases initiated July 1, 1998 and thereafter;

b. Probation may be considered for all cases after a hearing pursuant to C.R.C.P. 251.7, which Rule shall become effective July 1, 1998, and which shall be applicable to all cases pending before the Hearing Board or Hearing Panel of the Grievance Committee on July 1, 1998, and to all cases considered after that date;

c. An attorneys' peer assistance program will be established and funded as part of the attorney regulation process pursuant to C.R.C.P. 227, which shall become effective June 30, 1998, and C.R.C.P. 251.34, which shall become effective July 1, 1998;

d. Immunity shall be granted to those individuals and entities providing assistance through the alternatives to discipline and peer assistance programs, as provided in C.R.C.P. 251.32, which shall become effective July 1, 1998;

e. The Office of the Presiding Disciplinary Judge is established by C.R.C.P. 251.16, which shall become effective January 1, 1999. The court will attempt to appoint the Presiding Disciplinary Judge

on or before December 1, 1998, following an application and review process to be established by the court. After December 31, 1998, the Presiding Disciplinary Judge shall be substituted for the Presiding Officer of all Hearing Boards in which a hearing has not been held. The Presiding Officer so replaced shall then act as one of the other members of that Hearing Board in the event that case goes to trial. In those cases in which the Presiding Disciplinary Judge cannot sit, the Grievance Committee member who was appointed Presiding Officer will continue to act as Presiding Officer of the Hearing Board;

f. All conditional admissions of misconduct and deferral agreements entered into prior to January 1, 1999, shall be reviewed by the Inquiry Panel at a final meeting or meetings in 1999. Conditional admissions of misconduct and alternatives to discipline agreements entered into on or after January 1, 1999, shall be considered by the Presiding Disciplinary Judge or the Attorney Regulation Committee as provided by C.R.C.P. 251.1 et seq.

g. All attorney discipline cases in which trial has occurred prior to January 1, 1999 before a Hearing Board of the Grievance Committee prior to the appointment of the Presiding Disciplinary Judge, shall be reviewed by the applicable, existing Hearing Panel at a final meeting to be held in 1999;

h. All reinstatement and readmission cases in which hearing has been held by a Hearing Board of the Grievance Committee prior to the establishment of the officer of the Presiding Disciplinary Judge shall be reviewed by the applicable, existing Hearing Panel at a final meeting to be held in 1999.

i. An Advisory Committee shall be appointed to assist the court with administrative oversight of the attorney regulation system pursuant to C.R.C.P. 251.34, which shall become effective July 1, 1998. Therefore, the following individuals are hereby appointed to the Advisory Committee: John Lebsack, Bethiah Crane, Erika Schafer, David Stark, Justice Rebecca Love Kourlis, Justice Michael L. Bender and William C. McClearn, who shall serve as chair.

2. Rules implementing federal and state statutorily mandated procedures regarding licensing of attorneys who are in arrears in child support, C.R.C.P. 201.6, C.R.C.P. 201.9, C.R.C.P. 251.8, and C.R.C.P. 227 are hereby adopted and shall be effective July 1, 1998. Between July 1 and December 30, 1998, any hearings requested shall be held before a member of the Grievance Committee designated by the chairman.

3. C.R.C.P. 227 is hereby amended to raise late fees and reinstatement fees effective July 1, 1998.

4. The readmission process after disbarment shall be amended to provide for one hearing by amendment of C.R.C.P. 201.12 and 259.29, adopted and effective on July 1, 1998.

5. Any references in those rules adopted herein and made effective June 30, 1998, and July 1, 1998, to Regulation Counsel, the Attorney Regulation Committee, the Presiding Disciplinary Judge, the Appellate Discipline Commission, and Appellate Discipline Commission Counsel shall, in fact, refer to the Disciplinary Counsel, Committee Counsel, and the Grievance Committee between now and January 1, 1999.

6. C.R.C.P. 251.1 through 251.34 shall become effective January 1, 1999. In order to avoid confusion, Rules 241.1, et seq., have been repealed and re-enacted as C.R.C.P. 251.1, et seq., as set forth in this order.

7. Amendments to Colo. RPC 1.15 establishing an attorney trust account overdraft notification rule shall become effective July 1, 1999.

8. Rules establishing a Client Protection Fund, C.R.C.P. 252.1 through 252.16, shall become effective on January 1, 1999.

DONE at Denver, Colorado, this 30th day of June, 1998.

ANTHONY F. VOLLACK, Chief Justice

Rule 250. Mandatory Continuing Legal and Judicial Education

PREAMBLE: Statement of Purpose

As society becomes more complex, the delivery of legal services likewise becomes more complex. The public rightly expects that lawyers, in their practice of law, and judges, in the performance of their duties, will continue their professional development throughout their legal careers. The purpose of mandatory continuing legal and judicial education requirements is to promote and sustain competence and professionalism and to ensure that lawyers and judges remain current on the law, law practice management, and technology in our rapidly changing society.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''Reduced Malpractice and Augmented Competence: A Proposal'', see 12 Colo. Law. 1444 (1983). For article, ''Mandatory Continuing Legal Education Update'', see 17 Colo. Law. 2351 (1988).

Rule 250.1. Definitions

(1) An ''accredited'' CLE activity is an educational endeavor that meets the criteria in these Rules and the CLJE Committee's Regulations Governing Mandatory Continuing Legal and Judicial Education and satisfies the requirements of C.R.C.P. 250.6.

(2) ''CLE'' stands for ''Continuing Legal Education,'' which is any legal, judicial, or other educational activity that meets the criteria in these Rules and the Continuing Legal and Judicial Education (CLJE) Committee's Regulations Governing Mandatory Continuing Legal and Judicial Education and, therefore, satisfies the requirements of C.R.C.P. 250.2.

(3) A ''CLE credit'' or a ''CLE credit hour'' is a measurement unit combining time and quality assigned by the CLJE Office to all or part of a particular continuing legal educational activity. A CLE credit hour will be the equivalent of attending 50 minutes of an accredited program with accompanying textual material unless otherwise specified in these rules.

(4) ''CLE transcript'' means the official record maintained by the CLJE Office of a registered lawyer's or judge's CLE credit hours earned during a CLE compliance period and will be used to verify a registered lawyer's or judge's compliance with the CLE requirements.

(5) The ''CLJE Committee'' is the Colorado Supreme Court's Continuing Legal and Judicial Education Committee.

(6) ''Compliance period'' means the three years during which a registered lawyer or judge is required to earn the minimum number of CLE credits.

(7) ''Court'' means the Colorado Supreme Court.

(8) ''Judge'' is a judicial officer who is subject to the jurisdiction of the Commission on Judicial Discipline or the Denver County Court Judicial Discipline Commission.

(9) ''Office of Continuing Legal and Judicial Education'' (CLJE Office) is the central office of the Office of Attorney Regulation Counsel that administers and implements these rules and the CLJE Committee's Regulations Governing Mandatory Continuing Legal and Judicial Education.

(10) ''Provider'' means any individual or organization that offers continuing legal education activities.

(11) ''Registered lawyer'' is a lawyer who has paid the registration fee required by C.R.C.P. 227 for the current year and who is not on inactive status, or suspended, disbarred, or placed on disability inactive status by the Court.

(12) ''Teaching'' means participating as a speaker, lecturer, presenter, or moderator in any accredited CLE activity.

(13) ''These rules'' refer to rules 250.1 through 250.10 of the Colorado Rules of Civil Procedure.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Constitutionality. A state supreme court may constitutionally require attorneys to meet continuing legal education requirements, so long as such requirements have a rational connection with the attorney's fitness or capacity to practice law, which the requirements in Colorado have. Verner v. Colo., 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984) (decided under former rule 260.1).

Rule 250.2. CLE Requirements

(1) **CLE Credit Requirement.** Every registered lawyer and every judge must complete 45 credit hours of continuing legal education during each applicable CLE compliance period as provided in these rules. The 45 credit hours must include at least seven credit hours devoted to ethics. Failure to comply with these requirements in a timely manner as set forth in these rules may subject the registered lawyer or judge to a fee, a penalty, and/or administrative suspension.

(2) **Compliance Period.** All registered lawyers and judges become subject to these rules on the date of their admission or certification to the bar of the State of Colorado. The first compliance period begins on the date of admission or certification and ends on the 31st of December of the third full calendar year following the year of admission or certification to practice law in Colorado. For non-lawyer judges, the first CLE compliance period begins on the date of appointment as a judge and ends on the 31st of December of the third full calendar year following the year of appointment as a judge. Subsequent CLE compliance periods begin on the 1st of January immediately following a previous compliance period and end on the 31st of December of the third full calendar year thereafter. Compliance periods that commenced under the previous C.R.C.P. 260 will continue without interruption under these rules.

(3) **Reporting.** All registered lawyers and judges must report compliance as set forth in C.R.C.P. 250.7.

(4) **Lawyer Status and Compliance.** Any registered lawyer who has been suspended under C.R.C.P. 227A(4), or who has elected to transfer to inactive status under C.R.C.P. 227A(6)(a), will, upon being reinstated pursuant to C.R.C.P. 227A(5) or (7), become subject to the minimum continuing legal educational requirements set forth in these rules on the date of reinstatement, pursuant to C.R.C.P. 250.2 and as set forth in paragraph (5) of this rule.

(5) **Modification of Compliance Period.** A registered lawyer's obligation to comply with these rules during a compliance period will be deferred if the lawyer has been suspended for any reason other than noncompliance with these rules, has elected to transfer to inactive status, or has been placed on disability inactive status by Court order. However, upon reinstatement or return to active status, the compliance period will be calculated as follows:

(a) If the registered lawyer remains on suspension, inactive status, or disability inactive status for one year or longer, the start of the compliance period will begin on the date of reinstatement from suspension or disability inactive status, or date of transfer to active status, and will end on the 31st of December of the third full calendar year following the start of the compliance period.

(b) If the registered lawyer is suspended, on inactive status, or on disability inactive status for less than one year, the compliance period will not be recalculated. However, upon reinstatement or return to active status, the lawyer will have 91 days from the date of

reinstatement or return to active status, or the remainder of the original compliance period, whichever is longer, to complete and report all deferred CLE requirements as otherwise set forth under C.R.C.P. 250.7, and to pay any penalties or fees that accrued before the suspension or transfer to inactive status. Failure to complete deferred CLE requirements or to pay related penalties or fees during this 91 day period will subject the lawyer to suspension pursuant to C.R.C.P. 250.7(8).

(c) No registered lawyer will be permitted to change status to circumvent these rules.

(6) **No Roll-Over Credits.** CLE credit hours completed in excess of the required 45 credit hours in any applicable compliance period may not be used to meet the minimum educational requirements in any subsequent compliance period.

(7) **Exemptions.**

(a) **Inactive or Suspended Status.** A lawyer who is on inactive status, disability inactive status, or under suspension during his or her entire CLE compliance period is excused from the CLE requirements for that compliance period.

(b) **Age.** A registered lawyer or judge will be exempt from the CLE requirements of these rules starting on the registered lawyer's or judge's 72nd birthday. On the effective date of these rules, all registered lawyers and judges who were exempt from the educational requirements under the previous C.R.C.P. 260.5 (Exemptions), will again become subject to the requirements in these rules. For all previously exempt registered lawyers and judges, the compliance period will begin on the effective date of these rules and end on December 31, 2021 (the end of the third full calendar year following the start of the compliance period). For all registered lawyers and judges who reach their 65th birthday in 2018, the compliance period will be extended through December 31, 2021. For all registered lawyers and judges who reach their 65th birthday in 2019, and whose compliance period otherwise would have ended in 2019 or 2020, the compliance period will be extended through December 31, 2021. Subsequent compliance periods will begin on the 1st of January of the year immediately following the end of the previous compliance period.

(8) **Deferral.**

(a) **Inability to Comply.** In cases of inability to comply with these rules for good cause shown, the CLJE Office may, in its discretion, defer individual compliance with the CLE requirements set forth in these rules. Good cause may include, for example, a registered lawyer or judge serving on full-time active duty in the armed forces of the United States who is deployed to a location outside the United States, and who provides to the CLJE Office a copy of military orders or other official paperwork listing the date, location, and duration of the deployment.

(b) **No Waiver.** Deferral does not constitute a waiver of the CLE requirements.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''Mandatory Continuing Legal Education: A Study of its Effects'', see 13 Colo. Law. 1789 (1984).

Annotator's note. The following annotations include a case decided under former rule 260.2, which was similar to this rule.

Deprivation of due process claim requires only minimal scrutiny. A person's ''right'' or ''privilege'' in the practice of law, has never been among those held to be ''fundamental'', so only minimal scrutiny under the rational basis test is required to evaluate claims of deprivation of such a ''right'' without due process. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule does not violate prohibition against involuntary servitude. The requirement that attorneys attend education classes does not violate the thirteenth amendment prohibition against involuntary servitude. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule does not violate first amendment. This rule does not violate any alleged first amendment right ''not to be forced to hear speeches or assemblies''. Verner v. Colo., 533 F.

Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Strict requirements may be set. If states can set strict legal proficiency related requirements for admission to the bar, it follows that they may also set strict proficiency related requirements for continuing legal practice. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

A state may constitutionally exempt senior citizen attorneys from this rule's requirements upon a showing of hardship. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984) (decided under former rule 260.5).

Rule 250.3. The Supreme Court Advisory Committee and the Continuing Legal and Judicial Education Committee

(1) **Advisory Committee.** The Supreme Court Advisory Committee (Advisory Committee) is a permanent committee of the Court. *See* C.R.C.P. 251.34. The Advisory Committee oversees the coordination of administrative matters for all programs of the lawyer regulation process, including the continuing legal and judicial education program set forth in these rules. The Advisory Committee reviews the productivity, effectiveness, and efficiency of the continuing legal and judicial education program, and recommends to the Court proposed changes or additions to these rules and the CLJE Committee's Regulations Governing Mandatory Continuing Legal and Judicial Education.

(2) **The Continuing Legal and Judicial Education Committee.** The Continuing Legal and Judicial Education Committee (CLJE Committee) serves as a permanent committee of the Supreme Court.

(a) **Members.** The CLJE Committee consists of nine members appointed by the Court, and is subject to oversight by the Advisory Committee. With the exceptions of the chair and the vice chair, members will be appointed for one term of seven years. Diversity will be a consideration in making the appointments. The terms of the members will be staggered to provide, so far as possible, for the expiration each year of the term of one member. Six of the members must be volunteer lawyers, at least one of whom must also be a judge, and three of the members must be volunteer non-lawyers (citizen members). All members serve at the pleasure of and may be dismissed at any time by the Court. A member of the CLJE Committee may resign at any time. In the event of a vacancy, a successor will be appointed by the Court for the remainder of the unexpired term of the member whose office is vacated.

(b) **Chair and Vice Chair.** The Court will designate two members of the CLJE Committee to serve as its chair and vice-chair for unspecified terms. The chair will also be a member of the Advisory Committee. The chair and vice-chair serve at the pleasure of and may be dismissed at any time by the Court.

(c) **Powers and Duties.** The CLJE Committee will formulate regulations consistent with these rules, modify or amend the same from time to time, and perform CLJE Committee duties established by these rules. The CLJE Committee's Regulations Governing Mandatory Continuing Legal and Judicial Education will be submitted to the Advisory Committee for review and approval by the Court and will be published on the website of the Office of Attorney Regulation Counsel.

(3) **Reimbursement.**The CLJE Committee members are entitled to reimbursement for reasonable travel, lodging and other expenses incurred in the performance of official duties.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Board members have immunity from damage liability. Individual members of the Board of Continuing Legal and Judicial Education have absolute quasi-judicial immunities from damage liability. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352

(10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984) (decided under former rule 260.3).

Rule 250.4. Attorney Regulation Counsel

The Attorney Regulation Counsel will maintain and supervise a permanent office, the CLJE Office, and will administer all mandatory CLE functions as part of a budget approved by the Court.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

Rule 250.5. Immunity

All persons performing official duties under the provisions of these rules, including but not limited to the Advisory Committee and its members, the CLJE Committee and its members, the Attorney Regulation Counsel and staff, and other enlisted volunteers are immune from suit for all conduct performed in the course of their official duties.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

Rule 250.6. Accreditation

(1) **Objective.** CLE must be an educational activity which has as its primary objective the promotion of professional competence of registered lawyers and judges, and must deal with subject matter directly related to the practice of law or the performance of judicial duties. The CLJE Committee will develop criteria for the accreditation of CLE activities as set forth in the Regulations Governing Mandatory Continuing Legal and Judicial Education, and the CLJE Office will accredit a broad variety of educational activities that meet these requirements.

(2) **Criteria.** For an activity to be accredited, the following criteria must be met: (1) the subject matter must directly relate to legal subjects and the performance of judicial duties or the practice of law, including professionalism, leadership, diversity, wellness, ethics, and law practice management, and (2) the activity must be directed to lawyers and judges. The CLJE Office will consider, in accrediting educational activities, the contribution the activity will make to the competent and professional practice of law or administration of justice.

(3) **Ethics.** For an activity or portion within an activity to be accredited as ''ethics'' it must deal with the Colorado Rules of Professional Conduct, the Colorado Code of Judicial Conduct, similar rules of other jurisdictions, the ABA Model Rules of Professional Conduct, the ABA Model Rules of Judicial Conduct, or legal authority related to any of the above-specified rules.

(4) **Non-accredited Activities.** The CLJE Office will not accredit activities completed in the ordinary course of the practice of law, in the performance of regular employment, or in a lawyer's or judge's service on a committee, section, or division of any bar-related organization except as provided in these rules.

(5) **Assignment of Credit.** The CLJE Office will assign an appropriate number of CLE credit hours to each educational activity it accredits.

(6) **Provider Eligibility.** The CLJE Committee may establish provider eligibility requirements consistent with these rules, as set forth in the Regulations Governing Mandatory Continuing Legal and Judicial Education.

(7) **Published List.** The CLJE Office will publish a list of all accredited programs, together with the approved CLE credit hours for each program on the website of the Office of the Attorney Regulation Counsel.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Constitutionality. Under any of the descriptions of ''rationality'' used by the United States supreme court, the requirements of this rule are rational and do not violate substantive due process guarantees. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984) (decided under former rule 260.4).

Rule 250.7. Compliance

(1) **Reporting Requirement.** Each registered lawyer and judge must report compliance with these rules. CLE credit hours must be reported by the online affidavit on the CLJE Office's website or other form approved by the CLJE Committee within a reasonable amount of time after the credit hours are earned. A registered lawyer or judge who is exempt from compliance under C.R.C.P. 250.2(7)(b) may nevertheless report CLE credit hours on a voluntary basis.

(2) **Verification Requirement.** It is the responsibility of each registered lawyer and judge to verify CLE credit hours completed during a compliance period, and to confirm that his or her CLE transcript is accurate and complete by no later than the 31st of January following that compliance period. Failure to comply with these requirements in a timely manner as set forth in these rules may subject the registered lawyer or judge to a fee, a penalty, and/or administrative suspension.

(3) **Make-up Plan.** If a registered lawyer or judge fails to complete the required CLE credit hours by the end of the CLE compliance period, the registered lawyer or judge must do the following: (1) by the 31st of January following the end of the CLE compliance period, file a specific plan to make up the deficiency; and (2) complete the planned CLE credit hours no later than the 31st of May following the end of the CLE compliance period. The plan must be accompanied by a filing fee determined by the CLJE Committee. Such plan will be deemed accepted by the CLJE Office unless within 28 days after the receipt of the make-up plan the CLJE Office notifies the registered lawyer or judge to the contrary. Completion of the make-up plan must be reported by affidavit to the CLJE Office no later than the 14th of June following the end of the CLE compliance period. Failure of the registered lawyer or judge to complete the plan by the 31st of May or to file an affidavit demonstrating compliance constitutes grounds for imposing administrative remedies set forth in paragraph (8) of this rule.

(4) **Statement of Noncompliance.** If any registered lawyer or judge fails to comply with these rules, or C.R.C.P. 203.1(8), the CLJE Office will promptly provide a statement of noncompliance to the registered lawyer or judge. The statement will advise the registered lawyer or judge that within 14 days of the date of the statement, either the noncompliance must be corrected, or the registered lawyer or judge must request a hearing before the CLJE Committee. Upon failure to do either, the CLJE Office will file the statement of noncompliance with the Court, which may impose the administrative remedies set forth in paragraph (8) of this rule.

(5) **Failure to Correct Noncompliance.** If the noncompliance is not corrected within 14 days, or if a hearing is not requested within 14 days, the CLJE Office will promptly forward the statement of noncompliance to the Court, which may impose the sanctions set forth in paragraph (8) of this rule.

(6) **Hearing Before the CLJE Committee.** If a hearing before the CLJE Committee is requested, the following apply:

(a) Notice of the time and place of the hearing will be given to the registered lawyer or judge by the CLJE Office at least 14 days prior thereto;

(b) The registered lawyer or judge may be represented by counsel;

(c) The hearing will be conducted in conformity with the Colorado Rules of Civil Procedure and the Colorado Rules of Evidence;

(d) The Office of Attorney Regulation Counsel will prosecute the matter and bear the burden of proof by a preponderance of the evidence;

(e) The chair will preside at the hearing, or will appoint another lawyer member of the CLJE Committee to act as presiding officer, and will appoint at least two other CLJE Committee members to the hearing panel;

(f) Upon the request of any party to the hearing, the chair or vice chair may issue subpoenas for the use of a party to compel attendance of witnesses and production of pertinent books, papers, documents, or other evidence, and any such subpoenas will be subject to the provisions of C.R.C.P. 45;

(g) The presiding officer will rule on all motions, objections, and other matters presented in connection with the hearing; and,

(h) The hearing will be recorded and a transcript may be provided to the registered lawyer or judge upon request and payment of the cost of the transcript.

(7) **Determination by the CLJE Committee.** Within 28 days after the conclusion of the hearing, the Panel will issue a written decision on behalf of the CLJE Committee setting forth findings of fact and the determination as to whether the registered lawyer or judge has complied with the requirements of these rules. A copy of such findings and determination will be sent to the registered lawyer or judge involved.

(a) If the Panel determines that the registered lawyer or judge complied, the registered lawyer's or judge's record will reflect compliance and any previously assessed fees may be rescinded.

(b) If the Panel determines the registered lawyer or judge was not in compliance, the written decision issued by the Panel will be promptly filed with the Court.

(8) **Supreme Court Review.** When the Court receives either a statement of noncompliance or the written decision of a CLJE Committee hearing, the Court will enter such order as it deems appropriate, which may include an order of administrative suspension from the practice of law in the case of registered lawyers or referral of the matter to the Colorado Commission on Judicial Discipline or the Denver County Court Judicial Discipline Commission in the case of judges.

(9) **Notice.** All notices given pursuant to these rules may be sent to any address provided by the registered lawyer or judge pursuant to C.R.C.P. 227.

(10) **Reinstatement.** Any lawyer who has been suspended for noncompliance pursuant to C.R.C.P. 250.7(8) may be reinstated by order of the Court upon a showing that the lawyer's CLE deficiency has been corrected. The lawyer must file with the CLJE Office a petition seeking reinstatement by the Court. The petition must state with particularity the CLE activities that the lawyer has completed, including dates of completion, which correct the deficiency that caused the lawyer's suspension. The petition must be accompanied by a reinstatement filing fee as determined by the CLJE Committee. The CLJE Office will file a properly completed petition with its recommendation with the Clerk of the Court within 14 days after receipt.

(11) **Jurisdiction.** All suspended and inactive lawyers remain subject to the jurisdiction of the Court as set forth in C.R.C.P. 251.1(b).

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018; (4) and (10) amended and effective January 24, 2019.

ANNOTATION

Annotator's note. The following annotations include a case decided under former rule 260.6, which was similar to this rule.

Constitutionality. A state supreme court may constitutionally require attorneys to meet continuing legal education requirements, so long as such requirements have a rational connection with the attorney's fitness or capacity to practice law, which the requirements in Colorado have. Verner v. Colo., 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

This rule does not violate procedural due process. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

This rule does not violate federal separation of powers doctrine. The claim that this rule violates the separation of powers principle embodied in the United States constitution fails, since the principle of separation of powers is not enforceable against the states as a matter of federal constitutional law. Verner v. Colo., 533

F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

The rule does not violate sixth amendment. This rule does not violate sixth amendment rights by not providing for a jury trial and not permitting consideration of ''mitigating factors''. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Suspension not "cruel and unusual punishment". The claim that suspension from practice for violation of this rule constitutes ''cruel and unusual punishment'' is without merit, since the eighth amendment does not apply where loss of a license is the full extent of possible punishment. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Jurisdiction of federal courts limited. Federal district courts only have jurisdiction to consider challenges to the constitutionality of a state disciplinary rule. All claims that are addressed to particular conduct during the disciplinary proceedings are dismissed for want of jurisdiction. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982),aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 250.8. Access to Information

(1) **Compliance Information.**

(a) **CLE Transcript Maintenance.** For each registered lawyer or judge, the CLJE Office will maintain CLE transcripts for the current and immediately preceding compliance periods as reported pursuant to C.R.C.P. 250.7(1).

(b) **Compliance Records - Confidential.** Records maintained by the CLJE Office pertaining to a registered lawyer's or judge's compliance are confidential and will not be disclosed except upon written request or consent of the registered lawyer or judge affected or as directed by the Court.

(2) **Accreditation Information - Public.** All records submitted by a Provider to obtain accreditation pursuant to C.R.C.P. 250.6 will be available to the public.

(3) **Expunction of Records.**

(a) **Expunction - Self-Executing.** All records maintained by the CLJE Office pursuant to these rules, in paper or electronic form, will be expunged from the files of the CLJE Office as follows:

(i) All records pertaining to accreditation of CLE activities by approved Providers pursuant to C.R.C.P. 250.6 will be expunged one year after the end of the year in which the activity request was processed by the CLJE office;

(ii) All records pertaining to requests for accreditation of activities submitted by a registered lawyer or judge will be expunged three months following the date the submission was processed by the CLJE Office, including but not limited to activities under C.R.C.P. 250.9 and 250.10, self-study, graduate study, and teaching or writing accreditation requests;

(iii) Affidavits submitted in paper form to the CLJE Office by registered lawyers or judges relating to completion of an approved CLE activity will be expunged seven days after the claimed credits have been entered on the CLE Transcript by the CLJE Office;

(iv) All records pertaining to proceedings under C.R.C.P. 250.7(3) - (10) will be expunged three years after the expiration of the registered attorney's or judge's current compliance period or after reinstatement, whichever time period is longer; and,

(v) All records pertaining to requests for deferrals pursuant to C.R.C.P. 250.2(8) will be expunged three years after the expiration of the registered attorney's or judge's current compliance period.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

ANNOTATION

Disciplinary rules are not designed to be a basis for civil liability, and they do not create a private cause of action. Weiszmann v. Kirkland and Ellis, 732 F. Supp. 1540 (D. Colo. 1990) (decided under former rule 260.7).

Rule 250.9. Representation in Pro Bono Legal Matters

(1) **Maximum Credits.** A registered lawyer may earn a maximum of nine CLE credit hours during each three-year compliance period for providing uncompensated pro bono legal representation to indigent or near-indigent persons, or supervising a law student providing such representation. Ethics credit may not be earned under this rule.

(2) **Eligibility.** To be eligible for CLE credit hours, the pro bono legal matter in which a registered lawyer provides representation must have been assigned to the registered lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; a law school; or an organized, non-profit entity, such as Legal Services Corporation, Metro Volunteer Lawyers, or Colorado Lawyers Committee, whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons. Prior to assigning the matter, the assigning court, program, law school, or entity will determine that the client is financially eligible for pro bono legal representation because (a) the client qualifies for participation in programs funded by the Legal Services Corporation, or (b) the client's income and financial resources are slightly above the guidelines utilized by such programs, but the client nevertheless cannot afford counsel.

(3) **Computation of Credits.** Subject to the reporting and review requirements specified herein, (a) a registered lawyer providing uncompensated, pro bono legal representation may receive one unit of credit for every five billable-equivalent hours of representation provided to the indigent client; and (b) a registered lawyer who acts as a supervisor to a law student may be awarded three CLE credit hours per completed matter.

(4) **Claiming Credits.** A registered lawyer wishing to receive CLE credit hours under this rule must submit to the assigning court, program, law school, or entity a completed form as designated by the CLJE Committee. As to supervising a law student, the registered lawyer will submit the form when the matter is fully completed. As to pro bono representation, if the representation will be concluded during a single three-year compliance period, then the registered lawyer will complete and submit the form when the representation is fully completed. If the representation will continue into another three-year compliance period, then the applying registered lawyer may submit an interim form seeking such credit as the lawyer may be eligible to receive during the three-year compliance period that is coming to an end. Upon receipt of an interim or final form, the assigning court, program, law school, or entity must in turn report to the CLJE Office the number of CLE credit hours that it recommends be awarded to the reporting registered lawyer under the provisions of this rule. The CLJE Committee has final authority to issue or decline to issue CLE credit hours to the registered lawyer providing representation or mentoring, subject to the other provisions of these rules.

(5) **Law Student Supervision.** A registered lawyer who acts as a supervisor to a law student who is eligible to practice law under C.R.C.P. 205.7(2) may claim CLE credits consistent with (1) and (3) above. The matter must be assigned to the law student by a court, program, law school, or entity as described in C.R.C.P. 250.9(2), or an organized student law office program administered by his or her law school, after such court, program, entity, or student law office determines that the client is eligible for pro bono representation in accordance with C.R.C.P. 250.9(2). The registered lawyer must be available to the law student for information and advice on all aspects of the matter and must directly and actively supervise the law student while allowing the law student to provide representation to the client. The registered lawyer must file or enter an appearance along with the law student in any legal matter pursued or defended for the client in any court. Lawyers may be acting as full-time or adjunct professors at the law student's law school at the same time they serve as supervising lawyers so long as it is not a primary, paid responsibility of that professor to administer the student law office and supervise its law-student participants.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

Rule 250.10. Participation in the Colorado Attorney Mentoring Program (CAMP)

(1) **One-Year CAMP Program.** A registered lawyer or judge may earn a maximum of nine CLE credit hours, two hours of which will count toward the ethics requirement of C.R.C.P. 250.2(1), for successful completion of the one-year CAMP program curriculum (pursuant to C.R.C.P. 255) as either a mentor or as a mentee.

(2) **Six-Month CAMP Program.** A registered lawyer or judge may earn a maximum of four CLE credit hours, one hour of which will count toward the ethics requirement of C.R.C.P. 250.2(1), for successful completion of the six-month CAMP program curriculum (pursuant to C.R.C.P. 255) as either a mentor or a mentee.

(3) **CLE Credit Participation Criteria.** To receive CLE credit hours as a mentor or mentee:

(a) The mentor must be a Colorado lawyer or judge in good standing with an active license or a Colorado lawyer or judge who retired from the practice of law in good standing. The mentor must be licensed for five years and must not be currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction, and must be current with all CLE requirements. The mentor must be approved by the CAMP Director.

(b) The mentee must be a licensed, active Colorado lawyer, who is either practicing or is intending to practice law in Colorado. The CAMP Director may accept and approve petitions to participate from new lawyers not otherwise eligible to participate in CAMP programs. The mentee must be registered in a CAMP program.

(c) Mentors may participate in a CAMP program, one mentor relationship at a time, as often as they wish, but may receive a maximum of nine total CLE credit hours, including a maximum of two ethics credit hours, per compliance period.

(d) Mentees may receive CLE credits as a mentee only once in a CAMP program.

(e) The award of CLE credits will apply to the compliance period in which the CAMP program is completed.

(f) Any mentee or mentor who fails to complete the CAMP program will not receive CLE credit, partial or otherwise.

(g) Mentors and mentees who participate together in pro bono representation during or as a part of this program may not also receive CLE credit under C.R.C.P. 250.9 for the same representation.

(4) **Verification by Director.** All certificates and affidavits of completion of a CAMP program must be submitted to the CAMP Director for verification pursuant to C.R.C.P. 255. Following verification of substantial completion, the CAMP Director will recommend to the CLJE Office that the CLE hours be recorded as earned.

Source: Amended and Adopted by the Court, En Banc, March 15, 2018, effective July 1, 2018.

Rule 251.1. Discipline and Disability; Policy — Jurisdiction

(a) Statement of Policy. All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of this state and of the United States, are charged with obedience to those laws at all times. As officers of the Supreme Court of Colorado, attorneys must observe the highest standards of professional conduct. A license to practice law is a proclamation by this Court that its holder is a person to whom members of the public may entrust their legal affairs with confidence; that the attorney will be true to that trust; that the attorney will hold inviolate the confidences of clients; and that the attorney will competently fulfill the responsibilities owed to clients and to the courts.

In order to maintain the highest standards of professional conduct, attorneys who have demonstrated that they are unable, or are likely to be unable, to discharge their professional responsibilities shall be subject to appropriate disciplinary or disability proceedings.

(b) Jurisdiction. Every attorney licensed to practice law in the State of Colorado is subject to the disciplinary and disability jurisdiction of the Supreme Court in all matters relating to the practice of law. Every attorney practicing law in this state pursuant to C.R.C.P. 204 or 205 is subject to the disciplinary and disability jurisdiction of the Supreme Court when practicing law pursuant to such rules. Every attorney serving as a magistrate pursuant to Colorado Rules for Magistrates, Chapter 35, vol. 12, C.R.S., is subject to the disciplinary and disability jurisdiction of the Supreme Court for conduct performed as a magistrate as provided by C.R.M. 5(h).

(c) Standards of Conduct. Any reference contained in these Rules to the Code of Professional Responsibility pertains to conduct occurring prior to January 1, 1993. On January 1, 1993, and thereafter, the conduct of attorneys licensed to practice law in the State of Colorado shall be governed by the Colorado Rules of Professional Conduct and the other Rules or Standards of Professional Conduct adopted from time to time by this Court.

(d) Plenary Power of the Supreme Court. The Supreme Court reserves the authority to review any determination made in the course of a disciplinary proceeding and to enter any order with respect thereto, including an order directing that further proceedings be conducted as provided by these Rules.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended June 1, 2000, effective July 1, 2000; (b) corrected and effective June 27, 2000; (b) amended and adopted December 4, 2002, effective January 1, 2003; (b) amended and effective January 14, 2015.

Editor's note: This rule was previously numbered as 241.1.

ANNOTATION

Law reviews. For note, ''Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility'', see 50 Den. L.J. 207 (1973). For article, ''Avoiding Family Law Malpractice: Recognition and Prevention — Parts I and II'', see 14 Colo. Law. 787 and 991 (1985).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Bill of rights freedoms should not be prevented. The supreme court should never make an order which would prevent any lawyer, or association of lawyers, from enjoying to the fullest the fundamental freedoms contained in the bill of rights. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

There is lodged in the supreme court exclusive power to admit applicants to the bar of this state, to prescribe the rules to be followed in the discipline of lawyers, and to revoke a license to practice law or otherwise assess penalties in disciplinary proceedings where the conduct of the lawyer accused either amounts to a violation of law or involves moral turpitude or dishonorable conduct; in all these matters full responsibility rests with the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Granting person permission to practice law is sole prerogative of supreme court of Colorado. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980) (decided under prior rule).

And statute disqualifying a convicted felon of practicing as an attorney in no wise interferes with the exclusive right of the supreme court to determine the rules and regulations which shall govern those seeking admission to the bar nor does the statute impinge in any real sense the judicial right to discipline those licensed to practice law. Rather, such a statute is an effort by the general assembly under its police power to bar convicted felons from practicing law in the courts, which the general assembly has the power to do so, since it does not violate the separation of powers doctrine. People v. Buckles, 167 Colo. 64, 453 P.2d 404 (1968).

The supreme court has the inherent power, apart from rule or statute, as well as the duty, to suspend an attorney whose conduct tends to obstruct or impede the administration of justice. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Supreme court authority in disciplinary proceedings is limited to lawyers. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Purpose of the bar and the admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

The procedures in force which must be followed in actions for the discipline of lawyers are defined in these rules on the discipline of attorneys. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

These rules require that the pendency of investigations be strictly confidential. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

No person acting as a representative of the supreme court has any power or authority to express an opinion concerning the propriety or the ethics of the conduct of any lawyer. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

In disciplinary proceedings the supreme court acts under well-established rules which protect the attorney from possible unjust public criticism until guilt is established under due process of law. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Previously, disciplinary action could not be taken merely for violating standards of ethics. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

To be actionable, it must have amounted to a violation of law, or involve moral turpitude or dishonorable conduct. See In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

An attorney must adhere with dedication to the highest standards of honesty and integrity in order that members of the public are assured that they may deal with attorneys with the knowledge that their matters will be handled with absolute propriety. People v. Golden, 654 P.2d 853 (Colo. 1982).

As officers of the court, lawyers are charged with obedience to the laws of this state and to the laws of the United States, and intentional violation by them of these laws subjects them to the severest discipline. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Attorney never to obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Richards, 748 P.2d 341 (Colo. 1987).

Since a lawyer is an officer of the court, the court cannot tolerate or allow fraud by a lawyer to go unpunished, for to declare such acts to be unprofessional conduct would be to use the mildest of language. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Disciplining those who perpetrate fraud on courts is a sacred duty. A most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who indulge in practices which are designed to perpetrate a fraud on the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

A lawyer who holds the position of district attorney, with the substantial powers of that office, assumes responsibilities beyond those of other lawyers and must be held to the highest standard of conduct. People v. Brown, 726 P.2d 638 (Colo. 1986).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct shall be disciplined appropriately. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Witt, 616 P.2d 139 (Colo. 1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

Supreme court has, as part of inherent powers, ultimate and exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers. People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); Mulei v. Jet Courier Serv., Inc., 860 P.2d 569 (Colo. App. 1993); Matter of Greene, 2013 CO 29, 302 P.3d 690.

In a disciplinary proceeding, the court's primary duty is to protect the public and the legal profession from unscrupulous lawyers. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

Disciplinary proceedings are sui generis in nature, and conviction of a criminal offense is not a condition precedent to the institution of such proceedings nor does acquittal constitute a bar to such proceedings. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986).

Although attorney discipline proceedings have been characterized as quasi-criminal in nature, Colorado has chosen to follow a largely civil model for the enforcement of attorney discipline. Matter of Greene, 2013 CO 29, 302 P.3d 690.

The doctrine of claim preclusion applies to attorney discipline proceedings. Matter of Greene, 2013 CO 29, 302 P.3d 690.

Four conditions are required to invoke claim preclusion: (1) Finality of the earlier judgment; (2) identity of subject matter; (3) identity of claims; and (4) identity of the parties, or at least those in privity with them. Matter of Greene, 2013 CO 29, 302 P.3d 690.

For purposes of claim-preclusion analysis, the concept of a "criminal episode" offers an analog for a "transaction or connected series of transactions" of attorney misconduct. Matter of Greene, 2013 CO 29, 302 P.3d 690.

Where a number of violations of the same ethical rule were allegedly committed by the same attorney, and the violations did not constitute a single transaction or series of transactions or share any interrelatedness of proof, the attorney regulation counsel was not precluded from filing a second complaint. Matter of Greene, 2013 CO 29, 302 P.3d 690.

Where the crime with which an attorney is charged is one of serious consequences denoting moral turpitude, which he is found guilty of, he cannot, in good conscience, be permitted to practice law in this state. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Acts and conduct on the part of an attorney which establish that he is incapable of being trusted, when coupled with acts of dishonesty and deceit, render that person unworthy of public confidence and recognition by the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Such acts should be promptly and severely punished. In that the foundation of the legal profession is honor, if acts which a respondent has committed are not promptly and severely punished, the public will not have reason to trust those lawyers who maintain the high standards of the profession. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Conduct of counsel found contrary to standard of honesty, justice, and integrity. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Attorney is subject to jurisdiction of court even though disbarred for failure to comply with the Code of Professional Responsibility while practicing law as an officer of this court. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Koransky, 830 P.2d 490 (Colo. 1992); People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Attorney who is licensed to practice law in Colorado is subject to the jurisdiction of the supreme court for violations of ethical obligations under the rules of professional conduct that are committed while the license to practice is suspended. In re C de Baca, 11 P.3d 426 (Colo. 2000).

Attorney who is a member of the Colorado bar is subject to the jurisdiction of the supreme court and its grievance committee for professional misconduct committed in another jurisdiction where attorney is licensed to practice law despite fact that attorney does not maintain a law office in this state and has not paid the required registration fee or satisfied the continuing legal education requirements of this state. People v. Schindelar, 845 P.2d 1146 (Colo. 1993).

Because hearing board's decision raised an important question of law, whether former § 12-5-120 (now § 13-93-115) authorizes an attorney to assert a retaining lien on a United States passport, the supreme court invoked its plenary authority under section (d) to address it, even though hearing board had dismissed the complaint. Matter of Attorney G., 2013 CO 27, 302 P.3d 248.

Applied in People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. Turner, 758 P.2d 1335 (Colo. 1988).

Rule 251.2. Attorney Regulation Committee

(a) Attorney Regulation Committee. The Attorney Regulation Committee of the Supreme Court of Colorado (hereinafter committee) is hereby established. The Committee shall serve as a permanent committee of the Supreme Court.

(1) Committee. The Committee shall be composed of seven members, a Chair and Vice-Chair.

(2) Members. The members shall be composed of four members of the Bar of Colorado and three public members. Diversity shall be a consideration in making the appointment. The Supreme Court, with the assistance of the Advisory Committee, shall appoint the members. The members shall serve one term of seven years but may be dismissed from the Committee at any time by order of the Supreme Court. The terms of the members of the Committee shall be staggered to provide, so far as possible, for the expiration each year of the term of one member. Members of the Committee may resign at any time. In the event of a vacancy on the Committee, the Supreme Court shall appoint a successor to serve the remainder of the unexpired term.

(3) Chair and Vice-Chair. The Chair and Vice-Chair shall be members of the Bar of Colorado. The Supreme Court, with the assistance of the Advisory Committee, shall

appoint the Chair and Vice-Chair. The Chair and Vice-Chair shall serve an unspecified term at the pleasure of the Supreme Court. The Chair and Vice-Chair of the Committee may resign at any time. The Chair shall exercise overall supervisory control of the Committee. The Vice-Chair shall assist the Chair and shall serve as Chair in the Chair's absence.

(4) Reimbursement of Committee Members. The members of the Committee shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Powers and Duties of the Committee. The committee shall be authorized and empowered to act in accordance with these Rules and to:

(1) Enlist the assistance of members of the Bar to conduct investigations, or assist with investigations;

(2) Periodically report to the Advisory Committee and the management committee on the operation of the committee;

(3) Recommend to the Advisory Committee proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings; and

(4) Adopt such practices as may from time to time become necessary to govern the internal operation of the committee, as approved by the Supreme Court.

(c) Abstention of Committee Members. Committee members shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of a member of the committee, or any attorney in any way affiliated with a committee member or the member's law firm, may accept or continue in employment connected with any matter pending before the committee, the Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court as long as the member is serving on the committee.

(d) Disqualification. Members of the committee shall not represent an attorney in any matter as provided in these Rules during their terms of service. Former members of the committee shall not represent an attorney in any matter that was being investigated or prosecuted as provided in these rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (d) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a)(1), (a)(2), and (a)(3) amended and adopted November 24, 2004, effective January 1, 2005.

Editor's note: This rule was previously numbered as 241.2.

ANNOTATION

Law reviews. For note, ''Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility'', see 50 Den. L.J. 207 (1973).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

Grievance committee is committee of supreme court, not bar association. The grievance committee, functioning in disciplinary proceedings under the rules on the discipline of attorneys, ceases to be a representative of the bar association and becomes a committee of the supreme court, and as such is responsible solely to the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

It has no greater power than the court. The grievance committee acting as the investigating agent for the supreme court has no greater power or authority than the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Confidential matters cannot be used for any other purpose than that of disciplinary action. No committee serving in the confidential capacity called for under the rules for discipline of attorneys can conduct hearing as the representative of the supreme court and thereafter make use of any confidential matters coming to its attention for any purpose other than that of disciplinary action if such action is warranted; and if such action is not warranted, it cannot use the data obtained as the basis for the publication of an opinion on ethics in which the identity of the original subject is divulged. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

The data gathered by the grievance committee are not public records and are not to be released unless by vote of the committee with the approval of the supreme court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Committee cannot escape responsibility for releasing information of intended investigations. Where a grievance committee functioning in the capacity of an agent and representative of the supreme court, or persons identified with it, releases information that it intends to investigate certain persons in connection with particular conduct in violation of the applicable rules, such committee cannot escape responsibility for the advance press publication of its intentions. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

The committee occupies a position of trust and confidence. When the supreme court calls upon a committee of the bar to conduct investigations in disciplinary proceedings, the members of that committee occupy a position of trust and confidence, and they must function under applicable rules. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Any such committee acting for the court should not be charged with duties as members of another committee of the bar association, a private organization, which might require the individual members to disregard the confidential nature of the duties they have assumed as an agent of the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Rule 251.3. Attorney Regulation Counsel

(a) Attorney Regulation Counsel. The Supreme Court shall appoint a Regulation Counsel. The Regulation Counsel shall serve at the pleasure of the Supreme Court.

(b) Qualifications. The Regulation Counsel shall be an attorney, duly admitted to the Bar of Colorado, with no less than five years experience in the practice of law. The Regulation Counsel, while serving in that capacity, shall not hold any other public office or engage in the private practice of law.

(c) Powers and Duties. The Regulation Counsel shall act in accordance with these Rules and:

(1) Maintain and supervise a permanent office to serve as a central office for the filing of requests for investigation and for the coordination of such investigations; the filing of claims with the Colorado Attorneys' Fund for Client Protection as provided in C.R.C.P. 252 and the consideration of such claims; the administration of all disciplinary and disability enforcement proceedings carried on pursuant to these Rules; and, the administration of all proceedings conducted pursuant to C.R.C.P. 252, et seq., under a budget approved by the Supreme Court;

(2) Appoint and supervise a staff as necessary to carry out the duties of the Regulation Counsel;

(3) Conduct investigations as provided by C.R.C.P. 251.9 and C.R.C.P. 251.10, dismiss the allegations as provided in C.R.C.P. 251.11, and report to the committee as provided in C.R.C.P. 251.12;

(4) Prepare and prosecute disciplinary and disability actions against attorneys as provided by these Rules;

(5) In appropriate cases, negotiate dispositions of pending matters as authorized in C.R.C.P. 251.10(b)(4) and C.R.C.P. 251.22;

(6) Prepare and prosecute petitions for immediate suspension in conformity with C.R.C.P. 251.8;

(7) Prosecute contempt proceedings for violations of these Rules;

(8) Prosecute contempt proceedings for violations of orders of the Supreme Court relating to suspended and disbarred attorneys and attorneys placed on disability inactive status;

(9) Participate in and present recommendations reflecting the public interest in all proceedings for reinstatement held pursuant to C.R.C.P. 251.29 and C.R.C.P. 251.30;

(10) Maintain permanent records of matters processed by the committee, and the disposition thereof;

(11) Participate in the management and supervision of the bar mediation process established by the Supreme Court, implemented by the Colorado Bar Association, and administered by the mediation committee of the association in conjunction with the committee; and,

(12) Perform such other duties as the Supreme Court may direct.

Mediators shall be appointed by the Supreme Court. The mediation committee and the Regulation Counsel shall jointly recommend attorneys to the Court for appointment as mediators. The Regulation Counsel shall forward the names of those recommended to the Court together with a proposed order making the appointment of the mediators.

(d) Disqualification. A former member of the Regulation Counsel's staff shall not represent an attorney in any proceeding that was being investigated and/or prosecuted during the member's association with the Regulation Counsel's staff.

Source: Amended and adopted June 25, 1998, effective January 1, 1999.

Editor's note: This rule was previously numbered as 241.4.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 241.4, which was similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

Supreme court regulation counsel and office of attorney regulation counsel are part of the judicial branch of state government because they are subject to the direction of the supreme court pursuant to this rule and participate in the process of regulating attorneys. Gleason v. Judicial Watch, Inc., 2012 COA 76, 292 P.3d 1044.

Colorado Supreme Court disciplinary counsel is an "arm of the state" and not a ''person'' for the purposes of a suit for damages pursuant to 42 U.S.C. § 1983. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Disciplinary prosecutor, acting in an official capacity, is an "arm of the state" and not a ''person'' for the purposes of a suit for damages pursuant to 42 U.S.C. § 1983. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Disciplinary prosecutors, in their individual capacity, are absolutely immune from liability for damages under 42 U.S.C. § 1983 when acting within the scope of their prosecutorial duties. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Rule 251.4. Duty of Judge to Report Misconduct or Disability

A judge has a duty to report unprofessional conduct by an attorney to Regulation Counsel pursuant to Rule 2.15 of the Colorado Code of Judicial Conduct. No action taken by any judge pursuant to Rule 2.15 shall in any way limit the power of the reporting judge to exercise the power of contempt against an attorney, nor should the reporting of such matters to the Regulation Counsel be used in lieu of contempt proceedings.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective April 12, 2012.

Editor's note: This rule was previously numbered as 241.5.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

A most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who indulge in practices which are designed to perpetrate a fraud on the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Where the court specifically noted that the issue of contempt was not properly before

the court, the trial court lacked authority to impose disciplinary sanctions against an attorney, along with client, for failing to disclose at the settlement conference that funds were never paid into the directory. Mulei v. Jet Courier Serv., Inc., 860 P.2d 569 (Colo. App. 1993).

Applied in Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979).

Rule 251.5. Grounds for Discipline

Misconduct by an attorney, individually or in concert with others, including the following acts or omissions, shall constitute grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship:

(a) Any act or omission which violates the provisions of the Code of Professional Responsibility or the Colorado Rules of Professional Conduct;

(b) Any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action;

(c) Any act or omission which violates these Rules or which violates an order of discipline or disability; or

(d) Failure to respond without good cause shown to a request by the committee, the Regulation Counsel, or the Board of Trustees of the Colorado Attorneys' Fund for Client Protection or obstruction of the committee, the Regulation Counsel, or the Board or any part thereof in the performance of their duties. Good cause includes, but is not limited to, an assertion that a response would violate the respondent's constitutional privilege against self-incrimination.

This enumeration of acts and omissions constituting grounds for discipline is not exclusive, and other acts or omissions amounting to unprofessional conduct may constitute grounds for discipline.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and effective June 16, 2011.

Editor's note: This rule was previously numbered as 241.6.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client'', see 59 Den. L.J. 75 (1981). For Article, ''Incriminating Evidence: What to do With a Hot Potato'', see 11 Colo. Law. 880 (1982). For article, ''The Search for Truth Continued: More Disclosure, Less Privilege'', see 54 U. Colo. L. Rev. 51 (1982). For article, ''The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel'', see 54 U. Colo. L. Rev. 67 (1982). For article, ''Descriptions of Disciplinary Matters'', see 14 Colo. Law. 1418 (1985).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Constitutionality upheld. This rule is not unconstitutionally vague on its face or as applied. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standards used in determining constitutional challenges to rule. Same standards used in determining a constitutional challenge to a statute are used in determining constitutional challenge to this rule or a disciplinary rule un-

der the code of professional responsibility. People v. Morley, 725 P.2d 510 (Colo. 1986).

Presumption of constitutionality attaches to such enactment, and the burden is on the party challenging an enactment to demonstrate its unconstitutionality beyond a reasonable doubt. People v. Morley, 725 P.2d 510 (Colo. 1986).

Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer. People v. Morley, 725 P.2d 510 (Colo. 1986).

ABA standards for imposing lawyer sanctions utilized to determine proper sanction in disciplinary proceeding and certain findings as to aggravating and mitigating factors made. People v. Susman, 787 P.2d 1119 (Colo. 1990); In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Applied in People v. Schermerhorn, 193 Colo. 364, 567 P.2d 799 (1977); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Voss, 196 Colo. 485, 587 P.2d 787 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People ex rel. Gallagher v. Hertz, 608 P.2d 335 (Colo. 1979); People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Berge, 620 P.2d 23 (Colo. 1980); People v. Davis, 620 P.2d 725 (Colo. 1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Emmert, 676 P.2d 672 (Colo. 1983); People v. Spangler, 676 P.2d 674 (Colo. 1983); People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Madrid, 700 P.2d 558 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Danker, 735 P.2d 874 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Smith, 778 P.2d 685 Colo. (1989).

II. GROUNDS.

A. In General.

Violation of election laws sufficient to justify public censure. People v. Casias, 646 P.2d 391 (Colo. 1982).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Demonstration of rehabilitation required for readmittance to bar. Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980).

Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Maximum suspension of three years rather than disbarment appropriate for attorney who violated a number of disciplinary rules including filing a false claim for loss of unemployment damages; failure to prepare case for trial over two-year period; failure to file affidavit required under grandparent visitation statute; arriving at settlement conference in intoxicated state; failure to file complaint and representing to client that case was close to being settled; and failure to notify disciplinary counsel of conviction of driving while ability impaired. People v. Anderson, 828 P.2d 228 (Colo. 1992).

Aggravating factors present in case include attorney's substantial experience in the practice of law, attorney's prior disciplinary record, attorney's pattern of misconduct taking place over several years and involving multiple offenses, the practice of deceit by attorney to mislead clients concerning the status of their cases, the obstruction of disciplinary proceedings by attorney's intentional failure to respond to requests for investigation, and the display of indifference to making restitution by the failure to repay a retainer after promising to do so. People v. Fahrney, 791 P.2d 1116 (Colo. 1990).

Aggravating factors present in case were: (1) A dishonest and selfish motive on the part of the respondent; (2) a pattern of misconduct; (3) multiple offenses; and (4) substantial experience in the practice of law. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Aggravating factors present in case include: (1) The attorney's prior disciplinary record; (2) a dishonest or selfish attitude on the part of the attorney; (3) a pattern of misconduct; (4) the attorney's refusal to acknowledge the wrongfulness of his conduct; (5) the vulnerability of the client's wife and her children during the attorney's representation of them; and (6) the attorney's substantial experience in the practice of law. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Aggravating factors present in case include: (1) Attorney's history of prior discipline; (2) the vulnerable status of the attorney's victims; and (3) the attorney's obstruction of the disciplinary process. In re Meyers, 981 P.2d 143 (Colo. 1999).

Aggravating factors present in case include the respondent attorney's dishonest and selfish motive, pattern of misconduct and multiple offenses, refusal to acknowledge the wrongful nature of the conduct, the vulnerability of the victims, the respondent's substantial experience with the law, and the respondent's indifference to making restitution. People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Mitigating factors present in case included the respondent's full and free disclosure to the grievance committee and the hearing board, good character and reputation, and the respondent's remorse for wrongdoing. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Insofar as respondent's addiction to illegal drugs was a symptom of more deeply seated psychological and emotional problems, the respondent established the existence of these allegedly mitigating factors. However, even though the respondent testified that none of the converted funds were used to purchase illegal drugs, the supreme court is inclined to view the respondent's drug use itself as an aggravating rather than mitigating factor. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Several significant aggravating factors are that the respondent engaged in multiple offenses and in a pattern of misconduct, failed to cooperate with the grievance committee in the attorney discipline proceedings, and submitted false statements and false evidence to the court in a related proceeding. People v. Hellewell, 827 P.2d 527 (Colo. 1992).

Aggravating factors in case where three-year suspension rather than disbarment imposed include prior disciplinary offenses, pattern of misconduct, multiple offenses, submission of false evidence, false statements, or other deceptive practices during disciplinary process, refusal to acknowledge the wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. Mitigating factors include remoteness of prior offenses and gesture of restitution. People v. Anderson, 828 P.2d 228 (Colo. 1992).

Public censure was appropriate where attorney made false statements in the course of discovery in cases where the attorney was the plaintiff. Evidence showed that the attorney was suffering from a psychiatric condition at the time, and the assistant disciplinary counsel could not prove that the attorney's false statements were knowing, but only that they were negligent. People v. Dillings, 880 P.2d 1220 (Colo. 1994).

Mitigating factors present in case include: (1) At the time of the misconduct, the attorney was experiencing personal problems; (2) the attorney cooperated during the disciplinary proceedings; (3) the attorney has a good character and reputation in the community; and (4) there has been a substantial delay in these disciplinary proceedings. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Attorney's depression did not qualify as mitigating factor of mental disability where no testimony showed depression caused the misconduct. People v. Reynolds, 933 P.2d 1295 (Colo. 1997).

The Americans with Disabilities Act of 1990 did not prevent the Colorado supreme court from disciplining attorney who suffered from depression in light of finding that the depression had not been shown to have directly caused his misconduct. People v. Reynolds, 933 P.2d 1295 (Colo. 1997).

Demonstration of drug rehabilitation and of improved business practices required for reinstatement. Where attorney was suspended for misuse of client funds due to confusion and inattention resulting from cocaine addiction, he would be required to demonstrate a history of negative drug screening tests and that he had educated himself about the business aspects of practicing law, including the handling of trust accounts, to qualify for reinstatement following three-year suspension. People v. Schubert, 799 P.2d 388 (Colo. 1990).

Demonstration of participation in a course of therapy for clinical depression required for reinstatement where attorney was suspended for inattention resulting from such depression. People v. Barr, 855 P.2d 1386 (Colo. 1993).

Demonstration of four conditions required for attorney publicly censured after conviction of driving while ability impaired: Continue psychotherapy, remain on antabuse, submit monthly reports regarding progress on antabuse, and execute written authorization to therapist to release medical information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996).

Pattern of misconduct involving failure to render services, multiple offenses, and conversion of client's property sufficient to justify disbarment. People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Conduct found to violate this rule. People v. Bugg, 635 P.2d 881 (Colo. 1981).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Barnthouse, 941 P.2d 916 (Colo. 1997).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Bergmann, 716 P.2d 1089 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Horn, 738 P.2d 1186 (Colo. 1987); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Wyman, 769 P.2d 1076 (Colo. 1989); People v. Smith, 769 P.2d 1078 (Colo. 1989); People v. Feiman, 778 P.2d 830 (Colo. 1990); People v. Vigil, 779 P.2d 372 (Colo. 1989); People v. Malman, 779 P.2d 380 (Colo. 1989). People v. Barr, 805 P.2d 440 (Colo. 1991); People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Tatum, 814 P.2d 388 (Colo. 1991); People v. Shunneson, 814 P.2d 800 (Colo. 1991); People v. Mulvihill, 814 P.2d 805 (Colo. 1991); People v. Gebauer, 821 P.2d 782 (1991); People v. Borchard, 825 P.2d 999 (Colo. 1992); People v. Dillings, 880 P.2d 1220 (Colo. 1994); People v. Tauger, 893 P.2d 121 (Colo. 1995).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Goss, 646 P.2d 334 (Colo. 1982).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Tyler, 678 P.2d 1014 (Colo. 1984); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Spurlock, 713 P.2d 829 (Colo. 1985); People v. Doolittle, 713 P.2d 834 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McPhee, 728 P.2d 1292 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. May, 745 P.2d 218 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Bottinelli, 782 P.2d 746 (Colo. 1989); People v. Chappell, 783 P.2d 838 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990); People v. Hensley-Martin, 795 P.2d 262 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Mandell, 813 P.2d 732 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Dowhan, 814 P.2d 822 (Colo. 1991); People v. Nulan, 820 P.2d 111 (Colo. 1991); People v. Williams, 824 P.2d 813 (Colo. 1992); People v. Dieters, 825 P.2d 478 (Colo. 1992); People v. Eaton, 828 P.2d 246 (Colo. 1992); People v. Williams, 915 P.2d 669 (Colo. 1996); People v. Pierson, 917 P.2d 275 (Colo. 1996); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Nelson, 941 P.2d 922 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Bennett, 843 P.2d 1385 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); In re Hugen, 973 P.2d 1267 (Colo. 1999).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Blanck, 713 P.2d 832 (Colo. 1985); People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Reeves, 766 P.2d 1192 (Colo. 1988); People v. Felker, 770 P.2d 402 (Colo. 1989); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Greene, 773 P.2d 528 (Colo. 1989); People v. Vernon, 782 P.2d 745 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Hedicke, 785 P.2d 918 (Colo. 1990); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Goens, 803 P.2d 480 (Colo. 1990); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787

(Colo. 1991); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Grossenbach, 814 P.2d 810 (Colo. 1991); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Kramer, 819 P.2d 77 (Colo. 1991); People v. Finesilver, 826 P.2d 1256 (Colo. 1992); People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Littlefield, 893 P.2d 773 (Colo. 1995); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009); People v. Cohen, 369 P.3d 289 (Colo. O.P.D.J. 2016); People v. Belair, 413 P.3d 357 (Colo. O.P.D.J. 2018).

B. Violation of Code of Professional Responsibility.

Law reviews. For article, ''Punishing Ethical Violations: Aggravating and Mitigating Factors'', see 20 Colo. Law. 243 (1991).

Annotator's note. For additional annotations, see the annotations under the disciplinary rules for the canons included in the Code of Professional Responsibility.

Disbarment is warranted where attorney converted client funds and where factors in mitigation, although present, were not sufficient to justify a lesser sanction. People v. Ogborn, 887 P.2d 21 (Colo. 1994).

District attorney's failure to prosecute personal friend for possession of marijuana violates code of professional responsibility and warrants three-year suspension. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Suspension is generally appropriate when a lawyer knows of a conflict of interest and fails to disclose to a client the possible effect of that conflict. Respondent admittedly and knowingly failed to fully disclose to a client the possible effect of a conflict of interest and was therefore suspended from the practice of law for ninety days, stayed upon the successful completion of a one-year period of probation. People v. Fischer, 237 P.3d 645 (Colo. O.P.D.J. 2010).

Suspension for one year and one day was warranted for attorney who violated C.R.P.C. 1.1 and C.R.P.C. 8.4 by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings in violation of section (7) of this rule. People v. Davies, 926 P.2d 572 (Colo. 1996).

One-year suspension warranted when attorney's behavior constituted nine separate violations of the Colorado rules of professional conduct by challenging a final judgment repeatedly in state, federal, and water courts and pursuing a frivolous federal Racketeer Influenced and Corrupt Organizations Act lawsuit without a rudimentary analysis of the facts, while disregarding a judge's order to cease collateral attacks. People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Smith, 819 P.2d 497 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Lamberson, 802 P.2d 1098 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Ross, 810 P.2d 659 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); In re Demaray, 8 P.3d 427 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988); People v. Frank, 782 P.2d 769 (Colo. 1989); In re Bilderback, 971 P.2d 1061 (Colo. 1999); ; People v. Kintzele, 409 P.3d 680 (Colo. O.P.D.J. 2017).

C. Violation of Legal Ethics.

Where severe sanctions necessitated. Where misconduct is grievous and demonstrates insensitivity to the professional obligations of a lawyer, it necessitates a severe sanction to reflect the gravity of the breach of ethical standards and to protect the public from future unprofessional conduct. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Of more concern is our responsibility to protect the public interest by ensuring continued confidence of the people of this state in the function and role of the office of district attorney and the integrity of the legal profession and the judicial system. People v. Brown, 726 P.2d 638 (Colo. 1986).

The public has a right to expect that one who engages in such gregarious professional misconduct shall be disciplined appropriately. People v. Kendrick, 646 P.2d 337 (Colo. 1982).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity

to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

The severity of the ethical violations may be balanced by lack of prior discipline, absence of injury to clients, compliance with court ordered treatment plan, and dismissal of criminal charges in felony prosecution. People v. Abelman, 744 P.2d 486 (Colo. 1987).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Adjudicating, as a judge, the criminal case of a person who is his client in a divorce proceeding warrants public censure because it is the duty of an attorney-judge to promptly disclose conflicts of interest and to disqualify himself without suggestion from anyone. People v. Perrott, 769 P.2d 1075 (Colo. 1989).

Unauthorized recordation of telephone conversation established unethical conduct. Telephone conversation, which attorney initiated and recorded without the permission of other party to conversation, established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Suggesting that witness have ex parte communication with chief justice. Where an attorney suggested to a principal witness in a pending grievance proceeding against that attorney that he write a letter on behalf of the attorney to the chief justice of the state supreme court, substantially recanting his testimony in the grievance proceeding, the attorney's conduct violated this rule and the code of professional responsibility. Public censure is the appropriate discipline for this breach of professional obligations. People v. Hertz, 638 P.2d 794 (Colo. 1982).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Costello, 781 P.2d 85 (Colo. 1989).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

When an attorney converts client property, disbarment is an appropriate sanction. People v. Hellewell, 827 P.2d 527 (Colo. 1992).

Disbarment justified. Misappropriation of client's funds, falsifying billing records of clients, failure to disclose conviction, and disbarment from another state's bar warrant disbarment. People v. Miller, 744 P.2d 489 (Colo. 1987).

Disbarment warranted where attorney accepted fees to represent clients after an order of suspension was entered against the attorney and the attorney failed to notify certain of his clients and opposing counsel of his suspension. People v. Zimmermann, 960 P.2d 85 (Colo. 1998).

Disbarment was the proper remedy in view of the numerous and grave instances of professional misconduct, including the intentional misappropriation of client funds. People v. Lefly, 902 P.2d 361 (Colo. 1995).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982).

Misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers. The most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Buckles, 673 P.2d 1008 (Colo. 1984).

Attorney's misuse of funds, writing of bad checks, and neglect in handling a legal matter justify disbarment. People v. Murphy, 778 P.2d 658 (Colo. 1989).

A stipulation of misconduct admitting to withdrawing money while acting as personal representative so that one's corporation can post an appeal bond, converting funds from estates while serving as personal representative, converting settlement proceeds, and converting funds while serving as president of endowment foundation warrant disbarment. People v. Costello, 781 P.2d 85 (Colo. 1989).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings violates this rule and warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Exploiting a client's friendship and trust to extort funds for one's personal use, failing to take any action on behalf of a client, and failing to cooperate with the grievance commit-

tee in its investigation of complaints with respect to such matters violates this rule and warrants disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1989).

Commingling trust funds, failing to maintain complete records of client's funds, and failure to render appropriate accounts to client constitutes grounds for discipline. People v. Wright, 698 P.2d 1317 (Colo. 1985).

Failure to deposit funds in trust account, to notify client of receipt of funds and provide accounting, and to forward file promptly to new attorney and communicating with former client on the subject of representation after client had obtained new legal counsel, along with other offenses, warrants public censure. People v. Swan, 764 P.2d 54 (Colo. 1988).

Public censure justified. Failure to place client's funds in interest bearing account to detriment of client, wrongful disbursement of funds, misrepresentation to the court, and failure to comply with court order to produce documentation warrant, at the very least, public censure. People v. C de Baca, 744 P.2d 512 (Colo. 1987).

Refusal to provide accounting for money and jewelry delivered to him, and refusal to itemize the services performed and the costs incurred, warrants disbarment. People v. Lanza, 660 P.2d 881 (Colo. 1983).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of this rule, DR 9-102, Code of Prof. Resp., and DR 2-110, Code of Prof. Resp. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Suspension justified considering respondent's violations of ethical duties to client and other aggravating factors including a pattern of misconduct, a substantial experience in the practice of law, and the vulnerability of respondent's client. People v. Grossenbach, 803 P.2d 961 (Colo. 1991).

Where money was accepted for investment plans which were totally false, fictitious, and fraudulent, attorney violated legal ethics and disbarment was appropriate. People v. Kramer, 819 P.2d 77 (Colo. 1991).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted grounds for attorney discipline. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

D. Violation of Honesty, Justice, or Morality.

Attorney never to obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Haase, 781 P.2d 80 (Colo. 1989).

A lawyer who holds the position of district attorney, with the substantial powers of that office, assumes responsibilities beyond those of other lawyers and must be held to the highest standard of conduct. When those powers are abused and duties ignored, the discipline must be commensurate with the act. People v. Brown, 726 P.2d 638 (Colo. 1986).

Conduct of counsel found contrary to standards of honesty, justice and integrity. People v. Emmert, 632 P.2d 562 (Colo. 1981).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose conviction and disbarment from another state's bar. An attorney's failure to disclose her conviction and a subsequent disbarment from bar of another state prior to being admitted to the Colorado bar constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Attorney's failure to disclose felony conviction and subsequent disbarment from bar of another state is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Attorney/real estate broker lying to salesperson working for attorney/real estate broker regarding progress and completion of transfer of salesperson's license was a violation even though salesperson was not a client. People v. Susman, 747 P.2d 667 (Colo. 1987).

Accepting marijuana in exchange for legal services warrants one-year suspension from practice of law. People v. Davis, 768 P.2d 1227 (Colo. 1989).

Alcohol and health problems not excuse. Alcohol and health problems, as well as emotional problems, do not excuse an attorney's dilatory practices and false statements to his clients. People v. Goss, 646 P.2d 334 (Colo. 1982).

Efforts at rehabilitation do not excuse conduct which includes dishonesty and fraud, failing to preserve identity of client funds, and failing to properly pay or deliver client funds, and which otherwise warrants disbarment. People v. Shafer, 765 P.2d 1025 (Colo. 1988).

Attorney's conduct (committing fraud by check) provides grounds for discipline under rules of civil procedure and violates the code of professional responsibility. People v. Proffitt, 731 P.2d 1257 (Colo. 1987).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting

public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Rader, 822 P.2d 950 (Colo. 1992).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Suspension of one year and one day warranted where attorney sexually mistreated employees of his law firm. People v. Lowery, 894 P.2d 758 (Colo. 1995).

Suspension for one year and one day appropriate when attorney terminated representation without reasonable notice, failed to provide client with accounting and refund, and failed to meet continuing education requirements. Restitution required as condition of reinstatement. People v. Rivers, 933 P.2d 6 (Colo. 1997).

Suspension for one year and one day warranted where attorney knowingly submitted a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998).

Attorney's commission of bank fraud constitutes misconduct involving an act or omission violating the highest standards of honesty, justice, or morality and warrants disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Six-month suspension justified where attorney knowingly failed to perform services for client, knowingly violated court order, engaged in dishonest conduct, and intentionally failed to respond to formal complaint or to cooperate with grievance committee without good cause. People v. Smith, 880 P.2d 763 (Colo. 1994).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Eastepp, 884 P.2d 305 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Sims, 913 P.2d 526 (Colo. 1996); People v. Allbrandt, 913 P.2d 532 (Colo. 1996).

E. Gross Negligence.

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980).

Attorney violated section (4) by engaging in two non-sufficient funds transactions involving his "special" account, and 22 non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Failure to take action on behalf of client. In failing to represent or take any action on behalf of his client after he was retained and entrusted with work and in making representations to his client which were false, an attorney violates this rule and the code of professional responsibility. People v. Southern, 638 P.2d 787 (Colo. 1982).

Failing to record deeds of trust. An attorney's conduct in borrowing money from his former clients and in failing to record deeds of trust on their behalf to be used as security constitutes professional misconduct and is sufficient to justify suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Continued pattern of conduct involving neglect and misrepresentation. Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation, and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Pattern of neglect which has not been corrected despite lesser sanctions requires imposition of suspension for protection of public. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Repeated neglect and delay in handling legal matters and failure to comply with the directions contained in a letter of admonition and to answer letter of complaint from the grievance committee constitute a violation of this rule and, with other offenses of the code of professional responsibility, are sufficient to justify suspension for three years. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Abandoning clients sufficient to justify disbarment. People v. Sanders, 713 P.2d 837 (Colo. 1985); People v. Susman, 787 P.2d 1119 (Colo. 1990).

Conduct manifesting gross carelessness in representation of clients is sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Attorney's neglect of dissolution case and misrepresentation to client concerning the filing of dissolution petition was especially egregious in view of client's desire to remarry. Conduct, in addition to number and severity of other instances of misconduct, taking into account mitigating factors, is sufficient for suspension. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Failure to perform adequate research on statute of limitations problem, given the time available and the urgings of clients to proceed, constitutes gross negligence within meaning of this rule. Attorney's claimed reliance on federal court decision declaring statute of limitations unconstitutional was objectively unreasonable in light of state court decision which expressly disagreed with federal court decision. People v. Barber, 799 P.2d 936 (Colo. 1990).

Suspension is appropriate discipline given the number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstances and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering proper mitigating factors such as attorney's lack of experience, absence of prior discipline, attorney's willingness to undergo psychiatric evaluation and accept transfer to disability inactive status, suspension without credit for time on disability inactive status is appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Undertaking to provide services to clients in areas in which one lacks experience, which would ordinarily result in a reprimand, warrants a 30-day suspension when coupled with continued neglect after private censure. People v. Frank, 752 P.2d 539 (Colo. 1988).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Respondent's continued neglect of matters entrusted to him, including his failure to deliver a promissory note and his failure to record a deed of trust, and respondent's acceptance of a retainer and his subsequent failure to litigate the matter warrant suspension from the practice of law for two years. Respondent's misconduct was aggravated by his failure to cooperate with the grievance committee. People v. Fagan, 791 P.2d 1123 (Colo. 1990).

Failure to timely file a paternity action constitutes neglect of a legal matter that warrants public censure. People v. Good, 790 P.2d 331 (Colo. 1990).

Suspension for one year and one day appropriate where attorney violated section (4) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Abandonment of law practice and conversion of clients' funds to attorney's own use justifies disbarment of attorney. People v. Franks, 791 P.2d 1 (Colo. 1990).

Disbarment is appropriate discipline for attorney who caused potentially serious injury to clients by abandoning his practice, knowingly failing to perform services for clients, and engaging in pattern of neglect. People v. Nichols, 796 P.2d 966 (Colo. 1990).

Aggravating factors in case were the previous issuance of a letter of admonition for a disciplinary offense, the lawyer's actions in dealing with clients which establish a dishonest or selfish motive, the acceptance of new clients and the charging of retainers immediately before lawyer moved to Ireland, multiple offenses and a repetition of the same conduct, the bad faith obstruction of the disciplinary process, the utilization of the substantial experience and expertise of the lawyer in the practice of law to collect substantial fees for services that the lawyer knew he could not perform, and the total indifference of the lawyer to making restitution and to repaying misappropriated funds. People v. Franks, 791 P.2d 1 (Colo. 1990).

Neglect of a legal matter entrusted to the attorney and misrepresentation to the client in connection with a real estate transaction constituted violations of this rule and various other rules. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Failure to file petition for dissolution of marriage and failure to return unearned legal fees sufficient to warrant 45-day suspension. People v. Combs, 805 P.2d 1115 (Colo. 1991).

Attorney's lack of preparation for trial constituted gross negligence. People v. Butler, 875 P.2d 219 (Colo. 1994).

F. Criminal Behavior.

Disciplinary proceedings are sui generis in nature, and conviction of a criminal offense is not a condition precedent to the institution of such proceedings nor does acquittal constitute a ban to such proceedings. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986).

Acquittal may be considered by grievance committee. Although an acquittal is not a bar to disciplinary action, it may be considered by the grievance committee. People v. Kenelly, 648 P.2d 1065 (Colo. 1982).

Disbarment warranted by attorney's conviction of conspiracy to deliver counterfeited federal reserve notes, serious neglect of several legal matters, unjustified retention of clients' property, failure to respond to the grievance committee, and previous disciplinary record. People v. Mayer, 752 P.2d 537 (Colo. 1988).

Felonious conduct and violation of code of professional responsibility justifies disbarment. Where a lawyer's conduct not only constitutes a violation of the code of professional responsibility, but also involves felonious conduct, clearly and convincingly proven by testi-

mony of sheriff's officers, the grievance committee is justified in requiring disbarment. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Conviction of a district attorney of two felonies and a misdemeanor while in office warrants the most severe sanction — disbarment. People v. Brown, 726 P.2d 638 (Colo. 1986).

Conviction of a serious felony involving dishonesty, fraud, deceit, and conversion of clients funds in another state and failure to notify Colorado authorities of same justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Use of license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible form of discipline. Any lesser sanction would unduly depreciate such misconduct in the eyes of the public and the legal profession. People v. Morley, 725 P.2d 510 (Colo. 1986).

Disbarment not unjust discipline for embezzling funds from estate of client, conversion of money belonging to employer, and convictions of theft and unlawful distribution and possession of controlled substance, after consenting to entry of disbarment in another jurisdiction. People v. Fitzke, 716 P.2d 1065 (Colo. 1986).

Where there is a great weight of mitigating evidence, even when an attorney has engaged in serious criminal conduct which would ordinarily justify disbarment, a three-year suspension and the requirement to pay costs of the disciplinary proceeding may be appropriate in lieu of disbarment. People v. Preblud, 764 P.2d 822 (Colo. 1988).

Existence of numerous mitigating factors warrant three-year suspension and payment of costs rather than disbarment for attorney convicted of felony violations of the California Revenue and Taxation Code. People v. Mandell, 813 P.2d 732 (Colo. 1991).

Felony theft held sufficient grounds for suspension. People v. Petrie, 642 P.2d 519 (Colo. 1982).

Pleading guilty to felony theft from at-risk victims is a crime of dishonesty that warrants disbarment. People v. Zarlengo, 367 P.3d 1197 (Colo. O.P.D.J. 2016).

Defendant intentionally and without permission took eyeglass frames from two retail stores and thereby violated section (5). There were many aggravating factors, the only mitigating factor was a suspension eight years prior. One year suspension levied. People v. Barnthouse, 948 P.2d 534 (Colo. 1997).

Conviction for sale of narcotic drug warrants disbarment and action striking attorney's name from the role of lawyers authorized to practice before the court. People v. McGonigle, 198 Colo. 315, 600 P.2d 61 (1979).

Conviction of conspiracy to violate drug laws. A lawyer who enters into a conspiracy to violate the law by importing narcotic drugs for distribution should be disbarred. People v. Unruh, 621 P.2d 948 (Colo. 1980), cert. denied, 476 U.S. 1171, 106 S. Ct. 2894, 90 L. Ed. 2d 981 (1986).

Conviction for conspiracy to possess with intent to distribute cocaine warrants disbarment and the striking of the attorney's name from the roll of attorneys licensed to practice in this state. People v. Avila, 778 P.2d 657 (Colo. 1989).

Use of professional status to accomplish illicit commercial transaction. Violation of the criminal laws of Colorado is grounds for discipline, and the use of one's professional status to accomplish an illicit commercial transaction for profit demands the most severe sanction. People v. McGonigle, 198 Colo. 315, 600 P.2d 61 (1979).

Attorney's use of his position as director of a bank to arrange financial transactions in a manner prohibited by federal law, where his conduct was deliberate, carefully planned, and extended over a period of a year and a half, justified disbarment, notwithstanding such factors as attorney's full restitution to bank, his cooperation with federal officials, his lack of any prior criminal record, his history of community service, and the existence of psychological problems which may have precipitated his illegal activity and which have been acknowledged and solved. People v. Loseke, 698 P.2d 809 (Colo. 1985).

Structuring financial transaction to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002).

Committing offense of bigamy and placing unauthorized signatures upon land deeds warranted public censure. People v. Tucker, 755 P.2d 452 (Colo. 1988).

Committing offense of third-degree sexual assault on a client and recklessly accusing a lawyer and judge of having an improper ex parte communication warranted suspension for a year and a day, and, for purposes of a disciplinary proceeding, the sexual assault only had to be proved by clear and convincing evidence, not beyond a reasonable doubt. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996).

Discharging firearm in direction of spouse while intoxicated, although not a crime involving dishonesty, goes beyond mere negligence and public censure is appropriate. Miti-

gating factors, although present, were insufficient to warrant making censure private. People v. Senn, 824 P.2d 822 (Colo. 1992).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which the department of housing and urban development (HUD) would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

Suspension of one year and one day warranted for attorney who entered guilty plea to class 5 felony of failure to pay employee income tax withheld and who violated other disciplinary rules involving neglect of legal matter, failure to seek lawful objectives of client, intentional failure to carry out employment contract resulting in intentional prejudice or damage to client. People v. Franks, 866 P.2d 1375 (Colo. 1994).

Suspension of two years warranted for attorney who reached a consent settlement with the securities and exchange commission stating that he had employed devices, schemes, or artifices to defraud or made untrue statements of material fact or engaged in acts, practices, or courses of business which operated as a fraud or deceit upon persons in violation of the Securities and Exchange Act. People v. Hanks, 967 P.2d 141 (Colo. 1998).

Where deputy district attorney was convicted of possession of cocaine under federal law, one-year suspension is appropriate due to seriousness of offense and fact that attorney had higher responsibility to the public by virtue of engaging in law enforcement. People v. Robinson, 839 P.2d 4 (Colo. 1992).

Guilty pleas of deputy district attorney for acting as an accessory to a crime and for official misconduct relating to the disposal of drug paraphernalia warrants six-month suspension. Respondent's status as a deputy district attorney at the time she committed the offenses is an aggravating factor because public officials engaged in law enforcement have assumed an even greater responsibility to the public than have other lawyers. People v. Freeman, 885 P.2d 205 (Colo. 1994).

Suspension of one year and one day appropriate for experienced attorney and judicial officer who pled guilty to unlawful use of a controlled substance. People v. Stevens, 866 P.2d 1378 (Colo. 1994).

Attorney who was not charged or convicted of a substance abuse related crime was suspended. The attorney's drug problem was self-reported, he had voluntarily hospitalized himself and undergone an after-care program, and he had over one year of sustained recovery. People v. Ebbert, 873 P.2d 731 (Colo. 1994).

Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998).

Attorney offered money to two police officers in the context of releasing his client from custody. The attorney alleged such action was a joke intended to teach his client that the police would not release the client from custody. Such activity was determined to be bribery even though the attorney was not charged by the police and sufficient for a three-year suspension. In re Elinoff, 22 P.3d 60 (Colo. 2001).

Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998).

Entering guilty pleas to multiple counts of bank fraud evidences serious criminal conduct warranting disbarment. People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Entering guilty plea to committing mail fraud evidences serious criminal conduct warranting disbarment. People v. Bollinger, 859 P.2d 901 (Colo. 1993).

When a lawyer knowingly converts client funds, disbarment is virtually automatic, at least in the absence of significant factors in mitigation. People v. McDonnell, 897 P.2d 829 (Colo. 1995).

Convictions for conspiring to commit fraud against the United States and impeding an officer of a United States court justify disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990).

Conviction for bankruptcy fraud warrants disbarment. People v. Brown, 841 P.2d 1066 (Colo. 1992).

Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Suspension justified where respondent violated federal and state laws by failing to file personal income tax returns, failing to pay withholding taxes, using cocaine, and using marihuana. People v. Holt, 832 P.2d 948 (Colo. 1992).

The fact that no specific client of the respondent was actually harmed by the respondent's misconduct misses the point in pro-

ceeding for suspension of an attorney. While the primary purpose of attorney discipline is the protection of the public and not to mete punishment to the offending lawyer, lawyers are, nonetheless, charged with obedience to the law, and intentional violation of those laws subjects an attorney to the severest discipline. People v. Holt, 832 P.2d 948 (Colo. 1992).

Lack of prior disciplinary record insufficient to call for sanction less than disbarrment where attorney convicted of bankruptcy fraud, conspiracy to commit bankruptcy fraud and other federal offenses. People v. Schwartz, 814 P.2d 793 (Colo. 1991).

Although attorney had not previously been disciplined, sanction of disbarment was warranted where attorney's felony conviction for possession of a firearm occurred while he was still on probation for a felony conviction for possession of marijuana. People v. Laquey, 862 P.2d 278 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney pleaded guilty to bribery. People v. Viar, 848 P.2d 934 (Colo. 1993).

Conviction for aiding fugitive to flee warrants disbarment despite lack of a prior disciplinary record. People v. Bullock, 882 P.2d 1390 (Colo. 1994).

Respondent given two-year suspension for aiding and abetting aliens' entry into the United States and by advising clients to make misrepresentations for such entry. Such an act generally warrants disbarment, but respondent's full disclosure during proceedings, expression of remorse, and the fact that a prior offense was remote in time were mitigating factors. Respondent also required to discontinue the representation of clients before INS and the Department of Labor. People v. Boyle, 942 P.2d 1199 (Colo. 1997).

Six-month suspension justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imposition of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse; and (6) relative inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993).

Six-month suspension appropriate for respondent convicted of drunken driving offense and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 460 (Colo. 1997).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Failure to file federal income tax returns in combination with mitigating factors of no prior discipline and significant personal problems at the time of the misconduct warrants public censure. People v. Tauger, 893 P.2d 121 (Colo. 1995).

Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)).

Public censure is appropriate for driving under the influence with mitigating factor of candidness and cooperativeness. This was attorney's first conviction, and he was truthful, candid, and cooperative. He also underwent alcohol evaluation by a doctor. People v. Miller, 409 P.3d 667 (Colo. O.P.D.J. 2017).

Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997).

Public censure was appropriate where an already suspended attorney was the subject of prior discipline for misdemeanor convictions of assault and driving while impaired and where an additional period of suspension would have little, if any, practical effect and would not have afforded a meaningful measure of protection for the public. People v. Flores, 871 P.2d 1182 (Colo. 1994).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Suspension for 180 days is warranted based upon conviction of third degree assault

charges. People v. Knight, 883 P.2d 1055 (Colo. 1994).

The conduct of an attorney who is convicted of domestic violence and who fails to report the conviction substantially reflects adversely on the attorney's fitness to practice. The aggravating factors outweigh the mitigating factors; accordingly, the proper form of discipline is six months' suspension. In re Hickox, 57 P.3d 403 (Colo. 2002).

Disbarment is warranted for driving while impaired, marihuana possession, improperly executing agreement without authority, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Disbarment warranted where attorney was convicted of two separate sexual assaults on a client and a former client and attorney's previous dishonest conduct was an aggravating factor as well as findings of the attorney's selfish motive in engaging in the sexual misconduct, the two clients' vulnerability, the attorney's more than 20 years practicing law, and the attorney's failure to acknowledge the wrongful nature of his conduct. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Disbarment warranted for attorney convicted of criminal attempt to commit sexual exploitation of a child, a class 4 felony. People v. Damkar, 908 P.2d 1113 (Colo. 1996).

Disbarment warranted for attorney convicted of one count of sexual assault on a child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998).

Disbarment warranted for attorney convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment appropriate sanction for attorney who intentionally killed another person. Despite a lack of prior discipline in this state, giving full faith and credit to another state's law and its jury finding that attorney intentionally took her husband's life by shooting him 10 times with a firearm, disbarment is an appropriate sanction. People v. Sims, 190 P.3d 188 (Colo. O.P.D.J. 2008).

Disbarment warranted for writing nonsufficient funds checks while practicing law during a period of suspension and committing several other disciplinary rules violations. People v. Fager, 938 P.2d 138 (Colo. 1997).

Disbarment justified in a reciprocal discipline proceeding where attorney convicted of knowingly making false statements to obtain a loan from a federal savings and loan institution. Attorney was also disbarred by the United States court of federal claims and had his license revoked by the Virginia state bar for the same offense. Unless certain exceptions exist, the same discipline that was imposed in the foreign jurisdiction is generally imposed in a reciprocal discipline proceeding. People v. Kiely, 968 P.2d 110 (Colo. 1998).

Disbarment warranted for knowingly abandoning clients, converting their funds, and causing actual financial and emotional harm to them. Attorney violated duty to preserve clients' property, to diligently perform services on their behalf, to be candid with them during the course of the professional relationship, and to abide by the legal rules of substance and procedure that affect the administration of justice. People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009).

Disbarment warranted for attorney convicted of conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of a false income tax return. People v. Evanson, 223 P.3d 735 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Allbrandt, 913 P.2d 532 (Colo. 1996); In re Tolley, 975 P.2d 1115 (Colo. 1999) (decided under former rule 241.6).

G. Violation of Other Rules.

Disbarment in another state violates this rule and warrants disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Disbarment from practice in federal court violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension from practice in federal tax court violates this rule and warrants discipline. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Pattern of neglect which has not been corrected despite lesser sanctions requires imposition of suspension for protection of public. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Repeated neglect and delay in handling legal matters and failure to comply with the directions contained in a letter of admonition and to answer letter of complaint from the grievance committee constitute a violation of this rule and, with other offenses of the code of profes-

sional responsibility, are sufficient to justify suspension for three years. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Repeated misconduct charges warranted suspension of licenses. Where respondent had been disciplined three times previously, once by private censure and twice by letters of admonition and where two of the matters involved delay and the respondent's failure to inform his clients of the status of their cases, subsequent misconduct warranted that respondent's license to practice law be suspended for six months. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980).

Two-year suspension was not excessively harsh where previous suspension and vulnerability of young, unsophisticated client in current matter are properly considered as aggravating factors in fixing punishment. People v. Yaklich, 744 P.2d 504 (Colo. 1987).

Continuing to represent client and failing to comply with disciplinary rule after initial suspension from practice of law warrants suspension for additional year. People v. Underhill, 708 P.2d 790 (Colo. 1985).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Multiple criminal and traffic convictions demonstrate a pattern of misconduct, and the presence of multiple offenses warrants suspension for six months with the requirement of reinstatement proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998).

H. Failure to Respond to Grievance Committee.

Failure to answer a disciplinary complaint is itself a violation of the disciplinary rules. People v. Richards, 748 P.2d 341 (Colo. 1987).

Because an attorney has a duty to cooperate with disciplinary proceedings under this rule, default judgments are not subject to being set aside easily. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Continued pattern of conduct involving neglect and misrepresentation. Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation, and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Stipulation of deputy public defender that he failed to communicate with a client for seven months and failed to answer in a timely manner either the request for investigation or the formal complaint in the disciplinary matter, and his neglect of six separate professional matters over a three-year period warrant a 30-day suspension where substantial mitigating factors exist, including the absence of a prior disciplinary history, the absence of a selfish or dishonest motive, the presence of serious personal and emotional problems, a cooperative attitude throughout the disciplinary proceedings, a good character and professional reputation, the imposition of other penalties or sanctions, and the presence of remorse. People v. Bobbitt, 859 P.2d 902 (Colo. 1993).

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Failure to respond to informal complaints constitutes failure to respond to a request by the grievance committee without good cause. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Failure to take action on behalf of client in civil action, failure to advise client of claim, attempt to place property beyond the reach of creditors, and failure to cooperate in disciplinary proceedings justifies three-year suspension of attorney. People v. Baptie, 796 P.2d 978 (Colo. 1990).

Suspension for three years is appropriate where lawyer failed to respond to motions or appear at hearing, resulting in dismissal of clients' bankruptcy proceeding, thereby increasing clients' debts tenfold. The hearing board further found that the attorney engaged in bad faith obstruction of the disciplinary proceedings and refused to acknowledge the wrongful nature of his conduct or the vulnerability of his clients. People v. Farrant, 883 P.2d 1 (Colo. 1994).

Fabrication of administrative decision and settlement discussions to conceal respondent's failure to prosecute client's wage claim unnecessarily wasted grievance committee's time and resources, warranting increased period of suspension and relatively high assessment of costs. People v. Gaimara, 810 P.2d 1076 (Colo. 1991).

Disbarment appropriate remedy for attorney who neglected client's legal matter, failed to return retainer after being requested to do so, abandoned law practice, evaded process, and failed to respond to request of grievance com-

mittee. People v. Williams, 845 P.2d 1150 (Colo. 1993).

Disbarment appropriate remedy for attorney who neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998).

Disbarment warranted for attorney who abandoned her law practice, disregarded court orders, made misrepresentations to her clients, and failed to respond or appear, with aggravating factors. People v. Valley, 960 P.2d 141 (Colo. 1998).

Failure to respond to request for investigation from grievance committee is a violation of former section (7). People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Kramer, 819 P.2d 77 (Colo. 1991); People v. Hebenstreit, 823 P.2d 125 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Honaker, 863 P.2d 337 (Colo. 1993); People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension when attorney currently on disability inactive status. People v. Moya, 793 P.2d 1154 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Fagan, 423 P.3d 412 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Fritsche, 897 P.2d 805 (Colo. 1995); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998).

Rule 251.6. Forms of Discipline

Any of the following forms of discipline may be imposed in those cases where grounds for discipline have been established:

(a) Disbarment. Disbarment is the revocation of an attorney's license to practice law in this state, subject to readmission as provided by C.R.C.P. 251.29(a). Disbarment shall be for at least eight years;

(b) Suspension. Suspension is the temporary suspension of an attorney's license to practice law in this state, subject to reinstatement as provided in C.R.C.P. 251.29(b). Suspension, which may be stayed in whole or in part, shall be for a definite period of time not to exceed three years;

(c) Public Censure. Public censure is a reproach published with other grievance decisions and made available to the public; and

(d) Private Admonition. Private admonition is an unpublished reproach. An attorney who has been admonished by the committee and who wishes to challenge the order of admonition may, by written petition filed with the Regulation Counsel within 21 days after the date the letter of admonition was mailed to the admonished attorney or personally read to the attorney, demand as a matter of right that imposition of the admonition be vacated, that a complaint be filed against the attorney, and that disciplinary proceedings continue in the manner prescribed by these rules.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.7.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Constitutionality upheld. This rule provides sufficient guidelines to impose discipline to comply with due process of law. People v.

Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Standards used in determining constitutional challenges. Same standards used in determining a constitutional challenge to a statute are used in determining constitutional challenge to this rule. People v. Morley, 725 P.2d 510 (Colo. 1986).

A statute passes constitutional muster for the purposes of imposing professional discipline if it prescribes the possible penalties that can be imposed for a violation of a statutory provision. People v. Morley, 725 P.2d 510 (Colo. 1986).

An attorney-at-law is an officer of court exercising a privilege or franchise to the enjoyment of which he has been admitted not as a matter of right, but upon proof of fitness through evidence of his possession of satisfactory legal attainments and fair private character. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

An attorney is continually accountable to the court. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The privilege to practice law may at any time be declared forfeited for misconduct, whether professional or nonprofessional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The power to declare a forfeiture of the privilege to practice is a summary one inherent in the courts and exists not to mete out punishment to an offender, but rather so that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

It is not an adversary proceeding. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

A hearing board always has discretion in determining the appropriate sanction for attorney misconduct and may impose any of the forms of discipline listed in this rule, which range from private admonition to disbarment. In re Attorney F, 2012 CO 57, 285 P.3d 322.

Hearing board erred, therefore, in concluding that it was compelled by case law to impose a public censure instead of private admonition. In re Attorney F, 2012 CO 57, 285 P.3d 322.

Where complaints are resolved against an attorney, the committee may recommend public censure. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another. People v. Brown, 726 P.2d 638 (Colo. 1986).

Disbarment held not to be excessive. Use of a license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible from of discipline. Any lesser sanction would unduly depreciate such misconduct in the eyes of the public and the legal profession. People v. Morley, 725 P.2d 510 (Colo. 1986).

Disbarment may be recommended when attorney found guilty of crime. Where the committee finds that the nature of a crime of which an attorney has been found guilty is such as to render him an unfit person to be licensed to practice law, he therefore should be disbarred, and the committee recommend such disbarment. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Disciplinary recommendation of grievance committee is advisory only and is not binding on the supreme court. People v. Smith, 773 P.2d 528 Colo. 1989).

Disbarment was the only available remedy to protect the interest of the public where attorney had been afforded multiple opportunities including two suspensions and court ordered rehabilitation, and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to his client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Disbarment proper when attorney failed to timely answer complaint, put on evidence at hearing on amount of damages, answer amended complaint which included punitive damages that the court awarded and respond to grievance committee. The attorney had history of prior discipline for seriously neglecting client matters. Additional aggravating factors included the presence of multiple offenses, failing to cooperate in the disciplinary proceedings, and having substantial experience in the practice of law. There were no mitigating factors. In the Matter of Scott, 979 P.2d 572 (Colo. 1999).

Disbarment is appropriate, in the absence of aggravating or mitigating factors, where lawyer knowingly converts client property and deceives client with the intent to benefit the lawyer or another and causes serious injury to a client. People v. Mulligan, 817 P.2d 1028 (Colo. 1991).

Disbarment is the presumptive sanction for conversion of client funds. Where attorney

knowingly converted, used, and failed to return client funds, disbarment was warranted. The attorney's failure to participate in disciplinary proceedings or present significant factors in mitigation further precluded any deviation from the presumptive sanction. People v. Young, 201 P.3d 1273 (Colo. O.P.D.J. 2008).

In the absence of aggravating or mitigating circumstances, disbarment is generally appropriate when (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. People v. Southern, 832 P.2d 946 (Colo. 1992).

The ultimate sanction for multiple charges of misconduct generally should be greater than the sanction for the most serious conduct. People v. Schubert, 799 P.2d 388 (Colo. 1990).

Court makes 90-day suspension consecutive to previously imposed one year and a day suspension where existing suspension imposed for unrelated conduct. In re Meyers, 981 P.2d 143 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to warrant suspension. People v. Smith, 828 P.2d 249 (Colo. 1992).

Maximum period of suspension was warranted in light of multiple instances of misconduct and necessity for respondent to complete drug rehabilitation program. People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Driscoll, 830 P.2d 1019 (Colo. 1992).

Established facts demonstrating that attorney knowingly practiced law after he had been administratively suspended by Colorado supreme court for failing to comply with his CLE and attorney fee registration requirements merited short suspension of attorney from practice of law. Upon consideration of the nature of attorney's misconduct, his mental state, the potential harm he caused, the aggravating factors, and the absence of significant mitigating factors, the ABA standards for imposing lawyer sanctions and Colorado supreme court case law both support short suspension. Of particular salience here was attorney's failure to participate in disciplinary proceedings. People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Attorney received suspension for charging excessive fee in another state. The action taken in the other state had resulted in the attorney's receipt of a one-year conditional suspension. Usually the court will impose the same discipline as that which was imposed in the foreign jurisdiction, but because Colorado does not provide for conditional suspensions public censure was deemed appropriate. People v. Nash, 873 P.2d 764 (Colo. 1994).

Applied in People v. Barbary, 164 Colo. 588, 437 P.2d 57 (1968); People v. Creasey, 811 P.2d 40 (Colo. 1991).

Rule 251.7. Probation

(a) Eligibility. When an attorney has demonstrated that the attorney:

(1) Is unlikely to harm the public during the period of probation and can be adequately supervised;

(2) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and,

(3) Has not committed acts warranting disbarment, then the attorney may be placed on probation. Probation shall be imposed for a specified period of time in conjunction with a suspension which may be stayed in whole or in part. Such an order shall be regarded as an order of discipline. The period of probation shall not exceed three years unless an extension is granted upon motion by either party. A motion for an extension must be filed prior to the conclusion of the period originally specified.

(b) Conditions. The order placing an attorney on probation shall specify the conditions of probation. The conditions shall take into consideration the nature and circumstances of the attorney's misconduct and the history, character, and health status of the attorney and shall include no further violations of the Colorado Rules of Professional Conduct. The conditions may include but are not limited to the following:

(1) Making periodic reports to the Regulation Counsel or to the attorneys' peer assistance program as provided in subsection (d) of this Rule;

(2) Monitoring the attorney's practice or accounting procedures;

(3) Establishing a relationship with an attorney-mentor, and regular reporting with respect to the development of that relationship;

(4) Satisfactory completion of a course of study;

(5) Successful completion of the multi-state professional responsibility examination;

(6) Refund or restitution;

(7) Medical evaluation or treatment;
(8) Mental health evaluation or treatment;
(9) Evaluation or treatment in a program that specializes in treating disorders related to sexual misconduct;
(10) Evaluation or treatment in a program that specializes in treating matters relating to perpetration of family violence, including but not limited to domestic partner, elder, and child abuse;
(11) Substance abuse evaluation or treatment;
(12) Abstinence from alcohol and drugs; and
(13) No further violations of the Colorado Rules of Professional Conduct.

(c) Costs. The attorney shall also be responsible for all costs of evaluation, treatment and supervision. Failure to pay these costs prior to termination of probation shall constitute a violation of probation.

(d) Monitoring. The Regulation Counsel shall monitor the attorney's compliance with the conditions of probation imposed under these rules. When appropriate, the Regulation Counsel may delegate its monitoring role to the attorneys' peer assistance program. In cases in which the attorneys' peer assistance program is the designated monitor, regular reports regarding the progress of the attorney shall be submitted by the attorneys' peer assistance program to the Regulation Counsel.

(e) Violations. If, during the period the attorney is on probation, the Regulation Counsel receives information that any condition may have been violated, the Regulation Counsel may file a motion with the Presiding Disciplinary Judge specifying the alleged violation and seeking an order requiring the attorney to show cause why the stay should not be lifted and the sanction activated for violation of the condition. The filing of such a motion shall toll any period of suspension until final action. A hearing shall be held upon motion of either party before the Presiding Disciplinary Judge. At the hearing, the Regulation Counsel has the burden of establishing by a preponderance of the evidence the violation of a condition of probation. When, in a revocation hearing, the alleged violation of a condition is the attorney's failure to pay restitution or costs, the evidence of the failure to pay shall constitute prima facie evidence of a violation. Any evidence having probative value shall be received regardless of its admissibility under the rules of evidence if the attorney is accorded a fair opportunity to rebut hearsay evidence. At the conclusion of a hearing, the Presiding Disciplinary Judge shall prepare a report setting forth findings of fact and decision.

(f) Termination. Unless otherwise provided in the order of suspension, within 28 days and no less than 14 days prior to the expiration of the period of probation, the attorney shall file an affidavit with the Regulation Counsel stating that the attorney has complied with all terms of probation and shall file with the Presiding Disciplinary Judge notice and a copy of such affidavit and application for an order showing successful completion of the period of probation. Upon receipt of this notice and absent objection from the Regulation Counsel, the Presiding Disciplinary Judge shall issue an order showing that the period of probation was successfully completed. The order shall become effective upon the expiration of the period of probation.

(g) Independent Charges. A motion for revocation of an attorney's probation shall not preclude the Regulation Counsel from filing independent disciplinary charges based on the same conduct as alleged in the motion.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

The expiration of a specific period of probation imposed on an attorney does not alone entitle that attorney to reinstatement to the unconditional practice of law. While the rule does not expressly state that the probationer remains on probation until an order of successful completion has issued, that is not only a probable, but in fact the necessary, implication

of the requirement. In re Bass, 2013 CO 40, 307 P.3d 1052.

Applied in In re Green, 982 P.2d 838 (Colo. 1999).

Rule 251.8. Immediate Suspension

(a) Immediate Suspension. Immediate suspension is the temporary suspension by the Supreme Court of an attorney's license to practice law for a definite or indefinite period of time while proceedings conducted pursuant to this Rule and these Rules are pending against the attorney.

Although an attorney's license to practice law shall not ordinarily be suspended during the pendency of such proceedings, the Supreme Court may order the attorney's license to practice law immediately suspended when there is reasonable cause to believe that:

(1) the attorney is causing or has caused immediate and substantial public or private harm and the attorney:

(A) has been convicted of a serious crime as defined by C.R.C.P. 251.20(e);

(B) has converted property or funds;

(C) has abandoned clients; or

(D) has engaged in conduct which poses an immediate threat to the effective administration of justice.

(b) Petition for Immediate Suspension.

(1) When it is believed that an attorney should be immediately suspended, the committee or Regulation Counsel shall file a petition with the Presiding Disciplinary Judge. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause that the alleged conduct has in fact occurred. A copy of the petition shall be served on the attorney pursuant to these Rules.

(2) The Presiding Disciplinary Judge, or the Supreme Court, by any justice thereof, may order the issuance of an order to show cause directing the attorney to show cause why the attorney should not be immediately suspended, which order shall be returnable within 14 days. After the issuance of an order to show cause, and after the period for response has passed without a response having been filed, or after consideration of any response and reply, the Presiding Disciplinary Judge shall prepare a report setting forth findings of fact and recommendation and file the report with the Supreme Court. After receipt of the report the Supreme Court may enter an order immediately suspending the attorney from the practice of law, or dissolve the order to show cause.

(3) If a response to the order to show cause is filed and the attorney requests a hearing on the petition, said hearing shall be held within 14 days before the Presiding Disciplinary Judge. Thereafter, the Presiding Disciplinary Judge shall submit a transcript of the hearing and a report setting forth findings of fact and a recommendation to the Supreme Court within 7 days after the conclusion of the hearing. Upon the receipt of the recommendation and the record relating thereto, the Supreme Court may enter an order immediately suspending the attorney from the practice of law or dissolve the order to show cause.

(4) When the Supreme Court enters an order immediately suspending the attorney, the Regulation Counsel shall promptly prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14, notwithstanding the provisions of C.R.C.P. 251.10 and C.R.C.P. 251.12. Thereafter the matter shall proceed as provided by these Rules.

(5) An attorney who has been immediately suspended pursuant to this Rule shall have the right to request an accelerated disposition of the allegations which form the bases for the immediate suspension by filing a notice with the Regulation Counsel requesting accelerated disposition. After the notice has been filed, the Regulation Counsel shall promptly file a complaint pursuant to these Rules and the matter shall be docketed by the Presiding Disciplinary Judge for accelerated disposition. Thereafter the matter shall proceed and be concluded without appreciable delay.

(c) [Transferred to Rule 251.8.5]

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (c) transferred to Rule 251.8.5, effective January 1, 1999; (b)(2) amended and effective June 28, 2007; (a)

amended and effective February 5, 2009; (b)(2) and (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: Paragraph (a) was previously numbered as 241.8. Paragraph (b) is new.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 259, which was similar to this rule.

Applied in People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980); People v. Harfmann, 638 P.2d 745 (Colo. 1981); In re Green, 982 P.2d 838 (Colo. 1999).

Rule 251.8.5. Suspension for Nonpayment of Child Support, or for Failure to Comply with Warrants Relating to Paternity or Child Support Proceedings

(a) Application. The provisions of this rule shall apply to an attorney licensed or admitted to practice law in Colorado who is in arrears in payment of child support or who is in arrears under a child support order as defined by section 26-13-123 (a), C.R.S., or who fails to comply with a warrant relating to paternity or child support proceedings.

Proceedings commenced against an attorney under the provisions of this rule are not disciplinary proceedings. Suspension of an attorney's license to practice law under the provisions of this rule is not a form of discipline, and shall not necessarily bar disciplinary action.

(b) Petition for Suspension.

(1) Upon receipt of reliable information that an attorney is in arrears in payment under a child support order, or has failed to comply with subpoenas or warrants relating to paternity or child support proceedings, regulation counsel may file a petition for suspension with the presiding disciplinary judge. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause to believe that the attorney is in arrears on a child support order, or has failed to comply with a subpoena or a warrant relating to paternity or child support proceedings. A copy of the petition shall be served on the attorney pursuant to these rules.

(2) The presiding disciplinary judge shall order the issuance of an order to show cause directing the attorney to show cause why the attorney's license to practice law should not be immediately suspended, which order shall be returnable within 28 days. After the issuance of an order to show cause, and after the period for response has passed without a response having been filed, or after consideration of any response and reply, the presiding disciplinary judge shall enter an order immediately suspending the attorney from the practice of law, unless within the 28-day period: the attorney has paid the past-due obligation, negotiated a payment plan approved by the court or the state child support enforcement agency or agency having jurisdiction over the child support order, requested a hearing before the presiding disciplinary judge, or complied with the warrant or subpoena.

(3) If a response to the order to show cause is timely filed and the attorney or the regulation counsel requests a hearing before the presiding disciplinary judge on the petition, the hearing shall be held within 14 days of the request, or as soon thereafter as is practicable. At the hearing, the burden is initially on the regulation counsel to prove the allegations in the petition by a preponderance of the evidence. If the presiding disciplinary judge has determined that the regulation counsel has proved the allegations in the petition by a preponderance of the evidence, he or she shall issue an order immediately suspending the attorney, unless the attorney proves by a preponderance of the evidence that: (1) there is a mistake in the identity of the attorney; (2) there is a bona fide disagreement currently before a court or an agency concerning the amount of the child support debt, arrearage balance, retroactive support due, or the amount of the past-due child support when combined with maintenance; (3) all child support payments were made when due; (4) the

attorney has complied with the subpoena or warrant; (5) the attorney was not served with the subpoena or warrant; or (6) there was a technical defect with the subpoena or warrant. No evidence with respect to the appropriateness of the underlying child support order or ability of the attorney in arrears to comply with such order shall be received or considered by the presiding disciplinary judge. Upon conclusion of the hearing, the presiding disciplinary judge shall promptly prepare an opinion setting forth his or her findings of facts and decision.

(c) Appeal. For purposes of this rule, the decision of the presiding disciplinary judge shall be final, and an appeal may be commenced as set forth in C.R.C.P. 251.26.

(d) Reinstatement.

(1) If, after an attorney's license has been suspended, the attorney has paid the past-due obligations, entered into a payment plan approved by the court or the agency having jurisdiction over the child support order, or complied with the warrant or subpoena, the attorney may seek reinstatement by filing a verified petition, with evidence of compliance, with the presiding disciplinary judge.

(2) Immediately upon receipt of a petition for reinstatement, the regulation counsel shall have 28 days or, upon a showing of good cause, such greater time as authorized by the presiding disciplinary judge within which to conduct any investigation deemed necessary. The attorney shall cooperate in any such investigation. At the end of the period of time allowed for the investigation, the regulation counsel shall file an answer. Based on the petition and answer, the presiding disciplinary judge may order reinstatement or hold a hearing to determine whether the attorney shall be reinstated. The attorney shall bear the burden of establishing the right to be reinstated by a preponderance of the evidence.

(3) If the petition for reinstatement is denied by the presiding disciplinary judge, the attorney may proceed pursuant to C.R.C.P. 251.26.

Source: Entire rule added and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective February 17, 2000; (b)(2), (b)(3), and (d)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: Prior the January 1, 1999, this rule was contained in paragraph (c) of Rule 251.8.

ANNOTATION

Law reviews. For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Rule 251.8.6. Suspension for Failure to Cooperate

(a) Application. The provisions of this rule shall apply in all cases where there is a request for investigation pending against an attorney under these rules, alleging serious misconduct. If the attorney fails to cooperate either by failing to respond to the request for investigation or by failing to produce information or records requested by Regulation Counsel, then Regulation Counsel may file a petition for suspension of the attorney's license to practice law. Proceedings commenced against an attorney under the provisions of this rule are not disciplinary proceedings. Suspension of an attorney's license to practice law under the provisions of this rule is not a form of discipline, and shall not necessarily bar disciplinary action.

(b) Petition for Suspension. Regulation Counsel may file a petition for suspension with the supreme court alleging that the attorney has not responded to requests for information, has not responded to the request for investigation, or has not produced records or documents requested by Regulation Counsel and has not interposed a good-faith objection to producing the records or documents. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause to believe that the serious misconduct alleged in the request for investigation has in fact occurred. The affidavit shall also include the efforts undertaken by Regulation Counsel to obtain the

attorney's cooperation. A copy of the petition shall be served on the attorney pursuant to C.R.C.P. 251.32(b). The failure of the attorney to file a response in opposition to the petition within 14 days may result in the entry of an order suspending the attorney's license to practice law until further order of the court. The attorney's response shall set forth facts showing that the attorney has complied with the requests, or the reasons why the attorney has not complied and may request a hearing.

Upon consideration of a petition for suspension and the attorney's response, if any, the supreme court may suspend the attorney's license to practice law for an indefinite period pending further order of the court; it may deny the petition; or it may issue any other appropriate orders. If a response to the petition is filed and the attorney requests a hearing on the petition, the supreme court may conduct such a hearing or it may refer the matter to the presiding disciplinary judge for resolution of contested factual matters. The presiding disciplinary judge shall submit a report setting forth findings of fact and a recommendation to the supreme court within 7 days of the conclusion of the hearing.

(c) Reinstatement. An attorney suspended under this rule may apply to the supreme court for reinstatement upon proof of compliance with the requests of Regulation Counsel as alleged in the petition, or as otherwise ordered by the court. A copy of the application must be delivered to Regulation Counsel, who may file a response to the application within two business days after being served with a copy of the application for reinstatement. The supreme court will summarily reinstate an attorney suspended under the provisions of this Rule upon proof of compliance with the requests of Regulation Counsel.

Source: Entire rule and Comment added and effective October 29, 2001; (b) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMENT

This rule addresses problems caused by relatively few attorneys who fail to cooperate with the regulation counsel after a request for investigation has been filed against the attorney. In general, it would not apply after formal proceedings have been commenced against the attorney by the filing of a complaint. The rule would still apply, however, even after formal proceedings have begun, with respect to matters outside of the complaint.

Suspension under the rule is not discipline. In this sense, it is similar to a summary administrative suspension for failing to pay the attorney registration fee or to file a registration statement, see C.R.C.P. 227(A)(4), or for noncompliance with mandatory continuing legal education requirements, see C.R.C.P. 260.6. It is also similar to a suspension for nonpayment of child support, see C.R.C.P. 251.8.5, except resort in the first instance is made to the supreme court rather than the presiding disciplinary judge. Like those other rules, the intent of this rule is to ensure that an attorney complies with the requirements of the rules governing the legal profession, in this case the attorney's duty to cooperate with regulation counsel in the investigation of a request for investigation. See C.R.C.P. 251.1(a); C.R.C.P. 251.5(d); Colo. RPC 8.4(d). By this rule, the supreme court intends to facilitate communication between the attorney and regulation counsel. The rule is not designed to threaten or punish lawyers who have a good reason for not complying with regulation counsel's request, such as an inability to comply or possession of a good-faith objection to production. For example, an attorney will not be suspended under this rule merely because the attorney is out of the office on vacation.

Rule 251.9. Request for Investigation

(a) Commencement. Proceedings as provided in these Rules shall be commenced:

(1) Upon a request for investigation made by any person and directed to the Regulation Counsel; or

(2) Upon a report made by a judge of any court of record of this state and directed to the Regulation Counsel, as provided in C.R.C.P. 251.4;

(3) By the committee upon its own motion; or

(4) By the Regulation Counsel with the concurrence of the Chair or Vice-Chair of the committee.

(b) Determination to Proceed. Immediately upon receipt of a request for investiga-

tion, a report made by a judge, or a motion made by the committee, as provided in subsection (a) of this Rule, the matter shall be referred to the Regulation Counsel to determine:

(1) If the attorney in question is subject to the disciplinary jurisdiction of the Supreme Court;

(2) If there is an allegation made against the attorney in question which, if proved, would constitute grounds for discipline; and

(3) If the matter should be investigated as provided by C.R.C.P. 251.10 or addressed by means of an alternative to discipline as provided by C.R.C.P. 251.13.

In making a determination whether to proceed, the Regulation Counsel may make inquiry regarding the underlying facts and consult with the Chair of the committee. The decision of the Regulation Counsel shall be final, and the complaining witness shall have no right to appeal.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.9.

Rule 251.10. Investigation of Allegations

(a) When Commenced. If, pursuant to C.R.C.P. 251.9, the Regulation Counsel makes a determination to proceed with an investigation, the Regulation Counsel shall give the attorney in question written notice that the attorney is under investigation and of the general nature of the allegations made against the attorney. The attorney in question shall file with the Regulation Counsel a written response to the allegations made against the attorney within 21 days after notice of the investigation is given.

Upon receipt of the attorney's response, or at the expiration of the 21-day period if no response is received, the matter shall be assigned to an Investigator for investigation and report.

(b) Procedures for Investigation.

(1) The Investigator. A member of the committee, the Regulation Counsel, a member of the Regulation Counsel's staff, or an attorney enlisted pursuant to C.R.C.P. 251.2(b)(1) may act as Investigator. The Investigator shall expeditiously conduct an investigation of the allegations made against the attorney in question.

(2) Procurement of Evidence During Investigation. In the course of an investigation conducted pursuant to these Rules, the Investigator, acting pursuant to and in conformity with these Rules, shall have the power to administer oaths and affirmations.

In connection with an investigation of allegations made against an attorney, the Chair of the committee or the Regulation Counsel may issue subpoenas to compel the attendance of witnesses, including the attorney in question, and the production of pertinent books, papers, documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge.

Any person who fails or refuses to comply with a subpoena issued pursuant to this Rule may be cited for contempt of the Supreme Court.

Any person who knowingly obstructs the Regulation Counsel or the committee or any part thereof in the performance of their duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Supreme Court upon recommendation of the Presiding Disciplinary Judge. A copy of the recommendation, together with the findings of fact made by the Presiding Disciplinary Judge surrounding the contemptuous conduct, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to impose contempt.

(3) Investigator's Report. When the Investigator is not a member of the Regulation Counsel's staff, the Investigator shall submit a written report of investigation and recommendation to the committee for a determination as provided in C.R.C.P. 251.12. If the Investigator is a member of the Regulation Counsel's staff, the matter shall be submitted as provided in C.R.C.P. 252.11.

(4) Conditional Admission. While the matter is under investigation, the attorney in question and the Regulation Counsel may tender an agreed upon conditional admission of misconduct as provided in C.R.C.P. 251.22 to the committee when the form of discipline is no greater than a private admonition. When the form of discipline is greater than a private admonition or, if a range of disciplinary measures is specified in the conditional admission, then the conditional admission shall be tendered to the Presiding Disciplinary Judge. When a conditional admission is tendered pursuant to this Rule, the person acting as Investigator may forego submitting a written report of investigation and recommendation to the committee as provided in subsection (3) of this Rule.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (b)(2) amended and adopted December 13, 2001, effective January 1, 2002; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.10.

ANNOTATION

Attorney under investigation is a "party" to the investigative proceedings and, therefore, entitled, as required by the specific discovery provisions of the rules of civil procedure, to notice of the investigative subpoena and subpoena documents. Given the plain language of the rules, present and historic interpretation by attorney regulation counsel (ARC) of the rules, and the implications of a contrary interpretation that would render other rules in attorney discipline system moot and create a secretive system that discourages informal resolution of discipline claims, Attorney E was a ''party'' in his own investigation. Accordingly, ARC appropriately followed the specific provisions of C.R.C.P. 45, 26(a)(1)(B), and 30 by providing the attorney with notice of its subpoena and the documents produced from that subpoena. In re Attorney E, 78 P.3d 300 (Colo. 2003).

Rule 251.11. Determination by the Regulation Counsel

During the investigation or at the conclusion thereof, the Regulation Counsel may determine that the matter should be diverted to the alternatives to discipline program as provided in C.R.C.P. 251.13.

At the conclusion of an investigation of a matter that has not been diverted, the Regulation Counsel shall either dismiss the allegations or report to the committee for a determination as provided in C.R.C.P. 251.12. If the Regulation Counsel dismisses the allegations as provided herein, the person making the allegations against the attorney in question may request review of the Regulation Counsel's decision. If review is requested, the committee shall review the matter and make a determination as provided by C.R.C.P. 251.12; provided, however, that the committee shall sustain the dismissal unless it determines that the Regulation Counsel's determination constituted an abuse of discretion. When the committee sustains a dismissal, it shall furnish the person making the allegations with a written explanation of its determination.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.10.5.

Rule 251.12. Determination by the Committee

If, at the conclusion of an investigation, the Regulation Counsel believes that the committee should order private admonition imposed or authorize the Regulation Counsel

to prepare and file a complaint, the Regulation Counsel shall submit a report of investigation and recommendation to the committee, which shall determine whether there is reasonable cause to believe grounds for discipline exist and shall either:

(a) Direct the Regulation Counsel or other investigator appointed pursuant to C.R.C.P. 251.2(b)(1) to conduct further investigation;

(b) Dismiss the allegations and furnish the person making the allegations with a written explanation of its determination;

(c) Divert the matter to the alternatives to discipline program as provided by C.R.C.P. 251.13;

(d) Order private admonition imposed; or

(e) Authorize the Regulation Counsel to prepare and file a complaint against the attorney.

In determining whether to authorize the Regulation Counsel to file a complaint, the committee shall consider the following:

(1) Whether it is reasonable to believe that misconduct warranting discipline can be proved by clear and convincing evidence;

(2) The level of injury;

(3) Whether the attorney previously has been disciplined; and

(4) Whether the conduct in question is generally considered to warrant the commencement of disciplinary proceedings because it involves misrepresentation, conversion or commingling of funds, acts of violence, or criminal or other misconduct that ordinarily would result in public censure, suspension or disbarment.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.11.

ANNOTATION

The rule does not require that the attorney regulation committee's authorization for a complaint set forth, with particularity or otherwise, the grounds for discipline with which the respondent is to be charged. People v. Kanwal, 2014 CO 20, 321 P.3d 494.

Rule 251.13. Alternatives to Discipline

(a) Referral to Program. The Regulation Counsel, the committee, the Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court may offer diversion to the alternatives to discipline program to the attorney. The alternatives to discipline program may include, but is not limited to, diversion or other programs such as mediation, fee arbitration, law office management assistance, evaluation and treatment through the attorneys' peer assistance program, evaluation and treatment for substance abuse, psychological evaluation and treatment, medical evaluation and treatment, monitoring of the attorney's practice or accounting procedures, continuing legal education, ethics school, the multistate professional responsibility examination, or any other program authorized by the Court.

(b) Participation in the Program. As an alternative to a form of discipline, an attorney may participate in an approved diversion program in cases where there is little likelihood that the attorney will harm the public during the period of participation, where the Regulation Counsel can adequately supervise the conditions of diversion, and where participation in the program is likely to benefit the attorney and accomplish the goals of the program. A matter generally will not be diverted under this Rule when:

(1) The presumptive form of discipline in the matter is likely to be greater than public censure;

(2) The misconduct involves misappropriation of funds or property of a client or a third party;

(3) The misconduct involves a serious crime as defined by C.R.C.P. 251.20(e);

(4) The misconduct involves family violence;

(5) The misconduct resulted in or is likely to result in actual injury (loss of money,

legal rights, or valuable property rights) to a client or other person, unless restitution is made a condition of diversion;

(6) The attorney has been publicly disciplined in the last three years;

(7) The matter is of the same nature as misconduct for which the attorney has been disciplined in the last five years;

(8) The misconduct involves dishonesty, deceit, fraud, or misrepresentation; or

(9) The misconduct is part of a pattern of similar misconduct.

(c) Diversion Agreement. If an attorney agrees to an offer of diversion as provided by this rule, the terms of the diversion shall be set forth in a written agreement. If the agreement is entered prior to a determination to proceed is made pursuant to C.R.C.P. 251.9, the agreement shall be between the attorney and Regulation Counsel. If diversion is offered and entered after a determination to proceed is made pursuant to C.R.C.P. 251.9 but before authorization to file a complaint, the diversion agreement between the attorney and Regulation Counsel shall be submitted to the committee for consideration. If the committee rejects the diversion agreement, the matter shall proceed as otherwise provided by these Rules. If diversion is offered and entered after a complaint has been filed pursuant to C.R.C.P. 251.14, the diversion agreement shall be submitted to the Presiding Disciplinary Judge or Supreme Court, whichever body before which the matter is pending for consideration. If the diversion agreement is rejected, the matter shall proceed as provided by these Rules.

The agreement shall specify the program(s) to which the attorney shall be diverted, the general purpose of the division, the manner in which compliance is to be monitored, and any requirement for payment of restitution or cost.

(d) Costs of the Diversion. The attorney shall pay all the costs incurred in connection with participation in any diversion program. The attorney shall also pay the administrative cost of the proceeding as set by the Supreme Court.

(e) Effect of Diversion. When the recommendation for diversion becomes final, the attorney shall enter into the diversion program(s) and complete the requirements thereof. Upon the attorney's entry into the diversion programs(s), the underlying matter shall be placed in abeyance, indicating diversion. Diversion shall not constitute a form of discipline.

(f) Effect of Successful Completion of the Diversion Program. If diversion is entered prior to a determination to proceed is made pursuant to C.R.C.P. 251.9(b)(3), and if Regulation Counsel determines that the attorney has successfully completed all requirements of the diversion program, the Regulation Counsel shall close the file. If diversion is successfully completed in a matter that was determined to warrant investigation or other proceedings pursuant to these Rules, the matter shall be dismissed and expunged pursuant to C.R.C.P. 251.33(d). After the file is expunged, the attorney may respond to any general inquiry as provided in C.R.C.P. 251.33(d).

(g) Breach of Diversion Agreement. The determination of a breach of a diversion agreement will be as follows:

(1) If the Regulation Counsel has reason to believe that the attorney has breached the diversion agreement, and the diversion agreement was entered prior to a decision to proceed pursuant to C.R.C.P. 251.9(b), and after the attorney has had an opportunity to respond, Regulation Counsel may elect to modify the diversion agreement or terminate the diversion agreement and proceed with the matter as provided by these rules.

(2) If Regulation Counsel has reason to believe that the attorney has breached the diversion agreement after a determination to proceed has been made, then the matter shall be referred to the Presiding Disciplinary Judge or Supreme Court, whichever body approved the diversion agreement, with an opportunity for the attorney to respond. The Regulation Counsel will have the burden by a preponderance of the evidence to establish the materiality of the breach, and the attorney will have the burden by a preponderance of the evidence to establish justification for the breach. If after consideration of the information presented by the Regulation Counsel and the attorney's response, if any, it is determined that the breach was material without justification, the agreement will be terminated and the matter will proceed as provided for by these rules. If a breach is established but determined to be not material or to be with justification, the diversion

agreement may be modified in light of the breach. If no breach is found, the matter shall proceed pursuant to the terms of the original diversion agreement.

(3) If the matter has been referred for determination to the committee, Presiding Disciplinary Judge, or the Supreme Court as provided for in section (g)(2) of this rule, upon motion of either party, the Presiding Disciplinary Judge shall hold a hearing on the matter. Upon conclusion of the hearing, the Presiding Disciplinary Judge shall prepare written findings of fact and conclusions and enter an appropriate order in those matters in which the Presiding Disciplinary Judge originally approved the diversion agreement. If the hearing is requested in a matter pending before the committee or Supreme Court for consideration, the Presiding Disciplinary Judge shall prepare findings of fact and recommendations and forward them to the body which originally approved the diversion agreement for its determination of the matter.

(h) Effect of Rejection of Recommendation for Diversion. If an Attorney rejects a diversion recommendation, the matter shall proceed as otherwise provided in these Rules.

(i) Confidentiality. All the files and records resulting from the diversion of a matter shall not be made public except by order of the Supreme Court. Information of misconduct admitted by the attorney to a treatment provider or a monitor while in a diversion program is confidential if the misconduct occurred before the attorney's entry into a diversion program.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000; (c) and (i) corrected January 8, 2001, effective September 12, 2000; (d) amended and adopted October 6, 2005, effective January 1, 2006.

Editor's note: This rule was previously numbered as 241.11.5.

Rule 251.14. Complaint — Contents, Service

(a) Contents of Complaint. Complaints seeking to establish grounds for discipline of an attorney shall be filed as provided by these Rules with the Presiding Disciplinary Judge. An original and three copies of the complaint shall be filed.

The complaint shall set forth clearly and with particularity the grounds for discipline with which the respondent is charged and the conduct of the respondent which gave rise to those charges. All disciplinary and disability proceedings filed as herein provided shall be conducted in the name of the People of the State of Colorado and shall be prosecuted by the Regulation Counsel.

(b) Service of Complaint. The Regulation Counsel shall promptly serve upon the respondent, as provided in C.R.C.P. 251.32(b), a citation and a copy of the complaint filed against the respondent. The citation shall require the respondent within 21 days after service thereof to file an original and three copies of a written answer to the complaint, in compliance with C.R.C.P. 251.15.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.12.

ANNOTATION

Law reviews. For article, "Statutes and Cases Concerning Unauthorized Practice of Law in Colorado", see 24 Dicta 257 (1947). For note, "Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility", see 50 Den. L.J. 207 (1973).

Consideration of charges not made in formal complaint against an attorney constitutes a violation of the respondent's rights to procedural due process of law. People v. Emeson, 638 P.2d 293 (Colo. 1981) (decided under former C.R.C.P. 247).

The rule does not require that a complaint

limit the sanctions to which a person may be exposed or the precise elements upon which particular sanctions may depend. The rule could not require this given both the diverse nature of possible grounds for discipline and the multiplicity of considerations upon which particular discipline may ultimately depend. People v. Kanwal, 2014 CO 20, 321 P.3d 494.

Board's findings that attorney engaged in dishonest conduct in collection matter contravened requirement that the grounds for discipline be set forth "clearly and with particularity." The complaint and the issues identified for hearing did not adequately place the attorney on notice that he had violated the disciplinary rules prohibiting dishonest conduct. A proper charge of dishonesty would have identified conduct constituting violation of C.R.P.C. 4.1(a) (making a false statement of material fact or law to a third person) or 8.4(c) (engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation); not 8.4(g) (engaging in conduct violating accepted standards of legal ethics). In re Quiat, 979 P.2d 1029 (Colo. 1999) (decided under rule in effect prior to the 1999 repeal and reenactment).

Rule 251.15. Answer — Filing, Failure to Answer, Default

(a) Answer. Within 21 days after service of the citation and complaint, or within such greater period of time as may be approved by the Presiding Disciplinary Judge, the respondent shall file an original and three copies of an answer to the complaint with the Presiding Disciplinary Judge and one copy with the Regulation Counsel. In the answer the respondent shall either admit or deny every material allegation contained in the complaint, or request that the allegation be set forth with greater particularity. In addition, the respondent shall set forth in the answer any affirmative defenses. Any objection to the complaint which a respondent may assert, including a challenge to the complaint for failure to charge misconduct constituting grounds for discipline, must also be set forth in the answer.

(b) Failure to Answer, and Default. If the respondent fails to file an answer within the period provided by subsection (a) of this Rule, the Regulation Counsel shall file a motion for default with the Presiding Disciplinary Judge. Thereafter, the Presiding Disciplinary Judge shall enter a default and the complaint shall be deemed admitted; provided, however, that a respondent who fails to file a timely answer may, upon a showing that the failure to answer was the result of mistake, inadvertence, surprise, or excusable neglect, obtain leave of the Presiding Disciplinary Judge to file an answer.

Notwithstanding the entry of a default, the Regulation Counsel shall give the respondent notice of the final hearing, at which the respondent may appear and present arguments to the Hearing Board regarding the form of discipline to be imposed.

Thereafter, the Hearing Board shall review all pleadings, arguments, and the report of investigation and shall prepare a report setting forth its findings of fact and its decision as provided in C.R.C.P. 251.19.

If, however, after the entry of default neither the respondent nor Regulation Counsel timely requests a hearing before the Hearing Board, then the sanctions hearing shall be held solely before the Presiding Disciplinary Judge.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted September 30, 2004, effective January 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.13.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 241.13, which was similar to this rule.

Both the charges and the well-pleaded facts are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Young, 201 P.3d 1273 (Colo. O.P.D.J. 2008).

The allegations of fact were deemed admitted where attorney did not answer the complaint filed in the case and the hearing board entered a default against him. People v. Davies,

926 P.2d 572 (Colo. 1996); In re Demaray, 8 P.3d 427 (Colo. 1999).

A motion to set aside a default because the respondent failed to file a timely answer under this rule can be analogized to a motion under C.R.C.P. 60 (b)(1). The decision to grant relief is entrusted to the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of discretion. In re Weisbard, 25 P.3d 24 (Colo. 2001).

In a motion to set aside a default judgment, the movant bears the burden of proving the grounds for relief by clear, strong, and satisfactory proof. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Because an attorney has a duty to cooperate with disciplinary proceedings, default judgments are not subject to being set aside easily. In re Weisbard, 25 P.3d 24 (Colo. 2001).

In setting aside a default judgment on the grounds of excusable neglect, the court must determine: Whether the neglect causing the default was excusable; whether the movant has alleged a meritorious defense; and whether relief from the order would be equitable. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Failure to act because of carelessness and negligence is not excusable neglect. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Applied in People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Jacobson, 747 P.2d 654 (Colo. 1987); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Barr, 855 P.2d 1386 (Colo. 1993); In the Matter of Scott, 979 P.2d 572 (Colo. 1999).

Rule 251.16. Presiding Disciplinary Judge

(a) Presiding Disciplinary Judge. The office of the Presiding Disciplinary Judge of the Supreme Court of Colorado is hereby established. The Supreme Court shall appoint a Presiding Judge to serve at the pleasure of the Supreme Court.

(b) Qualifications. The Presiding Disciplinary Judge shall be an attorney, duly admitted to the Bar of Colorado, with more than five years experience in the practice of law. The Presiding Disciplinary Judge, while serving in that capacity, may hold any other public office.

(c) Powers and Duties of the Presiding Disciplinary Judge. The Presiding Disciplinary Judge shall be authorized and empowered to act in accordance with these Rules and to:

(1) Maintain and supervise a permanent office in the Denver metropolitan area to serve as the central office in which disciplinary and disability proceedings shall be conducted as provided in these Rules, under a budget approved by the Supreme Court;

(2) Select counsel and appoint a staff as necessary to assist the Presiding Disciplinary Judge in the administration of the judge's office and in the performance of the judge's duties;

(3) Order the parties in disciplinary proceedings to attend a settlement conference;

(4) Impose discipline on an attorney or transfer an attorney to disability inactive status as provided in these Rules;

(5) Periodically report to the Advisory Committee and the management committee on the operation of the office of the Presiding Disciplinary Judge;

(6) Recommend to the Advisory Committee proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings; and

(7) Adopt such practices as may from time to time become necessary to govern the internal operation of the office of the Presiding Disciplinary Judge, as approved by the Supreme Court.

(8) Preside over contempt proceedings initiated under these Rules and C.R.C.P. 107 when appropriate.

(9) Preside over sanctions hearings pursuant to C.R.C.P. 251.15(b) and C.R.C.P. 251.19(c).

(d) Abstention. The Presiding Disciplinary Judge shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of the Presiding Disciplinary Judge, or any attorney in any way affiliated with the Presiding Disciplinary Judge or the Judge's law firm, may accept or continue in employment connected with any matter pending before the committee, the Judge, or a Hearing Board as long as the Judge is serving as the Presiding Disciplinary Judge.

(e) Disqualification. Presiding Disciplinary Judges shall not represent an attorney in any matter as provided in these Rules during their terms of service. Former presiding disciplinary judges shall not represent an attorney in any matter that was being investigated or prosecuted as provided in these rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (e) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (d) corrected June 11, 2001, effective September 12, 2000; (c)(8) added and adopted December 13, 2001, effective January 1, 2002; (c)(9) added and adopted September 30, 2004, effective January 1, 2005.

Rule 251.17. Hearing Board

(a) Hearing Board. Hearing Boards are hereby established and empowered to act in accordance with these Rules.

(1) Members. The Supreme Court shall appoint a diverse pool of members of the Bar of Colorado and members of the public to serve as members of Hearing Boards. Persons appointed shall serve terms of six years. Terms shall be staggered to provide, so far as possible, for the expiration each year of the terms of an equal number of persons.

Persons appointed shall serve at the pleasure of the Supreme Court and may be dismissed from service at any time by order of the Supreme Court. Persons appointed may resign at any time.

(2) Vacancy. In the event of vacancies on the list of Hearing Board members, the Supreme Court shall, with the assistance of the Advisory Committee, appoint new persons to the list to serve on Hearing Boards.

(3) Reimbursement. Members of Hearing Boards shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Abstention of Members. Members of Hearing Boards shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of a member of the Hearing Board, or any attorney in any way affiliated with a member of the Hearing Board or the member's law firm, may accept or continue in employment connected with any matter pending before the Hearing Board on which the member is serving.

(c) Disqualification. Members of Hearing Boards shall not represent an attorney in any matter as provided in these Rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) and (c) amended and adopted October 29, 1998, effective January 1, 1999; (a)(1) amended and adopted November 24, 2004, effective January 1, 2005; (a)(1) amended and effective November 3, 2011.

Rule 251.18. Hearings Before the Hearing Board

(a) Notice. Not less than 56 days (8 weeks) before the date set for the hearing of a complaint, the Regulation Counsel shall give notice of such hearing as provided in C.R.C.P. 251.32(b) to the respondent, or the respondent's counsel, and to the complaining witness. The notice shall designate the date, place, and time of the hearing. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the hearing, to cross-examine witnesses, and to present evidence in the respondent's own behalf.

The notice shall also advise the complaining witness that the complaining witness has a right to be present at the hearing and if there is a finding of misconduct to make a statement, orally or in writing, regarding the form of discipline.

(b) Designation of a Hearing Board.

(1) All hearings on complaints seeking disciplinary action against a respondent shall be conducted by a Hearing Board except as provided in subsection (b)(3). A Hearing Board shall consist of the Presiding Disciplinary Judge and two other members, one of whom

shall be an attorney, who are to be selected at random from the pool of Hearing Board Members by the clerk for the Presiding Disciplinary Judge. If the Presiding Disciplinary Judge has been disqualified, then a presiding officer shall be selected at random from among the attorneys on the list of Hearing Board members. The presiding officer shall, in all respects, act in accordance with these Rules.

(2) The Presiding Disciplinary Judge or the presiding officer shall rule on all motions, objections, and other matters presented after a complaint is filed and in the course of a hearing.

(3) Once a default has been entered against a respondent, the respondent or Regulation Counsel has 28 days after notice of the default order to request a sanctions hearing before a three-person Hearing Board. The party requesting this hearing shall send notice of such request, in writing, to the Presiding Disciplinary Judge and the opposing party. If neither party requests a sanctions hearing before a three-person Hearing Board, the sanction shall be decided by the Presiding Disciplinary Judge.

(c) Prehearing Conference. At the discretion of the Presiding Disciplinary Judge, a prehearing conference may be ordered.

(d) Procedure and Proof. Except as otherwise provided in these Rules, hearings and all matters commencing with filing the complaint as provided in C.R.C.P. 251.14 shall be conducted in conformity with the Colorado Rules of Civil Procedure, the Colorado Rules of Evidence, and the practice in this state in the trial of civil cases; provided, however, that proof shall be by clear and convincing evidence, and provided further that the respondent may not be required to testify or to produce records over the respondent's objection if to do so would be in violation of the respondent's constitutional privilege against self-incrimination.

In the course of proceedings conducted pursuant to this Rule, the Presiding Disciplinary Judge or the Presiding Officer, acting pursuant to and in conformity with these Rules, shall have the power to administer oaths and affirmations.

A complete record shall be made of all depositions and of all testimony taken at hearings before a Hearing Board.

(e) Order for Examination. When the mental or physical condition of the attorney in question has become an issue in the proceeding, the Presiding Disciplinary Judge, on motion of the Regulation Counsel, may order the attorney to submit to a physical or mental examination by a suitable licensed or certified examiner. The order may be made only upon a determination that reasonable cause exists and after notice to the attorney. The attorney will be provided the opportunity to respond to the motion of the Regulation Counsel, and the attorney may request a hearing before the Presiding Disciplinary Judge. If requested, the hearing shall be held within 28 days of the date of the attorney's request, and shall be limited to the issue of whether reasonable cause exists for such an order.

(f) Procurement of Evidence During Hearing.

(1) Subpoena. In the course of a hearing conducted pursuant to these Rules, and upon the petition of any party to the hearing, the clerk of the Presiding Disciplinary Judge may, for the use of a party, issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers, documents, or other evidence.

Witnesses shall be entitled to receive fees for mileage as provided by law for witnesses in civil actions.

(2) Quashing a Subpoena. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge or the Presiding Officer of the Hearing Board.

(3) Contempt. Any person who fails or refuses to comply with a subpoena issued pursuant to these Rules may be cited for contempt of the Supreme Court.

Any person who by misbehavior obstructs the Hearing Board or any part thereof in the performance of its duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Presiding Disciplinary Judge or the presiding officer. A copy of the contempt citation, together with the findings of fact made by the Presiding Disciplinary Judge or the presiding officer surrounding the contempt, shall be

filed with the Supreme Court. The Supreme Court shall then determine whether to impose contempt.

(4) Discovery.

(A) Purpose and Scope. Rules 16 and 26 of the Colorado Rules of Civil Procedure shall not apply to proceedings conducted pursuant to these Rules. This Rule shall govern discovery in attorney discipline and disability proceedings.

(B) Meeting. A meeting of the parties must be held no later than 14 days after the case is at issue to confer with each other about the nature and basis of the claims and defenses and discuss the matters to be disclosed.

(C) Disclosures. No later than 28 days after the case is at issue, the parties shall disclose:

(i) The name and, if known, the address, and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged in the pleadings, identifying who the person is and the subjects of the information;

(ii) A listing, together with a copy of, or a description of, all documents, data compilations, and tangible things in the possession, custody, or control of the parties that are relevant to the disputed facts in the pleadings; and

(iii) A statement of whether the parties anticipate use of expert witnesses, identifying the subject areas of the proposed experts.

(D) Trial Management Order. Upon the request of one of the parties or upon order of the Presiding Disciplinary Judge or the presiding officer of the Hearing Board, no later than 42 days prior to the trial date, the parties shall disclose to the other party and file a trial management order containing the following matters under the following captions and in the following order:

(i) Statement of Claims and Defenses to be Pursued or Withdrawn. The parties shall set forth a listing of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as ''withdrawn.''

(ii) Stipulated Facts. The parties shall set forth a plain, concise statement of all facts which the Hearing Board shall accept as undisputed.

(iii) Pretrial Motions. The parties shall list motions, if any, which are anticipated to be filed before trial as well as motions, if any, which are pending before the Hearing Board. The parties shall indicate a deadline for the filing of such motions which shall be no later than 14 days prior to the date set for trial.

(iv) Legal Issues. The parties shall set forth a list of legal issues that are controverted, including appropriate citation of statutory, case or other authority. In addition, the parties shall indicate whether trial briefs will be filed, including a schedule for their filing. Trial briefs shall be filed no later than 7 days before the commencement of the trial.

(v) Identification of Witnesses and Exhibits. Each party shall provide the following information:

(a) Lay Witnesses. Each party shall include a list containing the name, address, and telephone number of any person whom the party will call and of any person whom the party may call as a witness at trial.

(b) Exhibits. Each party shall attach a list describing any physical or documentary evidence which the party intends to introduce at trial. Complainant shall assign a number and respondent shall assign a letter designation for each exhibit. If any party wishes to object to the authenticity or admissibility of any exhibit, such objection shall be noted, together with the grounds therefor.

(c) Expert Witnesses. Each party shall attach to the trial management order a list of the name, address, and telephone number of each person whom the party will call and any person whom the party may call as an expert witness at trial, indicating the anticipated length of testimony, including cross-examination. The list shall indicate whether the opposing party accepts or challenges the qualifications of a witness to testify as an expert as to the opinions expressed. If there is a challenge, the list shall be accompanied by a resume setting forth the basis for the expertise of the challenged witness. Copies of any expert reports shall be provided to the other party at this time.

(vi) Presentation of Testimony. If the testimony of any witness is to be presented by deposition or through any other acceptable means in lieu of live testimony, a copy shall be submitted to the Hearing Board or the Presiding Disciplinary Judge if there is no Hearing Board and include the proponent's and opponent's anticipated designations of the pertinent portions of such testimony or a statement why designation is not feasible prior to trial. If any party wishes to object to the admissibility of the testimony or to any tendered question or answer therein, it shall be noted, setting forth the grounds therefor.

(vii) Trial Efficiencies. If the anticipated length of the trial has changed, the parties shall so indicate.

(E) Limitations. Except upon order by the Presiding Disciplinary Judge or the presiding officer of the Hearing Board for good cause shown, discovery shall be limited as follows:

(i) The Regulation Counsel may take one deposition of the respondent and two other persons in addition to the depositions of experts as provided in C.R.C.P. 26. The respondent may take one deposition of the complaining witness and two other persons in addition to the depositions of experts as provided in C.R.C.P. 26. The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

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

(iii) The Regulation Counsel may obtain a physical or mental examination of the respondent pursuant to C.R.C.P. 251.18(e).

(iv) A party may serve the adverse party requests for production of documents pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(v) A party may serve on the adverse party 20 requests for admission, each of which shall consist of a single request. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause pursuant to C.R.C.P. 251.18(f)(4)(E), the Presiding Disciplinary Judge or the presiding officer of the Hearing Board shall consider the following:

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

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

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

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

(G) Supplementation of Disclosures and Discovery Responses. A party is under a duty to supplement its disclosures under section (f)(4)(C) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or summary disclosed pursuant to section (f)(4)(D)(v)(c) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be performed in a timely manner.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) and (f)(4)(D)(vi) amended and adopted September 30, 2004, effective January 1, 2005; (a) 1st paragraph, (b)(3), (e), (f)(4)(B), IP(f)(4)(C), IP(f)(4)(D), (f)(4)(D)(iii), and (f)(4)(D)(iv) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.14.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Procedural due process does not include criminal defendant's rights. In every disciplinary proceeding a lawyer is entitled to procedural due process, but those rights do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Sixth amendment rights to jury trial and speedy trial do not attach in discipline cases, since by its terms the sixth amendment only applies in criminal cases. People v. Smith, 937 P.2d 724 (Colo. 1997).

Fifth amendment privilege against self-incrimination did not operate to preclude respondent from being compelled to attend his own deposition. People v. Smith, 937 P.2d 724 (Colo. 1997).

No due-process violation where presiding officer of the board also served on the hearing panel that reviews the board's action. People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Consideration of charges not made in formal complaint against an attorney constitutes a violation of the respondent's rights to procedural due process of law. People v. Emeson, 638 P.2d 293 (Colo. 1981).

Right to call witnesses is a basic tenet of due process and applies to an attorney facing disciplinary charges. People v. Morley, 725 P.2d 510 (Colo. 1986).

This right, however, is not absolute. Due process does not vest a respondent in a disciplinary proceeding with a right to call any and all witnesses or elicit any testimony whatever; so long as the respondent is accorded a full and fair opportunity to present a defense to a charge, the tribunal hearing the case is entitled to exercise a sound discretion in limiting the type of evidence and the number of witnesses offered at a hearing. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standard of proof in disciplinary proceeding. The disciplinary prosecutor has to prove allegations of misconduct by clear, convincing and substantial evidence. People v. Bugg, 635 P.2d 881 (Colo. 1981) (decided under former Rule 249, C.R.C.P.).

Clear and convincing evidence is proof which persuades the trier of fact that the truth contention is highly probable. It is evidence stronger than a preponderance by less than beyond reasonable doubt. People v. Distel, 759 P.2d 654 (Colo. 1988).

Evidence which clearly and unequivocally establishes unlawful conduct of a lawyer should be admissible in a disciplinary proceeding if the official misconduct does not shock the conscience of the court or is not in bad faith. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Unlike the rule applicable to a criminal proceeding, evidence of professional misconduct obtained by law enforcement officers should be admissible at a disciplinary proceeding unless the officers themselves engaged in outrageous misconduct or acted in bad faith in obtaining the challenged evidence. People v. Morley, 725 P.2d 510 (Colo. 1986).

If governmental officials act outrageously or in bad faith in obtaining challenged evidence, due process of law requires the exclusion of such evidence or perhaps the even more drastic remedy of dismissal. There is no ''bright line'' or ''per se'' rule in this area of the law and each case must be decided on the basis of its own peculiar facts. People v. Morley, 725 P.2d 510 (Colo. 1986).

Evidence of attorney's disciplinary record may be properly admitted to the extent allowed under the Colorado rules of evidence in order to refute claim that he regularly attended to client matters. People v. Yaklich, 744 P.2d 504 (Colo. 1987).

Such evidence may be introduced to impeach respondent's credibility. People v. Distel, 759 P.2d 654 (Colo. 1988).

When acting as fact finder in attorney disciplinary proceedings, grievance committee has duty to assess credibility of all evidence before it, both controverted and uncontroverted. People v. Distel, 759 P.2d 654 (Colo. 1988).

Presiding disciplinary judge (PDJ) has exclusive authority under section (b) of this rule to hear respondent's motion for sanctions under C.R.C.P. 11(a). The plain language of the rules, their context, and the design of the

attorney regulation system support conclusion that PDJ has exclusive authority to consider and rule on a C.R.C.P. 11(a) motion for sanctions. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Abuse of discretion for presiding disciplinary judge to hold that assistant attorney regulation counsel violated rule when she advanced claim that attorney had violated C.R.P.C. 8.4(c). No evidence that assistant attorney regulation counsel failed to investigate either the facts or the law and she did not misrepresent them in the complaint. People v. Trupp, 92 P.3d 923 (Colo. 2004).

Applied in People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Rule 251.19. Findings of Fact and Decision

(a) Hearing Board Opinion and Decision. Within 56 days (8 weeks) after the hearing, the Hearing Board shall prepare an opinion setting forth its findings of fact and its decision. In preparing its decision, the Hearing Board shall take into consideration the respondent's prior disciplinary record, if any. The opinion shall be signed by each concurring member of the Hearing Board. Two members are required to make a decision. Members of the Hearing Board who dissent shall also sign the opinion, provided they indicate the basis of their dissent in the opinion.

(b) Decision of the Hearing Board. When it renders its decision, the Hearing Board shall:

(1) Determine that the complaint is not proved and enter an order dismissing the complaint;

(2) Enter an order imposing private admonition, public censure, a definite period of suspension, or disbarment; or

(3) Enter an order conditioned on the agreement of the attorney diverting the case to the alternatives to discipline program.

The Hearing Board may also enter other appropriate orders including, without limitation, probation, and orders requiring the respondent to pay the costs of the disciplinary proceeding, to make restitution, or to refund money paid to the respondent.

(4) Within 14 days of entry of an order as provided in this Rule or such greater time as the Hearing Board may allow, a party may move for post-hearing relief as provided in C.R.C.P. 59. In the event a motion for post-hearing relief is filed, the Presiding Disciplinary Judge or the presiding officer shall consult with the other members of the Hearing Board and then rule on the motion.

(5) For purposes of this Rule, the decision of the Hearing Board shall be final and time for filing notice of appeal shall commence as set forth in C.R.C.P. 251.27.

(6) Unless stayed, vacated, reversed, or otherwise modified by order of the Supreme Court, a final decision of the Hearing Board under paragraph (b)(5) of this Rule shall be considered for all purposes an order of the Supreme Court.

(c) Decision of the Presiding Disciplinary Judge. When the Presiding Disciplinary Judge renders a decision without a Hearing Board as provided in these rules, the Presiding Disciplinary Judge shall:

(1) Enter an order imposing private admonition, public censure, a definite period of suspension, or disbarment; or

(2) Enter an order conditioned on the agreement of the attorney diverting the case to the alternatives to discipline program.

The Presiding Disciplinary Judge may also enter other appropriate orders including, without limitation, probation, and orders requiring the respondent to pay the costs of the disciplinary proceeding, to make restitution, or to refund money paid to the respondent.

(3) Within 14 days of entry of an order as provided in this Rule or such greater time as the Presiding Disciplinary Judge may allow, a party may move for post-hearing relief as provided in C.R.C.P. 59.

(4) For purposes of this Rule, the decision of the Presiding Disciplinary Judge shall be final and time for filing notice of appeal shall commence as set forth in C.R.C.P. 251.26.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b)(6) added and adopted December 13, 2001, effective January 1, 2002; (c) added and adopted September 30, 2004, effective January 1, 2005; (b)(5) amended and effective February 5,

2009; (a), (b)(4), and (c)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.15.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

A disciplinary proceeding is an investigation by the court into the conduct of one of its officers and is neither a civil action nor a criminal proceeding, but a proceeding ''sui generis'', the object of which is not to punish the offender but to protect the court. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The grievance committee of the supreme court conducts the formal hearing on a complaint and makes a report, which sets forth its findings, conclusions, and recommendations. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Report and recommendation of grievance committee in disciplinary proceedings against lawyers is advisory, and the supreme court has the duty to review the recommendations and to increase or decrease the sanction imposed by the committee in a proper case. People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Jacobson, 747 P.2d 654 (Colo. 1987); People v. Shipp, 793 P.2d 574 (Colo. 1990); People v. Abelman, 804 P.2d 859 (Colo. 1991); People v. Larsen, 808 P.2d 1265 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Raubolt, 831 P.2d 462 (Colo. 1992).

While supreme court has always given the recommendation for discipline by the grievance committee great weight, the court reserves the right to exercise our independent judgment in arriving at the proper level of discipline. People v. Brown, 726 P.2d 638 (Colo. 1986); People v. Anderson, 817 P.2d 1035 (Colo. 1991); Colo. Supreme Ct. v. District Court, 850 P.2d 150 (Colo. 1993).

The supreme court's rule is to make an independent decision regarding the appropriate form of discipline, suited to the facts and circumstances of the particular case. People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

To warrant a finding of misconduct, the charges must be established by substantial, clear, convincing, and satisfactory evidence. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Proof of all elements of a criminal offense is necessary to establish misconduct on the basis of commission of a criminal act. Where one element of attempted theft was not proven by clear and convincing evidence, the attorney was not subject to sanction under C.R.P.C. 8.4(b). People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

This does not mean that strict rules of evidence apply in disbarment proceedings, although they are frequently invoked to insure a fair hearing. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Evidence taken at civil action that an attorney has been guilty of conduct justifying disbarment is admissible in disbarment proceeding. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The finding is not conclusive on the same question. The finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment. Notwithstanding the finding in the civil action, the culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Factual findings of grievance committee are binding on the supreme court, unless the supreme court, after considering the record as a whole, concludes that the findings are clearly erroneous and unsupported by substantial evidence. People v. Garnett, 725 P.2d 1149 (Colo. 1986) (apparently overruling People v. Mattox, 639 P.2d 397 (Colo. 1982)); People v. Susman, 747 P.2d 667 (Colo. 1987).

Letter of admonition concerning conduct which occurred after the events giving rise to the complaint in the instant case, but received prior to the time the hearing board held its hearing in the instant case, is part of the prior disciplinary record and may be properly considered. People v. Wolfe, 748 P.2d 789 (Colo. 1988).

Where an attorney fails to comply with condition pertaining to private censure, such failure provides basis for withdrawal of private censure and issuance of public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Hearing panel may modify recommendations of hearing board. People v. Shields, 905 P.2d 608 (Colo. 1995).

Modification by hearing panel of board's recommendation of discipline after it concluded a six-month suspension was insufficient in light of the attorney's prior discipline complied with this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Form of discipline imposed by hearing board for respondent's proven violations not unreasonable. Following ABA standards for imposing lawyer sanctions, violation of duty owed the public, even one involving dishonesty, fraud, deceit, or misrepresentation, as long as it is short of actual criminality, should generally be sanctioned by reprimand or censure. When dishonesty relates to practice of law, ABA standards recognize appropriateness of probation as a sanction if it will adequately protect the public. In re Rosen, 198 P.3d 116 (Colo. 2008).

Rule 251.20. Attorney Convicted of a Crime

(a) Proof of Conviction. Except as otherwise provided by these Rules, a certified copy of the judgment of conviction from the clerk of any court of criminal jurisdiction indicating that an attorney has been convicted of a crime in that court shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings in this state and shall be conclusive proof of the commission of that crime by the respondent.

(b) Duty to Report Conviction. Every attorney subject to these Rules, upon being convicted of a crime, except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall notify the Regulation Counsel in writing of such conviction within 14 days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the Regulation Counsel within 14 days after the date of the conviction a certificate thereof.

(c) Commencement of Disciplinary Proceedings Upon Notice of Conviction. Upon receiving notice that an attorney subject to these Rules has been convicted of a crime, other than a serious crime as hereinafter defined, the Regulation Counsel shall, following an investigation as provided in these Rules, make a determination as provided in C.R.C.P. 251.11 or refer the matter to the committee for further proceedings consistent with C.R.C.P. 251.12.

If the conviction is for a serious crime as hereinafter defined, the Regulation Counsel shall obtain the record of conviction and prepare and file a complaint against the respondent as provided in C.R.C.P. 251.14.

If a complaint is filed against a respondent pursuant to the provisions of this Rule, the Regulation Counsel shall present proof of the criminal conviction and may present any other evidence which the Regulation Counsel deems appropriate. If the respondent's criminal conviction is either proved or admitted, the respondent shall have the right to be heard by the Hearing Board only on matters of rebuttal of any evidence presented by the Regulation Counsel other than proof of the conviction.

(d) Conviction of a Serious Crime — Immediate Suspension. The Regulation Counsel shall report to the Supreme Court the name of any attorney who has been convicted of a serious crime, as hereinafter defined. The Supreme Court shall thereupon issue a citation directing the convicted attorney to show cause why the attorney's license to practice law should not be immediately suspended pursuant to C.R.C.P. 251.8. Upon full consideration of the matter, the Supreme Court may either impose immediate suspension for a definite or indefinite period or may discharge the rule to show cause. The fact that a convicted attorney is seeking appellate review of the conviction shall not limit the power of the Supreme Court to impose immediate suspension.

(e) Serious Crime Defined. The term serious crime as used in these Rules shall include:

(1) Any felony; and

(2) Any lesser crime a necessary element of which, as determined by its statutory or common law definition, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, or theft; or an attempt or conspiracy to commit such crime; or solicitation of another to commit such crime.

(f) Notice to Clients and Others of Immediate Suspension. An order of immediate suspension of an attorney pursuant to this Rule shall constitute a suspension of the attorney for the purpose of the provisions of C.R.C.P. 251.28.

(g) Automatic Reinstatement From Immediate Suspension When Conviction Reversed. An attorney suspended under the provisions of this Rule shall be reinstated to practice law immediately upon filing a certificate demonstrating that the underlying criminal conviction has been reversed; provided, however, that reinstatement of the attorney shall have no effect on any proceedings conducted pursuant to these Rules then pending against him.

(h) Conviction Defined. The term conviction as used in these Rules shall include any ultimate finding of fact in a criminal proceeding that an individual is guilty of a crime, whether the judgment rests on a verdict of guilty, a plea of guilty, or a plea of nolo contendere, and irrespective of whether entry of judgment or imposition of sentence is suspended or deferred by the court.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.16.

ANNOTATION

Law reviews. For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (October 2012).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Attorney licensed to practice law in state of Colorado is subject to discipline by Colorado supreme court in the event of his conviction of a criminal offense in a foreign jurisdiction. People v. Swope, 621 P.2d 321 (Colo. 1981).

Attorney's conduct while in office not only resulted in convictions of second degree official misconduct, § 18-8-405, and failure to disclose a conflict of interest, § 18-8-308, but also flagrantly violated minimal standards of candor and honesty required by attorneys and justified suspension. People v. Tucker, 676 P.2d 680 (Colo. 1983).

Attorney pleading guilty to cultivation of marijuana and unlawful possession of a controlled substance is subject to discipline. While convicted felon was not trafficking or dealing in illegal substances and was instead engaged in horticultural preservation and storing substance for others, suspension for three years is appropriate penalty. People v. McPhee, 728 P.2d 1292 (Colo. 1986).

Accepting illegal drugs for legal services is serious criminal conduct warranting severe sanction even though it does not fit definition of serious crime provided in rule. People v. Davis, 768 P.2d 1227 (Colo. 1989).

Failure to report felony conviction in another state where crime involved conversion of client funds justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Attorney's failure to report felony conviction including counts involving proof of intent to defraud is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988); People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Failure to report felony convictions in another state for two counts of failure to report income and two counts of filing false income tax returns warrants three-year suspension and payment of costs rather than disbarment in light of numerous mitigating factors. People v. Mandell, 813 P.2d 732 (Colo. 1991).

The conduct of an attorney who fails to report a domestic violence conviction substantially reflects adversely on the attorney's fitness to practice. Because there is no exception to the duty to report based upon mistake and because the aggravating factors outweigh the mitigating factors, the proper form of discipline is six months' suspension. In re Hickox, 57 P.3d 403 (Colo. 2002).

Failure to report felony conviction in another state for mail fraud warrants disbarment in absence of mitigating factors and where aggravating factor of a prior disciplinary record exists. People v. Bollinger, 859 P.2d 901 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney convicted of bank fraud. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Guilty plea followed by deferred judgment was a "conviction" and failure to report warranted public censure even though the conviction occurred prior to the adoption of a specific definition for the term ''conviction'' in this section. People v. Barnthouse, 941 P.2d 916 (Colo. 1997).

Bar reinstatement required demonstration of possession of moral and professional qualifications. Where a state attorney had been convicted of failing to file his federal income tax return and making false representations to a special agent of the Internal Revenue Service regarding the filing of income tax returns, and where the attorney was later found to have made a false statement in his application to the Arizona State Bar by answering in the negative an inquiry as to whether he had ever been questioned regarding the violation of any law, he was suspended from the practice of law in Colorado for three years, and was required to demonstrate upon application for reinstatement that he possessed moral and professional qualifications for admission to the bar of this state. People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980).

Bankruptcy fraud is a serious crime as defined by rule. People v. Brown, 841 P.2d 1066 (Colo. 1990).

Attorney's conviction of three counts of sexual assault on a child and three counts of aggravated incest conclusively established where the court notified him it intended to take judicial notice of the conviction and attorney neither responded to the substance of the notice nor denied the conviction occurred. Because of the nature and seriousness of the crimes for which the attorney was convicted, disbarment was appropriate. People v. Schwartz, 890 P.2d 82 (Colo. 1995).

Disbarment warranted for attorney convicted of criminal attempt to commit sexual exploitation of a child, a class 4 felony. People v. Damkar, 908 P.2d 1113 (Colo. 1996).

Attorney's violations constituted "serious crimes" as defined in section (e) of this rule where the attorney pleaded guilty to making and altering a false and forged prescription for Phentermine, a controlled substance, in violation of former § 12-22-315, a class 5 felony, and of criminal attempt to obtain a controlled substance by forgery and alteration in violation of § 18-2-101 and former § 12-22-315, a class 6 felony. People v. Moore, 849 P.2d 40 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney convicted of bankruptcy fraud and for conspiracy to commit bankruptcy fraud and other federal offenses. People v. Schwartz, 814 P.2d 793 (Colo. 1991).

Although attorney had not previously been disciplined, sanction of disbarment was warranted where attorney's felony conviction for possession of a firearm occurred while he was still on probation for a felony conviction for possession of marijuana. People v. Laquey, 862 P.2d 278 (Colo. 1993).

Conviction for aiding fugitive to flee warrants disbarment despite lack of a prior disciplinary record. People v. Bullock, 882 P.2d 1390 (Colo. 1994).

Respondent given two-year suspension for aiding and abetting aliens' entry into the United States and by advising clients to make misrepresentations for such entry. Such an act generally warrants disbarment, but respondent's full disclosure during proceedings, expression of remorse, and the fact that a prior offense was remote in time were mitigating factors. Respondent also required to discontinue the representation of clients before INS and the Department of Labor. People v. Boyle, 942 P.2d 1199 (Colo. 1997).

Disbarment is warranted for driving while impaired, marihuana possession, improperly executing agreement without permission, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Conviction of attempt to commit sexual assault in the second degree on a 17-year-old high school student filing clerk working at attorney's law firm is a serious crime as defined by the rule. The conviction together with sexual conduct toward a client warrant disbarment. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Disbarment warranted for attorney convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment warranted for writing nonsufficient funds checks while practicing law during a period of suspension and committing several other disciplinary rules violations. People v. Fager, 938 P.2d 138 (Colo. 1997).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Loseke, 698 P.2d 809 (Colo. 1985); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988).

Rule 251.21. Discipline Imposed by Foreign Jurisdiction

(a) Proof of Discipline Imposed. Except as otherwise provided by these Rules, a final adjudication in another jurisdiction of misconduct constituting grounds for discipline of an attorney shall, for purposes of proceedings pursuant to these Rules, conclusively establish such misconduct.

(b) Duty to Report Discipline Imposed. Any attorney subject to these Rules against whom any form of public discipline has been imposed by the authorities of another

jurisdiction, or who voluntarily surrenders the attorney's license to practice law in connection with disciplinary proceedings in another jurisdiction, shall notify the Regulation Counsel of such action in writing within 14 days thereof.

(c) Commencement of Proceedings Upon Notice of Voluntary Surrender of License. Upon receiving notice that an attorney subject to these Rules has voluntarily surrendered his license to practice law in another jurisdiction, the Regulation Counsel shall, following investigation pursuant to these Rules, refer the matter to the committee for further proceedings consistent with C.R.C.P. 251.12.

(d) Commencement of Proceedings Upon Notice of Discipline Imposed. Upon receiving notice that an attorney subject to these Rules has been publicly disciplined in another jurisdiction, the Regulation Counsel shall obtain the disciplinary order and prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14. If the Regulation Counsel intends either to claim that substantially different discipline is warranted or to present additional evidence, notice of that intent shall be given in the complaint.

If the attorney intends to challenge the validity of the disciplinary order entered in the foreign jurisdiction, the attorney must file with the Presiding Disciplinary Judge an answer and a full copy of the record of the disciplinary proceedings which resulted in the imposition of that disciplinary order within 21 days after service of the complaint or such greater time as the Presiding Disciplinary Judge may allow for good cause shown.

At the conclusion of proceedings brought under this Rule, the Hearing Board shall issue a decision imposing the same discipline as was imposed by the foreign jurisdiction, unless it is determined by the Hearing Board that:

(1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;

(2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Hearing Board cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;

(3) The imposition by the Hearing Board of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or

(4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Hearing Board.

(e) If Regulation Counsel does not seek substantially different discipline and if the respondent does not challenge the order based on any of the grounds set forth in (d)(1)(4) above, then the Presiding Disciplinary Judge may, without a hearing or a Hearing Board, issue a decision imposing the same discipline as imposed by the foreign jurisdiction.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (e) added and adopted September 30, 2004, effective January 1, 2005; (b) and (d) 2nd paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.17.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Disbarment from practice in another jurisdiction warrants disbarment in this state. People v. Payne, 738 P.2d 374 (Colo. 1987); People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Kochel, 764 P.2d 68 (Colo. 1988); People v. Brunn, 764 P.2d 1165 (Colo. 1988); People v. Sousa, 943 P.2d 448 (Colo. 1997).

Public censure was appropriate discipline in this state for attorney who received public reprimand in Texas. People v. Campbell, 932 P.2d 312 (Colo. 1997).

Public censure was appropriate discipline for attorney who had been reprimanded in Connecticut for failure to file federal income tax return. People v. Perkell, 969 P.2d 703 (Colo. 1998).

Three-year suspension was appropriate discipline for attorney who had received an indefinite suspension in Massachusetts. People v. Gargano, 306 P.3d 109 (Colo. O.P.D.J. 2013).

Disbarment from practice in federal court violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension from practice in tax court is a determination of misconduct in another jurisdiction constituting grounds for discipline under these rules. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Suspension from United States district court pursuant to a plea agreement in that court is a determination of misconduct in another jurisdiction and is grounds for suspension under these rules. People v. Gilson, 780 P.2d 1088 (Colo. 1989).

Imposition of same discipline as another jurisdiction. This rule calls for imposition of the same discipline as that imposed in another jurisdiction unless one of four listed exceptions has been established. People v. Gilson, 780 P.2d 1088 (Colo. 1989); People v. Breingan, 820 P.2d 1115 (Colo. 1991); People v. Mattox, 862 P.2d 276 (Colo. 1993); People v. Bengert, 885 P.2d 241 (Colo. 1994); People v. Calder, 897 P.2d 831 (Colo. 1995); People v. Cohan, 913 P.2d 523 (Colo. 1996); People v. Campbell, 932 P.2d 312 (Colo. 1997); People v. Rodriguez, 937 P.2d 1210 (Colo. 1997); People v. Harper, 294 P.3d 161 (Colo. O.P.D.J. 2012); People v. Gargano, 306 P.3d 109 (Colo. O.P.D.J. 2013); People v. Collins, 348 P.3d 993 (Colo. O.P.D.J. 2014).

Where the thrust of the respondent's defense was that the proof upon which the foreign state's findings of misconduct were based was infirm, and a determination in the respondent's favor would require the hearing board to reweigh the credibility of the witnesses at the out-of-state hearing, board acted properly in declining to do so. People v. Calder, 897 P.2d 831 (Colo. 1995); People v. Gargano, 306 P.3d 109 (Colo. O.P.D.J. 2013).

Where the thrust of the respondent's defense was that the proof upon which the tenth circuit court of appeals based its finding of misconduct was impermissibly infirm, and a determination in the respondent's favor would require the disciplinary panel to revisit issues that had been conclusively determined in a prior proceeding, the panel acted properly in declining to do so. People v. Smith, 937 P.2d 724 (Colo. 1997); People v. Gargano, 306 P.3d 109 (Colo. O.P.D.J. 2013).

Although infirmity of proof is a basis on which to challenge disciplinary action by a foreign jurisdiction, it does not apply to the findings and recommendations of a hearing board and the supreme court grievance committee panel. People v. Smith, 937 P.2d 724 (Colo. 1997).

A respondent attorney is entitled to due process in disciplinary proceedings, although there is no requirement that the lawyer be afforded the same constitutional safeguards as those granted a defendant in a criminal trial. People v. Gargano, 306 P.3d 109 (Colo. O.P.D.J. 2013).

Multiple due-process challenges to procedure followed by federal appeals court were rejected in People v. Smith, 937 P.2d 724 (Colo. 1997).

Respondent was not entitled to an evidentiary hearing on the question of whether motions he had filed in a prior case were frivolous. People v. Smith, 937 P.2d 724 (Colo. 1997).

Sixth amendment rights to jury trial and speedy trial do not attach in discipline cases, since by its terms the sixth amendment only applies in criminal cases. People v. Smith, 937 P.2d 724 (Colo. 1997).

Fifth amendment privilege against self-incrimination did not operate to preclude respondent from being compelled to attend his own deposition. People v. Smith, 937 P.2d 724 (Colo. 1997).

Nine-month period of suspension recommended by the board and accepted by the hearing panel was not more severe than the indefinite suspension imposed by the tenth circuit court of appeals, hence respondent could not challenge suspension on this basis. People v. Smith, 937 P.2d 724 (Colo. 1997).

No due-process violation where presiding officer of the board also served on the hearing panel that reviews the board's action. People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Failure to report suspension from the practice of law and felony conviction in another state justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Failure to disclose prior discipline in Kentucky, Colorado, and U.S. district court for district of Colorado to the U.S. district court for the district of Nevada warranted suspension from the practice of law for one year. People v. Mattox, 862 P.2d 276 (Colo. 1993).

Virginia disciplinary proceedings provided defendant with due process. Imposition of same discipline, in this case, disbarment, in Colorado customary. People v. Williams, 892 P.2d 885 (Colo. 1995).

Discipline in foreign jurisdiction for sharing legal fees and forming a partnership with a nonlawyer and for failing to deposit client funds in required interest-bearing account was suspension for two years, with the period of suspension stayed, and three years of probation on condition that the respondent be actually suspended for six months. Colorado law does not provide for the conditional suspension of a period of suspension or for probation, but a period of suspension of one year and one day ensures that the respondent has complied with the conditions of the foreign state suspension. People v. Bengert, 885 P.2d 241 (Colo. 1994).

Attorney received suspension for charging excessive fee in another state. The action taken in the other state had resulted in the attorney's receipt of a one-year conditional suspension. Usually the court will impose the same discipline as that which was imposed in the foreign jurisdiction, but because Colorado does not provide for conditional suspensions public censure was deemed appropriate. People v. Nash, 873 P.2d 764 (Colo. 1994).

Applied in People v. Swope, 621 P.2d 321 (Colo. 1981); People v. Miller, 744 P.2d 489 (Colo. 1987); People v. Trevino, 803 P.2d 473 (Colo. 1990); People v. Lenihan, 286 P.3d 1110 (Colo. O.P.D.J. 2012).

Rule 251.22. Discipline Based on Admitted Misconduct

(a) Acceptance of Admission. An attorney against whom proceedings are pending pursuant to these Rules may, at any point in the proceedings prior to final action by a Hearing Board, tender a conditional admission of misconduct constituting grounds for discipline in exchange for a stipulated form of discipline. The conditional admission must be approved by the Regulation Counsel prior to being tendered to the committee or the Presiding Disciplinary Judge.

If the form of discipline stipulated to is private admonition, the conditional admission shall be tendered to the committee for its review. The committee shall either reject the conditional admission and order the proceedings continued in accordance with these Rules, or accept the conditional admission and order private admonition imposed.

If the form of discipline stipulated to is disbarment, suspension, public censure, or a range that includes any of the former and private admonition, the conditional admission shall be tendered to the Presiding Disciplinary Judge for review. The Presiding Disciplinary Judge or Presiding Officer of the Hearing Board shall, after conducting a hearing as provided in this Rule, if one is requested, either reject the conditional admission and order the proceedings continued in accordance with these Rules, or approve the conditional admission and enter an appropriate order.

Imposition of discipline pursuant to a conditional admission of misconduct shall terminate all proceedings conducted pursuant to these Rules and pending against the attorney in connection with that misconduct.

(b) Conditional Admission — Contents. A conditional admission of misconduct shall be set forth in the form of an affidavit, be submitted by the attorney, and shall contain:

(1) An admission of misconduct which constitutes grounds for discipline;

(2) An acknowledgment of the proceedings pending against the attorney; and

(3) A statement that the admission is freely and voluntarily made, that it is not the product of coercion or duress, and that the attorney is fully aware of the implications of the attorney's admission.

If the conditional admission is tendered before a complaint is filed as provided in C.R.C.P. 251.14, it shall remain confidential if the form of discipline stipulated to is private admonition and its contents shall not be publicly disclosed or made available for use in any proceedings outside this Chapter except as otherwise provided in these Rules or by order of the Supreme Court.

(c) Conditional Admission — Hearing.

(1) Procedure. Within 14 days of the date a conditional admission is filed, the respondent or the Regulation Counsel may request a hearing before the Presiding Disciplinary Judge. If a hearing is requested, it shall be set promptly.

(2) Notice. Not less than 14 days before the date set for the hearing on the conditional admission, the Regulation Counsel shall give notice of such hearing as provided in C.R.C.P. 251.32(b) to the respondent, the respondent's counsel, and the complaining witness. The notice shall designate the date, place, and time of the hearing. The notice shall advise the respondent that the respondent is entitled to be represented by counsel at the hearing and to present argument regarding the form of discipline to be ordered.

(3) Complaining Witness. In addition to the foregoing, the notice shall advise the complaining witness that the complaining witness has a right to be present at the hearing and to make a statement, orally or in writing, to the Presiding Disciplinary Judge regarding the form of discipline.

(d) Stay of Proceedings. Proceedings conducted pursuant to these Rules that are pending before the Presiding Disciplinary Judge at the time a conditional admission is tendered may be stayed by order of the Presiding Disciplinary Judge.

(e) Further Proceedings. If the conditional admission of misconduct is rejected and the matter is returned for further proceedings consistent with these Rules, the conditional admission may not be used against the attorney.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (c)(1) and (c)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.18.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

The supreme court will deny attorney's application to voluntarily surrender his license to practice law in the state of Colorado where the gravity of the attorney's wrongful conduct necessitates disbarment. People v. Murphy, 174 Colo. 182, 483 P.2d 224 (1971).

Surrender of a license pursuant to this rule is not confidential and will be made known to the National Disciplinary Data Bank for dissemination on a national basis to other agencies who license attorneys. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Stipulation to 18-month suspension is reasonable and warranted, given the number and seriousness of the charges balanced against the mitigating factors. People v. Taylor, 799 P.2d 930 (Colo. 1990).

Stipulation to disbarment is appropriate where attorney pleaded guilty to felony menacing and had history of discipline. People v. Littlefield, 893 P.2d 773 (Colo. 1995).

Attorney under investigation for misconduct may submit a stipulation and conditional admission at any time but inquiry panel should not normally accept it until the inquiry panel has authorized the disciplinary counsel to file a formal complaint. People v. Borchard, 825 P.2d 999 (Colo. 1992).

Mitigating factors warranting suspension for three years. Conviction for distribution of cocaine is ''serious crime'' as defined in C.R.C.P. 241.16(e). However, mitigating factors including personal and emotional problems, full disclosure and cooperation with the grievance committee and the office of disciplinary counsel, and participation in interim rehabilitation warrant suspension from practice for three years. People v. Rhodes, 829 P.2d 850 (Colo. 1992).

Mitigating factors warranting public censure. Attorney who stipulated to misconduct admitted to activities warranting public censure. People v. Odom, 829 P.2d 855 (Colo. 1992).

Respondent's multiple acts of violence are indicative of a dangerous volatility which might well prejudice his ability to effectively represent his client's interests. Although respondent had taken major steps toward rehabilitation the acts committed were of such gravity as to require a public censure and a three-month suspension. People v. Wallace, 837 P.2d 1223 (Colo. 1992).

Stipulated agreement and recommendations of disbarment based on conditional admission of misconduct warranted where respondent practiced law while suspended. People v. Redman, 902 P.2d 839 (Colo. 1995).

Also warranted where attorney misappropriated and commingled client funds, failed to communicate with clients, engaged in dishonest conduct and conduct prejudicial to the administration of justice, charged unreasonable fees, neglected legal matters, and failed to pay funds to which a third person was entitled. People v. Clyne, 945 P.2d 1386 (Colo. 1997).

Stipulated agreement and recommendations of disbarment warranted where respondent pled guilty to conspiracy to commit securities fraud and securities fraud. People v. Frye, 935 P.2d 10 (Colo. 1997).

Stipulated agreement and recommendations of suspension for nine months based upon conditional admission of misconduct were warranted for attorney who was suspended in another state for neglect, failure to communicate, and failure to surrender documents and other client property after termination of representation. People v. McKee, 942 P.2d 494 (Colo. 1997).

Stipulated agreement and recommendations of suspension for six months based upon conditional admission of misconduct were warranted for attorney who engaged in conduct that adversely reflects on the lawyer's ability to practice law and for violating criminal laws of a state or the United States. People v. McIntyre, 942 P.2d 499 (Colo. 1997).

Stipulated agreement and recommendation of suspension for 30 days based upon con-

ditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was warranted where respondent neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was acceptable where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was warranted. People v. Williams, 936 P.2d 1289 (Colo. 1997).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that hindered a client's right to choose his or her own lawyer and which placed a financial hardship upon a departing associate who might not be able to represent the client if the associate's recovery would be limited to 25 percent or less of the total fee. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Applied in People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Rule 251.23. Disability Inactive Status

(a) Disability Inactive Status. Where it is shown that an attorney is unable to fulfill professional responsibilities competently because of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, the attorney shall be transferred to disability inactive status. During such time as an attorney is on disability inactive status the attorney shall not engage in the practice of law.

Proceedings instituted against an attorney pursuant to this Rule are disability proceedings. Transfer to disability inactive status is not a form of discipline and does not involve a violation of the attorney's oath. The pendency of proceedings provided for by this Rule shall not defer or abate other proceedings conducted pursuant to these Rules, unless after a hearing the Presiding Disciplinary Judge determines that the attorney, is unable to assist in the defense of those other proceedings because of the disability. If such other proceedings are deferred, then the deferral shall continue until such time as the attorney is found to be eligible for reinstatement as provided by C.R.C.P. 251.30.

(b) Transfer to Disability Inactive Status Without a Hearing. Where an attorney who is subject to these Rules has been judicially declared mentally ill, or has been involuntarily committed to a mental hospital, or has voluntarily petitioned for the appointment of a guardian, or has been found not guilty by reason of insanity in a criminal proceeding in a court of record, the Presiding Disciplinary Judge, upon proper proof of the fact, shall enter an order transferring the attorney to disability inactive status. Such order shall remain in effect unless altered by the Presiding Disciplinary Judge or the Supreme Court. A copy of the order transferring an attorney to disability inactive status shall be served upon the attorney and upon either the attorney's guardian or the superintendent of the hospital in which the attorney is confined. Service shall be made in such manner as the Presiding Disciplinary Judge may direct.

(c) Procedure When Disability is Alleged. Whenever any interested party shall petition the Presiding Disciplinary Judge to determine whether an attorney is incapable of continuing to practice law by reason of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, or whether the attorney in a proceeding conducted pursuant to these Rules is so incapacitated as to be unable to proffer a defense, the Presiding Disciplinary Judge shall direct such action as it deems necessary or proper to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts designated by the Presiding Disciplinary Judge; provided, however, that before any medical examination or other action may be ordered, the Presiding Disciplinary Judge must afford the attorney an opportunity to show cause why such examination or action should not be ordered. If, upon due consideration of the matter, the Presiding Disciplinary Judge determines that the attorney is incapable of continuing to

practice law or is incapable of defending in proceedings conducted pursuant to these Rules, the Presiding Disciplinary Judge shall enter an order transferring the attorney to disability inactive status. Such order shall remain in effect unless altered by the Presiding Disciplinary Judge or the Supreme Court.

An attorney against whom disability proceedings are pending shall be given notice of such proceedings. Notice shall be given in such a manner as the Presiding Disciplinary Judge may direct. The Presiding Disciplinary Judge may appoint counsel to represent the attorney if the attorney is without adequate representation.

(d) Procedure When Attorney During Course of Proceedings Alleges a Disability that Impairs the Attorney's Ability to Defend Himself. If in the course of proceedings conducted pursuant to these Rules the lawyer alleges disability by reason of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, that impairs the attorney's ability to defend adequately in such proceedings, such proceedings shall be suspended and the Presiding Disciplinary Judge shall enter an order transferring the attorney to disability inactive status and order a medical examination of the attorney. Upon review of the report of the medical examination and other relevant information, the Presiding Disciplinary Judge may do any of the following:

(1) Order a hearing on the issue of whether the attorney suffers from a disability that impairs the attorney's ability to defend adequately in such other proceedings;

(2) Continue the order transferring the lawyer to disability inactive status;

(3) Discharge the order transferring the lawyer to disability inactive status, and order that the proceedings pending against the attorney be resumed;

(4) Enter any other appropriate order, including an order directing further examination of the attorney.

(e) Burden of Proof. In a disability proceeding seeking the transfer of an attorney to disability inactive status the party petitioning for transfer shall bear the burden of proof by clear and convincing evidence.

(f) Hearings. Any hearings held pursuant to this Rule shall be conducted by the Presiding Disciplinary Judge in the manner prescribed by C.R.C.P. 251.18 and C.R.C.P. 251.19, and a Hearing Board shall not be required.

(g) Compensation. The Presiding Disciplinary Judge may fix the compensation to be paid to any legal counsel or medical expert appointed by the Presiding Disciplinary Judge pursuant to this Rule. The Presiding Disciplinary Judge may direct that such compensation be assessed as part of the costs of a proceeding held pursuant to this Rule and that it be paid as such in accordance with law.

(h) Post-Hearing Relief and Notice of Appeal. The attorney may file a motion for post-hearing relief or a notice of appeal as provided in C.R.C.P. 251.19.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.19.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Former section (a) is not unconstitutional. Requiring attorney to prove mental illness by clear and convincing evidence was not contrary to § 13-25-127 (1), which establishes a preponderance of the evidence as the quantum of proof in civil cases, because an attorney disciplinary proceeding is not strictly a civil proceeding. People v. Sullivan, 802 P.2d 1091 (Colo. 1990).

Supreme court affirms order of presiding disciplinary judge (PDJ) transferring attorney to disability inactive status. The office of attorney regulation counsel (OARC) adequately petitioned PDJ for a disability proceeding under section (c) of this rule by filing status report. Because the status report unquestionably put attorney on notice of the disability proceeding and gave him or her a meaningful opportunity to oppose the OARC's request for an independent medical examination (IME), the report satisfied the ''petition'' requirement of section (c). In addition, the law of the case doctrine did not preclude the PDJ from reconsidering his or her decision to disregard the report of the first medical expert retained to conduct an IME of the attorney. In light of testimony of this expert,

PDJ acted ''upon proper grounds'' when her or she decided to reconsider earlier ruling disregarding expert's report. Even without medical report, adverse inference of disability drawn by PDJ on the basis of attorney's disregard of orders to cooperate in second IME process was by itself sufficient to establish by clear and convincing evidence that the attorney suffers from a mental or emotional infirmity or illness and that such infirmity or illness prevents the attorney from both defending himself or herself in the consolidated disciplinary proceeding and fulfilling the responsibilities as an attorney, thereby requiring the attorney to petition for reinstatement under C.R.C.P. 251.30. In re Bass, 142 P.3d 1259 (Colo. 2006).

Applied in People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Southern, 638 P.2d 787 (Colo. 1982); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Craig, 708 P.2d 787 (Colo. 1985).

Rule 251.24. Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.25. Counsel for the Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.26. Proceedings Before the Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.27. Proceedings Before the Supreme Court

(a) Appellate Jurisdiction. Appellate review by the Supreme Court of every final decision of the Hearing Board in which public censure, a period of suspension, disbarment, or transfer to disability inactive status is ordered or in which reinstatement or readmission is denied shall be allowed as provided by these rules.

(b) Standard of Review. All disciplinary and disability proceedings filed in the Supreme Court as herein provided shall be conducted in the name of the People of the State of Colorado titled ''IN THE MATTER OF [the name of the ATTORNEY-RESPONDENT]'' and shall be prosecuted by the Regulation Counsel.

When proceedings are conducted before the Supreme Court as herein provided, the Supreme Court shall affirm the decision of the Hearing Board unless it determines that, based on the record, the findings of fact of the Hearing Board are clearly erroneous or that the form of discipline imposed by the Hearing Board (1) bears no relation to the conduct, (2) is manifestly excessive or insufficient in relation to the needs of the public, or (3) is otherwise unreasonable. The Supreme Court may conduct a de novo review of the conclusions of law.

The matter shall be docketed by the clerk of the Supreme Court as:

SUPREME COURT, STATE OF COLORADO
Case No.
ORIGINAL PROCEEDING IN DISCIPLINE [OR DISABILITY]

IN THE MATTER OF [the name of the ATTORNEY-RESPONDENT]

(c) Appeal—How Taken. An appeal from a Hearing Board to the Supreme Court shall be taken by filing a notice of appeal with the Supreme Court within the time set forth in this Rule. Upon the filing of the notice of appeal, the Supreme Court shall have the exclusive jurisdiction over the appeal and procedures concerning the appeal unless otherwise specified by these Rules. An advisory copy of the notice of appeal shall be served on the Presiding Disciplinary Judge within the time for its filing in the Supreme Court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not

affect the validity of the appeal, but is a ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal shall not be deemed jurisdictional.

(d) Contents of Notice of Appeal. Except as otherwise provided by these rules, and to the extent practicable, the notice of appeal shall conform to the requirements set forth in C.A.R. 3(e).

(e) Contents of Any Notice of Cross-Appeal. A notice of cross-appeal shall set forth the same information required for a notice of appeal and shall set forth the party initiating the cross-appeal and designate all cross-appellees.

(f) Number of Copies to be Filed. Five copies of the notice of appeal or cross-appeal shall be filed with the original.

(g) Appeal—When Taken. The notice of appeal required by this rule shall be filed with the Supreme Court with an advisory copy served on the Presiding Disciplinary Judge within 21 days of the date of mailing the decision from which the party appeals. If a timely notice of appeal is filed by a party, the other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (g), whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to both parties by a timely motion filed with the Presiding Disciplinary Judge by either party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (g) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion under C.R.C.P. 52 or 59, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) granting or denying a motion under C.R.C.P. 59, to alter or amend the judgment; (3) denying a motion for a new hearing under C.R.C.P. 59; (4) expiration of an extension of time granted by the Presiding Disciplinary Judge to file motion(s) for post-hearing relief under C.R.C.P. 59, where no motion is filed. The Hearing Board shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the Supreme Court shall be stayed. If the decision is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the decision.

Upon a showing of excusable neglect, the Supreme Court may extend the time for filing the notice of appeal by a party for a period not to exceed 28 days from the expiration of the time otherwise prescribed by this section (g). Such an extension may be granted before or after the time otherwise prescribed by this section (g) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the Supreme Court shall deem appropriate.

(h) Stay Pending Appeal. Application for a stay of the decision of a Hearing Board pending appeal must ordinarily be made in the first instance to the Hearing Board. The application for stay pending appeal should be granted except when an immediate suspension has been ordered, or when no conditions of probation and supervision while the appeal is pending will protect the public. A motion for such relief may be made to the Supreme Court, but the motion shall show that application to the Hearing Board for the relief sought is not practicable, or that the Hearing Board has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the Hearing Board for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties.

(i) Record on Appeal—Composition.

(1) The final pleadings which frame the issues before the Hearing Board; the findings of fact, conclusions of law and decision; motions for new trial and other post-trial motions, if any, and the Hearing Board's ruling; together with any other documents which by

designation of either party or by stipulation are directed to be included shall constitute the record on appeal in all cases.

(2) The reporter's transcript, or such parts thereof as provided under section (j) of this rule, relevant depositions and exhibits may be made a part of the record.

(3) The records and files of the Hearing Board shall be certified by the clerk of the Presiding Disciplinary Judge.

(4) The original papers in all instances shall be in the record submitted. Except on written request by a party, the Presiding Disciplinary Judge need not duplicate or retain a copy of the papers or exhibits included in the record. The party requesting that a duplicate be retained shall advance the cost of preparing the copies.

(5) The record shall be properly paginated and fully indexed and shall be prepared and bound under the direction of the Presiding Disciplinary Judge.

(j) Record of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Record is Ordered; Costs. Within 14 days after filing the notice of appeal, the appellant shall file with the Presiding Disciplinary Judge and with the clerk of the Supreme Court either: (1) a statement that no portions of the record other than those numerated in section (i) are desired or (2) a detailed designation of record, setting forth specifically those portions of the record to be included and all dates of proceedings for which transcripts are requested and the name(s) of the court reporter(s) who reported the proceedings that the appellant directs to be included in the record. The appellant shall serve a copy of the designation of record on each court reporter listed therein. If the appellant contends that a finding or conclusion is not supported by the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall include in the designation of record a description of the part of the transcript that the appellant intends to include in the record and a statement of the issues to be presented on appeal. If the appellee deems it necessary to include a transcript of other proceedings or other parts of the record, the appellee shall, within 14 days after the service of the statement or the appellant's designation of the record, file with the Presiding Disciplinary Judge and the Supreme Court, and serve on the appellant and on any court reporter who reported proceedings of which the appellee desires an additional transcript, a designation of the additional items to be included. Service on any court reporter of the appellant's designation of record or the appellee's additional designation of record shall constitute a request for transcription of the specified proceedings. Within 14 days after service of any such designation of record, each such court reporter shall provide in writing to all counsel in the appeal: (1) the estimated number of pages to be transcribed; (2) the estimated completion date; and (3) the estimated cost of transcription. Within 21 days after receiving the reporter's estimate, the designating party shall deposit the full amount of such estimate with the court reporter. For good cause shown, within said 21 days and upon the agreement of the court reporter, the Presiding Disciplinary Judge may order a payment schedule extending the time for payment. When the cost of the transcription will be paid by public funds, the public entity shall make arrangements with the court reporter for payment of the transcription costs. Within 28 days of the transmittal of the court reporter's cost estimate to the pro se party or counsel, the court reporter shall file with the Presiding Disciplinary Judge and Supreme Court a statement of: (1) the date the court reporter's estimate was provided and the date on which the reporter received full payment of the estimate; or (2) the schedule of payments approved by the Presiding Disciplinary Judge under a good cause extension; or (3) that the cost of the transcript will be paid from public funds. Each party shall advance the cost of preparing that part of the record designated by such party except as otherwise ordered by the Presiding Disciplinary Judge for good cause shown.

(k) Transmission of the Record.

(1) Time. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the Supreme Court within 56 days (8 weeks) after the filing of the notice of appeal unless the time is shortened or extended by an order entered as provided in this rule. After filing the notice of appeal the appellant shall comply with the provisions of this rule and shall take any other action necessary to enable the Presiding Disciplinary Judge to assemble and transmit the record.

(2) Duty of Presiding Disciplinary Judge to Transmit the Record. When the record, including any designated transcript, is complete for purposes of the appeal, the clerk of the Presiding Disciplinary Judge shall transmit it to the clerk of the Supreme Court. The clerk of the Presiding Disciplinary Judge shall number the documents comprising the entire designated record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted unless a party or the Supreme Court directs the Presiding Disciplinary Judge to do so. A party must make advance arrangements for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the Presiding Disciplinary Judge mails or otherwise forwards the record to the clerk of the Supreme Court. The clerk of the Presiding Disciplinary Judge shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the Supreme Court.

(3) Temporary Retention of Record by the Presiding Disciplinary Judge For Use In Preparing Appellate Papers. Notwithstanding the provisions of this rule, the parties may stipulate, or the Presiding Disciplinary Judge on motion of any party may order, that the record shall temporarily be retained by the Presiding Disciplinary Judge for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of this Rule and by presenting to the Supreme Court a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if the appellant is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the Supreme Court may order, the appellant shall request the Presiding Disciplinary Judge to transmit the record.

(4) Extension Of Time For Transmission Of The Record; Reduction Of Time. The Supreme Court for good cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted. Any request for extension of the period of time based upon the reporter's inability to complete the transcript shall be supported by an affidavit of the reporter specifying why the transcript has not yet been prepared, and the date by which the transcript can be completed and a statement by the court reporter that all payments due have been made. Failure to pay for the transcript in accordance with C.R.C.P. 251.27(j) is grounds for denial of a motion for extension. The Supreme Court may direct the Presiding Disciplinary Judge to expedite the preparation and transmittal of the record on appeal and, upon motion or sua sponte, take other appropriate action regarding preparation and completion of the record.

(5) Stipulation Of Parties That Parts of the Record Be Retained By the Presiding Disciplinary Judge. The parties may agree by written stipulation filed with the Presiding Disciplinary Judge that designated parts of the record shall be retained by the Presiding Disciplinary Judge unless thereafter the Supreme Court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(6) Preliminary Record Transmitted to the Supreme Court. If prior to the time the record is transmitted, a party desires to make to the Supreme Court a motion for dismissal, for a stay pending appeal, or for any intermediate order, the Presiding Disciplinary Judge at the request of any party shall transmit to the Supreme Court such parts of the original record as any party shall designate.

(l) Docketing the Appeal.

(1) Filing. At the time of the filing of the notice of appeal or the time of filing any documents with the Supreme Court before the filing of the notice of appeal, the Appellant shall pay to the clerk of the Supreme Court a docket fee of $150 and the clerk shall enter the appeal upon the docket. The party appealing shall docket the case as provided in section (b) of this Rule.

(2) Leave to Proceed On Appeal In Forma Pauperis From Hearing Board to Supreme Court. A party to an action before a Hearing Board who desires to proceed on appeal in forma pauperis shall file with the Presiding Disciplinary Judge a motion for leave so to proceed, together with an affidavit showing an inability to pay costs, a belief that the party is entitled to redress, and a statement of the issues which the party intends to present on appeal. If the motion is granted, the party may proceed without further application to the Supreme Court and without prepayment of costs. If the motion is denied, the Presiding Disciplinary Judge shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action before the Presiding Disciplinary Judge in forma pauperis may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the Presiding Disciplinary Judge shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the Presiding Disciplinary Judge shall state in writing the reasons for such certification or finding. A party proceeding under this subsection shall attach a copy of the Presiding Disciplinary Judge's order granting or denying leave to proceed in forma pauperis before the Hearing Board with the appendix to the notice of appeal.

(3) Filing Of The Record. Upon receipt of the record or papers authorized to be filed in lieu of the record under the provisions of subsections (k)(3) and (k)(6) of this rule following timely transmittal, the clerk of the Supreme Court shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(4) The appellant shall have 28 days after the filing with the clerk of the Supreme Court of the record on appeal within which to file an opening brief. The appellee shall have 28 days after the filing of the appellant's opening brief within which to file an answer brief. The appellant shall have 14 days after the filing of the answer brief within which to file a reply brief.

(m) General Provisions. Except as otherwise provided in these Rules, and to the extent practicable, appeals shall be conducted in conformity with the general provisions found in C.A.R. 25, 26, 27, 28, 29, 31, 32, 34, 36, 38, 39, 42, and 45.

(n) Oral Argument. Oral argument may be allowed at the discretion of the court in accordance with C.A.R. 34.

(o) Disposition. When proceedings are conducted before the Supreme Court as herein provided, the Supreme Court may resolve the matter by opinion or by order without opinion, as the court shall determine in its discretion.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (g) 1st and last paragraphs, (j), (k)(1), and (l)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.20.

ANNOTATION

Law reviews. For article, ''Constitutional Law'', which discusses Tenth Circuit decisions dealing with questions of due process in attorney disciplinary hearings, see 63 Den. U. L. Rev. 247 (1986).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

This rule does not constitute a denial of due process even though the final arbiters of fact, the justices of the Colorado supreme court, do not personally hear the testimony of the accused attorney or other witnesses. Razatos v. Colo. Supreme Court, 549 F. Supp. 798 (D. Colo.), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Recommendation of grievance committee's hearing panel is advisory only, and it is incumbent upon the supreme court to exercise its independent judgment, taking into consideration the facts, circumstances, and background of the lawyer, to increase or decrease the recommended sanction. People v. Mattox, 639 P.2d 397 (Colo. 1982).

While the supreme court has always given the recommendation for discipline by the grievance committee great weight, the court reserves the right to exercise our independent judgment

in arriving at the proper level of discipline. People v. Brown, 726 P.2d 638 (Colo. 1986).

Under this rule, the supreme court may accept the recommendation of the grievance committee or may impose such other discipline as may be proper under the circumstances. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

The selection of discipline to be imposed is ultimately a decision to be made by the supreme court after considering the appropriate factors and the purposes to be served by disciplinary sanctions. People v. Vigil, 779 P.2d 372 (Colo. 1989).

As part of its constitutional and inherent powers, the supreme court has exclusive jurisdiction over lawyers, and possesses the plenary authority to regulate and supervise the practice of law in Colorado. In re Caldwell, 50 P.3d 897 (Colo. 2002); Matter of Greene, 2013 CO 29, 302 P.3d 690.

This rule does not specifically authorize the appellate review of an order granting summary judgment, but that authority is reserved in C.R.C.P. 251.1(d). Matter of Greene, 2013 CO 29, 302 P.3d 690.

Suspension of a license to practice law is not criminal punishment for purposes of the double jeopardy clause of the fifth amendment. In re Cardwell, 50 P.3d 897 (Colo. 2002).

The primary purpose of lawyer regulation proceedings is to protect the public, not to punish the offending lawyer. In re Caldwell, 50 P.3d 897 (Colo. 2002).

Factual findings of grievance committee are binding on the supreme court, unless the supreme court, after considering the record as a whole, concludes that the findings are clearly erroneous and unsupported by substantial evidence. People v. Garnett, 725 P.2d 1149 (Colo. 1986) (apparently overruling People v. Mattox, 639 P.2d 397 (Colo. 1982)).

Supreme court is bound by the factual findings of the hearing board unless those findings are clearly erroneous and not supported by substantial evidence in the record. Court reviews questions of law de novo as in any appeal. In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Rosen, 198 P.3d 116 (Colo. 2008).

Where hearing board determined that an allegation of the complaint was not proven by clear and convincing evidence because it believed respondent's explanation of his actions rather than attorney regulation counsel's allegations, supreme court could not conclude, as a matter of law, that no reasonable fact finder could have made that determination. In re Rosen, 198 P.3d 116 (Colo. 2008).

An attorney may file exceptions to the findings of the grievance committee. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Exceptions to the report of the grievance committee will be ordered stricken where the attorney fails to support them by a reporter's transcript or such portions thereof as would be necessary to enable the court to pass upon the exceptions. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

If an attorney files exceptions, he should also provide a reporter's transcript to enable the supreme court to pass on the exceptions. People v. Murphy, 174 Colo. 182, 483 P.2d 224 (1971).

Respondent's exceptions stricken for failure to designate record as required by subsection (b)(4) of this rule. People v. Lutz, 897 P.2d 807 (Colo. 1995).

There is no evaluation of evidence on review. In determining whether the board's findings are supported by substantial evidence, it is not within the province of the supreme court to measure the weight of the evidence or to resolve the credibility of witnesses. People v. Distel, 759 P.2d 654 (Colo. 1988).

Applied in People v. King, 191 Colo. 120, 550 P.2d 848 (1976); People v. Kane, 655 P.2d 390 (Colo. 1982).

Rule 251.28. Required Action After Disbarment, Suspension, or Transfer to Disability

(a) Effective Date of Order - Winding Up Affairs. Orders imposing disbarment or a definite suspension shall become effective 35 days after the date of entry of the decision or order, or at such other time as the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge may order. Orders imposing immediate suspension, transferring an attorney to disability inactive status, or for failure to comply with rules governing attorney registration or continuing legal education, shall become effective immediately upon the date of entry of the order, unless otherwise ordered by the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge. After the entry of an order of disbarment, suspension unless fully stayed (see C.R.C.P. 251.7(a)(3)), or transfer to disability inactive status, the attorney may not accept any new retainer or employment as an attorney in any new case or legal matter; provided, however, that during any period between the date of entry of an order and its effective date the attorney may, with the consent of the client after full disclosure, wind up or complete any matters pending on the date of entry of the order.

(b) Notice to Clients in Pending Matters. An attorney against whom an order of

disbarment, suspension unless fully stayed, or transfer to disability inactive status has been entered shall promptly notify in writing by certified mail each client whom the attorney represents in a matter still pending of the order entered against the attorney and of the attorney's consequent inability to act as an attorney after the effective date of such order, and advising such clients to seek legal services elsewhere. In addition, the attorney shall deliver to each client all papers and property to which the client is entitled. An attorney who has been suspended as provided in the rules governing attorney registration or continuing legal education need not comply with the requirements of this subsection if the attorney has sought reinstatement as provided by the rules governing attorney registration or continuing legal education and reasonably believes that reinstatement will occur within 14 days of the date of the order of suspension. If the attorney is not reinstated within those 14 days, then the attorney must comply with this subsection.

(c) Notice to Parties in Litigation. An attorney against whom an order of disbarment, suspension unless fully stayed, or transfer to disability inactive status is entered and who represents a client in a matter involving litigation or proceedings before an administrative body shall notify that client as required by section (b) of this rule, and shall recommend that the client promptly obtain substitute counsel. In addition, the lawyer must notify in writing by certified mail the opposing counsel of the order entered against the attorney and of the attorney's consequent inability to act as an attorney after the effective date of the order. The notice to opposing counsel shall state the place of residence of the client of the attorney against whom the order was entered. An attorney who has been suspended as provided in the rules governing attorney registration or continuing legal education need not comply with the requirements of this section if the attorney has sought reinstatement as provided by the rules governing attorney registration or continuing legal education and reasonably believes that reinstatement will occur 14 days of the date of the order of suspension. If the attorney is not reinstated within those 14 days, then the attorney must comply with this section.

If the client of the attorney against whom an order was entered does not obtain substitute counsel before the effective date of such order, the attorney must appear before the court or administrative body in which the proceeding is pending and move for leave to withdraw.

(d) Affidavit Filed With Supreme Court or the Hearing Board. Within 14 days after the effective date of the order of disbarment, suspension, or transfer to disability inactive status, or within such additional time as allowed by the Supreme Court, the Hearing Board, or the Presiding Disciplinary Judge, the attorney shall file with the Supreme Court or the Hearing Board an affidavit setting forth a list of all pending matters in which the attorney served as counsel and showing:

(1) That the attorney has fully complied with the provisions of the order and of this rule;

(2) That the attorney has served on Regulation Counsel, a list of the clients notified pursuant to subsection (b) of this rule and a copy of each notice provided;

(3) That the attorney has notified every other jurisdiction before which the attorney is admitted to practice law of the order entered against attorney; and

(4) That the attorney has served a copy of such affidavit upon the Presiding Disciplinary Judge and the Regulation Counsel. The list and notices described in (d)(2) shall only be attached to the affidavit provided to Regulation Counsel.

Such affidavit shall also set forth the address of the attorney to which communications may thereafter be directed.

In addition, the attorney shall continue to file a registration statement in accordance with C.R.C.P. 227 for a period of five years following the effective date of the order listing the attorney's residence or other address where communications may thereafter be directed to the attorney; provided, however, that the annual registration fee need not be paid during such five-year period unless and until the attorney is reinstated. Upon reinstatement the attorney shall pay the annual registration fee for the year in which reinstatement occurs.

(e) Public Notice of Order. The clerk of the Supreme Court or the Presiding Disciplinary Judge shall release for publication orders of disbarment, suspension, or transfer to disability inactive status entered against an attorney.

(f) Notice of Order to the Courts. The Presiding Disciplinary Judge or the clerk of the Supreme Court shall promptly transmit notice of the final order of disbarment, suspension, or transfer to disability inactive status to all courts in this state. The chief judge of each judicial district may make such further orders pursuant to C.R.C.P. 251.32(h) or otherwise as the Chief Judge deems necessary to protect the rights of clients of the attorney.

(g) Duty to Maintain Records. An attorney who has been disbarred, suspended, or transferred to disability inactive status shall keep and maintain records of any steps taken by the attorney pursuant to this rule as proof of compliance with this rule and with the order entered against the attorney. Failure to comply with this section without good cause shown shall constitute contempt of the Supreme Court. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement or readmission.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a), (b), (c), and (d) amended and adopted October 6, 2005, effective January 1, 2006; (a) amended and effective October 2, 2008; (a), (b), (c), and IP(d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.21.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

It is not necessary that an attorney give notice pursuant to section (b) if he has not practiced law and has no clients. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Technical violations of the disciplinary orders and rules will not always preclude reinstatement, rather the most important consideration is the nature of the violations. In re Price, 18 P.3d 185 (Colo. 2001).

But denial of reinstatement is justified where attorney's failure to provide required notice of suspension to each client has potential to cause harm and such failure adversely affects the protections afforded the public by the disciplinary orders and rules. In re Price, 18 P.3d 185 (Colo. 2001).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules, the continuation of the practice of law after suspension, and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Suspension of one year and one day imposed for failing to abide by notification procedures of this section in conjunction with violation of other disciplinary rules where attorney who was suspended from practice of law for failure to pay registration fee and subsequently failed to notify client in pending bankruptcy matter, failed to withdraw from bankruptcy matter before trial date, failed to take action to secure substitute counsel, move for continuance, or otherwise protect his client's interest, and who failed to inform court or opposing counsel. People v. Smith, 828 P.2d 249 (Colo. 1992).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

An attorney who is suspended for failure to comply with CLE requirements is barred from practicing law under this rule and rule 5.5 of the Colorado rules of professional conduct, the same as if the attorney had been suspended following a disciplinary proceeding. Continuing to practice law after such an administrative suspension warranted an additional 18-month suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Winding up affairs unnecessary. Where an attorney is presently suspended from the practice of law, it is not necessary that he be granted time to wind up his legal affairs. Disbarment is therefore effective on the date that the opinion was announced. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Accepting a retainer while suspended from the practice of law is sufficient, in conjunction with the violation of other disciplinary rules, to justify further suspension. People v. Redman, 819 P.2d 495 (Colo. 1991).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Suspension of one year and one day appropriate for admitted solicitation of sexual favors when extensive mitigating factors were present. The instances of misconduct occurred over a short period of time during which respondent was undergoing emotional and personal problems, respondent voluntarily underwent psychological counseling, the psychologist indicated in writing that a reoccurrence of the offenses was seen as unlikely, and respondent had already received the sanction of a criminal conviction as a result of pleading guilty to harassment. Respondent was also the subject of several newspaper articles that reported his misconduct. People v. Crossman, 850 P.2d 708 (Colo. 1993).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension warrants further suspension for one year and one day. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Suspension for one year and one day is warranted where attorney mishandled client funds but where the court found several factors in mitigation such as the absence of a prior record, a reputation for honesty, and a demonstration of remorse. People v. Galindo, 884 P.2d 1109 (Colo. 1994).

Suspension for one year and one day appropriate when attorney terminated representation without reasonable notice, failed to provide client with accounting and refund, and failed to meet continuing education requirements. Restitution required as condition of reinstatement. People v. Rivers, 933 P.2d 6 (Colo. 1997).

Suspension for three years is warranted where attorney, in conjunction with violating numerous rules of professional conduct, violated this rule by failing to notify client by certified mail of order of suspension and attorney's inability to represent client. People v. Hohertz, 926 P.2d 560 (Colo. 1996).

Disbarment appropriate when attorney took no steps to protect the legal interests of his clients when he was placed under a suspension order. Attorney also had an extensive history of similar discipline. People v. Dolan, 873 P.2d 766 (Colo. 1994).

Conduct violating this rule in conjunction with other violations is sufficient to justify disbarment. People v. Ebbert, 925 P.2d 274 (Colo. 1996); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Zimmermann, 960 P.2d 85 (Colo. 1998); People v. Alexander, 281 P.3d 496 (Colo. O.P.D.J. 2012).

An attorney's continued practice of law while under suspension is negligent where there is evidence that the attorney incorrectly believed that he had been reinstated and where there is no evidence that misconduct caused any actual harm. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension for 90 days is warranted for attorney's continued practice of law during a period of suspension in view of prior record and substantial experience in practice of law even if attorney incorrectly believed that he had been reinstated. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension for 18 months is warranted where attorney failed to notify opposing counsel and trial court of suspension and where the attorney had extensive record of previous discipline. People v. Watson, 883 P.2d 1053 (Colo. 1994).

Public censure is warranted where, although the attorney failed to notify opposing counsel and appeared in one hearing after imposition of the suspension, the attorney's involvement was minimal, it occurred only upon request by the client, it did not result in any harm to the client, and the attorney did not receive any benefit from the appearance. People v. Pittam, 917 P.2d 710 (Colo. 1996).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings and did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Conduct violating this rule is sufficient to warrant public censure. People v. Williams, 936 P.2d 1289 (Colo. 1997).

Orders affecting disbarment or suspension are effective 30 days after the entry of the order or at such other time as the court may order. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Southern, 638 P.2d 787 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Rule 251.29. Readmission and Reinstatement After Discipline

(a) Readmission After Disbarment. A disbarred attorney may not apply for readmission until at least eight years after the effective date of the order of disbarment. To be eligible for readmission the attorney must demonstrate the attorney's fitness to practice law

and professional competence, and must successfully complete the written examination for admission to the Bar. The attorney must file a petition for readmission, properly verified, with the Presiding Disciplinary Judge, and furnish a copy to the Regulation Counsel. Thereafter, the petition shall be heard in procedures identical to those outlined by these rules governing hearings of complaints, except it is the attorney who must demonstrate by clear and convincing evidence the attorney's rehabilitation and full compliance with all applicable disciplinary orders and with all provisions of this Chapter. A Hearing Board shall consider every petition for readmission and shall enter an order granting or denying readmission.

(b) Reinstatement After Suspension. Unless otherwise provided by the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge in the order of suspension, an attorney who has been suspended for a period of one year or less shall be reinstated by order of the Presiding Disciplinary Judge, provided the attorney files an affidavit with the Regulation Counsel within 28 days prior to the expiration of the period of suspension, stating that the attorney has fully complied with the order of suspension and with all applicable provisions of this chapter. Upon receipt of the attorney's affidavit that has been timely filed, the Regulation Counsel shall notify the Presiding Disciplinary Judge of the attorney's compliance with this Rule. Upon receipt of the notice, the Presiding Disciplinary Judge shall issue an order reinstating the attorney. The order shall become effective upon the expiration of the period of suspension. If the attorney fails to file the required affidavit within the time specified, the attorney must seek reinstatement pursuant to section (c) of this Rule; provided, however, that a suspended attorney who fails to file a timely affidavit may obtain leave of the Presiding Disciplinary Judge to file an affidavit upon showing that the attorney's failure to file the affidavit was the result of mistake, inadvertence, surprise, or excusable neglect. An attorney reinstated pursuant to this section shall not be required to show proof of rehabilitation.

An attorney who has been suspended for a period longer than one year must file a petition with the Presiding Disciplinary Judge for reinstatement and must prove by clear and convincing evidence that the attorney has been rehabilitated, has complied with all applicable disciplinary orders and with all provisions of this chapter, and is fit to practice law.

If the attorney remains suspended for five years or longer, reinstatement shall be conditioned upon certification by the state board of law examiners of the attorney's successful completion, after the expiration of the period of suspension, of the examination for admission to practice law and upon a showing by the attorney of such other proof of professional competence as the Supreme Court or a Hearing Board may require; provided, however, that filing a petition for reinstatement within five years of the effective date of the suspension of the attorney tolls the five-year period until such time as the Hearing Board rules on the petition.

(c) Petition for Reinstatement. Any attorney who has been suspended for a period longer than one year must file a petition with the Presiding Disciplinary Judge for an order of reinstatement if the attorney wishes to be reinstated to practice law. The petition must be properly verified and, when filed, a copy must be furnished to the Regulation Counsel.

The petition for reinstatement must set forth:

(1) The date the order of suspension was entered and the effective date thereof, and a copy of the disciplinary order or opinion;

(2) The date on which all prior petitions for reinstatement were filed and the disposition thereof;

(3) The facts other than passage of time and absence of additional misconduct upon which the petitioning attorney relies to establish that the attorney possesses all of the qualifications required of applicants for admission to the Bar of Colorado, fully considering the previous disciplinary action taken against the attorney;

(4) Evidence of compliance with all applicable disciplinary orders and with all provisions of this Chapter regarding actions required of suspended lawyers;

(5) Evidence of efforts to maintain professional competence through continuing legal education or otherwise during the period of suspension; and

(6) A statement of restitution made as ordered to any persons and the Colorado Attorneys' Fund for Client Protection and the source and amount of funds used to make restitution.

(d) Reinstatement Proceedings. Immediately upon receipt of a petition for reinstatement the Regulation Counsel shall conduct any investigation the Regulation Counsel deems necessary. The petitioner shall cooperate in any such investigation.

The Regulation Counsel shall submit an answer to the petition. Thereafter, the petition for reinstatement shall be reviewed in procedures identical to those outlined by these Rules governing hearings of complaints.

The Regulation Counsel may present evidence bearing upon the matters in issue, and the attorney seeking reinstatement shall bear the burden of proving by clear and convincing evidence the averments in the petition.

(e) Hearing Board Decision. In deciding whether to grant or deny the petition, the Hearing Board shall consider the attorney's past disciplinary record. The Hearing Board may condition reinstatement upon compliance with any additional orders it deems appropriate, including but not limited to the payment of restitution to any person harmed by the misconduct for which the petitioner was suspended.

(f) Readmission and Reinstatement Proceedings Before the Supreme Court. An attorney whose petition for readmission or reinstatement is denied by the Hearing Board may proceed before the Supreme Court in a manner identical to that outlined in C.R.C.P. 251.27.

(g) Successive Petitions. No petition for reinstatement under this Rule shall be accepted within two years following a denial of a previous petition for reinstatement filed on behalf of the same person.

(h) Public Information. Notwithstanding the provisions of C.R.C.P. 251.31, and any Rule relating to the confidentiality of Bar admissions, petitions for reinstatement and applications for readmission shall be matters of public record.

Any hearing held under sections (a) and (d) of this Rule shall be open to the public.

(i) Cost Deposit. Petitions for readmission or reinstatement under this Rule shall be accompanied by a cost deposit of $500 to be used to pay all expenses connected with the reinstatement proceedings. If such costs should exceed $500, the Supreme Court, the Presiding Disciplinary Judge or the presiding officer of the Hearing Board may enter an order requiring the petitioner to supply an additional deposit. Upon the completion of proceedings held pursuant to this Rule an accounting shall be rendered and any portion of the cost deposit unexpended shall be returned to the petitioner.

(j) Reinstatement on Stipulation. Provided the petition for reinstatement under section (c) of this rule is filed within 28 days prior to the expiration of the period of suspension or 91 days (13 weeks) if the period of suspension is longer than one year and provided the attorney seeking reinstatement and the Regulation Counsel, after any investigation the Regulation Counsel deems necessary, stipulate to reinstatement, the Regulation Counsel shall file with the Presiding Disciplinary Judge the stipulation containing such terms and conditions of reinstatement, if any, as may be agreed. Upon receipt of the stipulation, the Presiding Disciplinary Judge may approve the stipulation following an appearance by the attorney before the Presiding Disciplinary Judge and enter an order of reinstatement on the terms and conditions contained in the stipulation or reject the stipulation and order that a hearing be held by a Hearing Board as provided in section (d) of this rule.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000; (b) 1st paragraph and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.22.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Section 18-1.3-401 (3) bars convicted felons from practicing law while they serve out all components of their sentences, including parole. In re Miranda, 2012 CO 69, 289 P.3d 957.

Attorney serving mandatory parole portion of felony criminal sentence cannot be reinstated to practice of law until he has completed his felony sentence. In re Miranda, 2012 CO 69, 289 P.3d 957.

Readmission conditioned upon full compliance with section (a) and full payment of costs and restitution. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Rice, 708 P.2d 785 (Colo. 1985).

Readmission conditioned upon full compliance with disciplinary orders issued in foreign disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987).

Even where suspension is only for six months, reinstatement can be conditioned on compliance with sections (c) and (e) and the undergoing of a mental health examination by a licensed mental health professional. People v. Goens, 770 P.2d 1218 (Colo. 1989).

Attorney suspended for only six months may be required to petition for reinstatement under section (c). People v. Garrett, 802 P.2d 1082 (Colo. 1990).

Reinstatement after six-month suspension may be conditioned upon compliance with sections (c) and (d) and a showing that the attorney's ability to fulfill his responsibilities as a lawyer is not impaired by any depression from which he is suffering. People v. Sullivan, 802 P.2d 1091 (Colo. 1990).

Person not entitled to admission to bar not entitled to reinstatement. Where a disciplined respondent was not qualified to take the bar examination in the first instance, he will never be entitled to apply for reinstatement pursuant to this rule. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Rule permits court to negate automatic reinstatement provision in order of suspension for six months. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Fact that psychiatric condition contributed to violations of code of professional responsibility requires application to grievance committee for reinstatement, including presentation of evidence of psychiatric and emotional condition that indicates fitness to practice law. People v. Fleming, 716 P.2d 1090 (Colo. 1986).

Requiring that a psychiatric evaluation precede reinstatement after suspension of longer than one year is justified by respondent's erratic behavior with respect to his handling of cases on which discipline is based and his conduct during the disciplinary proceedings, including his threatening manner toward prosecutor. People v. Fagan, 745 P.2d 249 (Colo. 1987).

Reinstatement conditioned upon compliance with section (b), payment of costs and restitution, and filing reports and making payments to referral service. People v. Taylor, 799 P.2d 930 (Colo. 1990).

Reinstatement conditioned upon compliance with sections (c) and (d) and the payment of costs and restitution. People v. Anderson, 817 P.2d 1035 (Colo. 1991).

Reinstatement conditioned upon compliance with sections (c) and (d), full payment of restitution ordered in connection with felony tax convictions, and costs of disciplinary proceeding. People v. Mandell, 732 P.2d 813 (Colo. 1991).

Reinstatement conditioned upon compliance with sections (b) to (d), demonstration of mental and emotional fitness to practice, and the payment of costs. People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Holmes, 921 P.2d 44 (Colo. 1996).

Reinstatement conditioned upon compliance with sections (b) to (d). People v. Moore, 849 P.2d 40 (Colo. 1993); People v. Regan, 871 P.2d 1184 (Colo. 1994).

Reinstatement conditioned upon compliance with sections (b) to (d), completion of drug and alcohol treatment, and the payment of costs and restitution. People v. Driscoll, 830 P.2d 1019 (Colo. 1992).

Reinstatement conditioned upon compliance with sections (b) to (d) and payment of costs. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Readmission of attorney disbarred after conviction for bank fraud conditioned upon demonstrating rehabilitation by clear and convincing evidence, including whether he restored all amounts lost by the banks for which he is or was personally liable. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Reinstatement conditioned on proof by clear and convincing evidence of rehabilitation. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Reinstatement conditioned on participation in randomized alcohol monitoring program, completion of community service, and consultation with a practice monitor for attorney who proved by clear and convincing evidence that he has been rehabilitated, complied with applicable disciplinary orders and rules, and is fit to practice law. Kline v. People, 367 P.3d 116 (Colo. O.P.D.J. 2016).

Reinstatement of attorney denied for failure to prove by clear and convincing evidence substantial compliance with all applicable disciplinary orders, rehabilitation, or fitness to prac-

tice law. Essling v. People, 327 P.3d 904 (Colo. O.P.D.J. 2014).

Reinstatement conditioned upon compliance with sections (b) to (d) along with the conditions of reinstatement set forth in the finding of fact, conclusions and recommendation of the hearing board. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Reinstatement of attorney suspended for one year and one day conditioned upon attorney demonstrating what amount of harm client suffered as a result of his misconduct, that he made appropriate restitution to her for that harm, and that attorney is emotionally and psychologically able to practice law. People v. Davies, 926 P.2d 572 (Colo. 1996).

Complainant's specific averments refuting attorney-respondent's averments contained in the petition for reinstatement did not constitute affirmative defenses to the petition for reinstatement, thus shifting the burden of proof borne by attorney-respondent under C.R.C.P. 241.22(d) (now this rule) to the complainant. In re Price, 18 P.3d 185 (Colo. 2001).

It was appropriate to require an attorney to petition for reinstatement under this rule, even though his period of suspension for violating disciplinary rule did not exceed one year, where the extraordinary number of previous matters in which the attorney was cited for neglect showed the need for a demonstration that he had been rehabilitated. People v. C De Baca, 862 P.2d 273 (Colo. 1993); People v. Beecher, 350 P.3d 327 (Colo. O.P.D.J. 2015).

Applied in People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Goss, 646 P.2d 334 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Awenius, 653 P.2d 740 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Roehl, 655 P.2d 1381 (Colo. 1983); People v. Brackett, 667 P.2d 1357 (Colo. 1983); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Tucker, 676 P.2d 680 (Colo. 1983); People v. Baca, 691 P.2d 1136 (Colo. 1984).

Rule 251.30. Reinstatement after Transfer to Disability Inactive Status

(a) Reinstatement Upon Termination of Disability. An attorney who has been transferred to disability inactive status pursuant to C.R.C.P. 251.23 shall be entitled to petition for reinstatement at such time as the Supreme Court or the Presiding Disciplinary Judge may direct. The petition shall be filed with the Presiding Disciplinary Judge, and a copy shall be furnished to the Regulation Counsel. Such petition for reinstatement shall be granted upon a showing by clear and convincing evidence that the attorney's disability has been removed and that the attorney is competent to resume the practice of law.

Upon receipt of a petition for reinstatement from disability inactive status, the Presiding Disciplinary Judge may take or direct such action as he or she deems necessary or proper to determine whether the attorney is again competent to practice law, including but not limited to the issuance of an order for an examination of the attorney by qualified medical experts designated by the Presiding Disciplinary Judge.

In addition, the Presiding Disciplinary Judge may direct that the petitioner re-establish proof of competence and learning in law, including certification by the state board of law examiners of the petitioner's successful completion of the examination for admission to practice law. If the petitioner remains on disability inactive status for five years or longer, reinstatement shall be conditioned upon certification by the state board of law examiners of the petitioner's successful completion, within the previous twelve months, of the examination for admission to practice law and upon a showing by the petitioner of such other proof of professional competence as the Supreme Court or the Presiding Disciplinary Judge may require; provided, however, that filing a petition for reinstatement within five years of the effective date of the attorney's transfer to disability inactive status tolls the five-year period until such time as the Presiding Disciplinary Judge rules on the petition.

When an attorney has been transferred to disability inactive status by an order in accordance with C.R.C.P. 251.23 and thereafter has been judicially declared to be competent, the Presiding Disciplinary Judge may dispense with any further evidence of the attorney's return to competence and may direct that the attorney be reinstated upon such terms as are deemed proper and advisable; provided, however, that if a disciplinary proceeding conducted pursuant to these rules and pending against the petitioner was deferred upon the petitioner's transfer to disability inactive status, such proceeding shall be resumed and the petitioner shall not be reinstated pending the final disposition of such proceeding.

(b) Reinstatement Proceedings. The Presiding Disciplinary Judge may, in the Presiding Disciplinary Judge's discretion, order that reinstatement proceedings identical to those provided for by C.R.C.P. 251.29(d) be conducted.

(c) Compensation of Medical Experts. The Presiding Disciplinary Judge may fix the compensation to be paid to any medical expert appointed by the Presiding Disciplinary Judge pursuant to this rule. The Supreme Court may direct that such compensation be assessed as part of the costs of a proceeding held pursuant to this Rule and that it be paid as such in accordance with law.

(d) Waiver of Doctor-Patient Privilege. For the purposes of any proceedings conducted pursuant to this Rule, the filing of a petition for reinstatement by an attorney who has been transferred to disability inactive status shall constitute a waiver of any doctor-patient privilege between the attorney and any psychiatrist, psychologist, physician, treating professional, or other medical expert who has examined or treated the attorney in connection with the disability. By order of the Supreme Court the attorney may be required to disclose the name of every psychiatrist, psychologist, physician, treating professional, or other medical expert who has examined or treated the attorney in connection with the disability, and to furnish written consent for the disclosure by such persons of any information and records pertaining to such examination or treatment requested by the Supreme Court.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.23.

ANNOTATION

Attorney on disability inactive status must demonstrate by clear and convincing evidence that her alcohol-related disability has been removed and that she is once again competent to practice law before she may be reinstated. People v. Coulter, 950 P.2d 176 (Colo. 1998); Kline v. People, 367 P.3d 116 (Colo. O.P.D.J. 2016).

Rule 251.31. Access to Information Concerning Proceedings Under These Rules

(a) Availability of Information. Except as otherwise provided by these rules, all records, except (i) the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court, and (ii) the lists of clients and copies of client notices referred to in C.R.C.P. 251.28(d)(2), shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.

Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(b) Confidentiality. Before the filing and service of a complaint as provided in C.R.C.P. 251.14, the proceedings are confidential within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation under C.R.C.P 251.10 may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public;

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession; or

(5) A petition for immediate suspension has been filed pursuant to C.R.C.P. 251.8.

(c) Public Proceedings. When the committee determines that reasonable cause to believe that grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, or when a petition for reinstatement or readmission is filed, the proceeding is public except for:

(1) The deliberations of the Presiding Disciplinary Judge, the Hearing Board, or the Supreme Court; and,

(2) Information with respect to which a protective order has been issued.

(d) Proceedings Alleging Disability. In disability proceedings, all orders transferring an attorney to or from disability inactive status shall be matters of public record, but otherwise, disability proceedings shall be confidential and shall not be made public, except by order of the Supreme Court, the Presiding Disciplinary Judge, or a Hearing Board.

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

(f) Disclosure to Law Firms. When the Regulation Counsel obtains an order transferring the attorney to disability inactive status or immediately suspending the attorney, or is authorized to file a complaint as provided by C.R.C.P. 251.12, the attorney shall make written disclosure to the attorney's current firm and, if different, to the attorney's law firm at the time of the act or omission giving rise to the matter, of the fact that the order has been obtained or that a disciplinary proceeding as provided for in these rules has been commenced. The disclosures shall be made within 14 days of the date of the order or of the date the Regulation Counsel notified the attorney that a disciplinary proceeding has been commenced.

(g) Pending Investigations. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings pending with the Regulation Counsel or before the committee.

(h) Cases Dismissed. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings that have been dismissed.

(i) Private Admonitions. Any public proceeding in which a private admonition is imposed as provided by C.R.C.P. 251.6 shall be public, as follows: the fact that private admonition is imposed shall be public information, but the private admonition itself shall not be disclosed.

(j) Production of Records Pursuant to Subpoena. The Regulation Counsel, pursuant to a valid subpoena, shall not permit access to files or records or furnish documents that are confidential as provided by these rules unless the Supreme Court orders otherwise. When counsel is permitted to disclose confidential documents contained in files or confidential records, a reasonable fee may be charged for identification of and photocopying the documents and records.

(k) Response to False or Misleading Statement. If public statements that are false or misleading are made about any disciplinary or disability case, the Regulation Counsel may disclose any information necessary to correct the false or misleading statements.

(l) Request for Nonpublic Information. A request for nonpublic information other than that authorized for disclosure under subsection (b) of this Rule shall be denied unless the request is from:

(1) An agency authorized to investigate the qualifications of persons for admission to practice law;

(2) An agency authorized to investigate the qualifications of persons for government employment;

(3) An attorney discipline enforcement agency;

(4) A criminal justice agency; or,

(5) An agency authorized to investigate the qualifications of judicial candidates. If a judicial nominating commission of the State of Colorado requests the information it shall be furnished promptly and the Regulation Counsel shall give written notice to the attorney that specified confidential information has been so disclosed.

(m) Notice to the Attorney. Except as provided in subsection (l)(5) of this Rule, if the Regulation Counsel is permitted to provide nonpublic information requested, and if the attorney has not signed a waiver permitting the requesting agency to obtain nonpublic information, the attorney shall be notified in writing at his or her last known address of that information which has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency. The notice shall advise the attorney that the information shall be released at the end of 21 days following mailing of the notice unless the attorney objects to the disclosure. If the attorney timely objects to the disclosure, the information shall remain confidential unless the requesting agency obtains an order from the Supreme Court requiring its release.

(n) Release Without Notice. If an agency otherwise authorized by section (l) of this rule has not obtained a waiver from the attorney to obtain nonpublic information, and requests that the information be released without giving notice to the attorney, the requesting agency shall certify that:

(1) The request is made in furtherance of an ongoing investigation into misconduct by the attorney;

(2) The information is essential to that investigation; and

(3) Disclosure of the existence of the investigation to the attorney would seriously prejudice that investigation.

(o) Notice to National Regulatory Data Bank. The Regulation Counsel shall transmit notice of all public discipline imposed against an attorney, transfers to or from disability inactive status, and reinstatements to the National Regulatory Data Bank maintained by the American Bar Association.

(p) Duty of Officials and Employees. All officials and employees within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court shall conduct themselves so as to maintain the confidentiality mandated by this rule.

(q) Evidence of Crime. Nothing in these rules except for the admission of past misconduct protected by C.R.C.P. 251.13(i) shall be construed to preclude any person from giving information or testimony to authorities authorized to investigate criminal activity.

(r) For matters that are confidential under subsection (b) of this rule and that involve allegations of sexual harassment, Regulation Counsel's investigation records regarding the sexual harassment allegations, not otherwise privileged or protected by court rule or court order, shall be available to the complainant and respondent, subject to the provisions of C.R.C.P. 251.33.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a) amended and adopted October 6, 2005, effective January 1, 2006; (b) amended and effective and committee comment added and effective February 5, 2009; (f) and (m) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (r) added and effective January 24, 2019.

Editor's note: This rule was previously numbered as 241.24.

COMMITTEE COMMENT

The confidentiality rule set forth in C.R.C.P. 251.31(b) seeks to strike a balance between the protection of attorneys against publicity predicated upon unfounded accusations and the protection of clients and prospective clients and the effective administration of justice from harm caused by attorneys who are unwilling or unable to fulfill their professional obligations. C.R.C.P. 251.31(b) also recognizes that restrictions on confidentiality no longer serve their purpose when allegations that would ordinarily be confidential have become generally known

through disclosure in the public record, publicity or otherwise.

The Regulation Counsel frequently receives inquiries from judges, clients or prospective clients and the media asking if an attorney is the subject of a pending disciplinary investigation. Ordinarily, this rule prohibits the Regulation Counsel from providing information about a pending investigation or even confirming that an investigation is pending. C.R.C.P. 251.31(b) sets forth exceptions when the Regulation Counsel may reveal the pendency, subject matter, and status of an investigation under C.R.C.P. 251.10.

Certain exceptions are clear. For example, when the attorney has waived confidentiality or when the proceeding against the attorney is based on a criminal conviction, discipline imposed on the attorney in another jurisdiction, or a petition for immediate suspension filed by the Regulation Counsel against the attorney under C.R.C.P. 251.8.

Other exceptions require the Regulation Counsel to exercise discretion. C.R.C.P. 251.31(b)(3) requires the Regulation Counsel to determine whether otherwise confidential allegations against an attorney have become generally known. Factors that the Regulation Counsel should consider in these circumstances include but are not limited to the nature and extent of media coverage, the nature and extent of inquiries from the media and the public, the nature and status of any related judicial proceedings, the number of people believed to have knowledge of the allegations, and the seriousness of the allegations.

Another important exception requiring the Regulation Counsel to exercise discretion is C.R.C.P. 251.31(b)(4), which allows disclosure when there is a need to notify another person or organization in order to protect the public, the administration of justice, or the legal profession. In determining whether a need to notify exists, the Regulation Counsel should consider factors including but not limited to the nature and seriousness of the conduct under investigation, the attorney's prior disciplinary history and whether the attorney has previously been disciplined for conduct similar to the alleged conduct under investigation, and the potential harm to a client or prospective client, the public or the judicial system. In those instances in which the Regulation Counsel determines that disclosure is permitted based on C.R.C.P. 251.31(b)(4) alone, the Regulation Counsel is authorized to disclose the pendency, subject matter, and status of an investigation in response to inquiry, but also to disclose this information affirmatively to those persons having a need to know the information in order to avoid potential harm.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Protective order issued by presiding disciplinary judge (PDJ) for "good cause" shown under section (e) does not offend the first amendment. First, section (e) furthers substantial government interest unrelated to the suppression of speech. Specifically, the government has substantial interests in preventing attorney from further abusing the discovery processes and in protecting the judge's privacy. Second, the protective order did not limit attorney's first amendment freedoms to an extent greater than necessary to protect the judge's privacy interests. The protective order prevented attorney, as a party to the investigative proceedings, from disseminating information obtained from federal bureau of investigation (FBI) documents only during attorney regulation counsel's precomplaint stage. In re Attorney E, 78 P.3d 300 (Colo. 2003).

Protective order issued by PDJ under section (e) must be modified because it unduly hinders both attorney regulation counsel's and attorney's ability to further their cases. Both parties to the investigative proceedings, attorney regulation counsel and attorney, must be able to use the documents in a limited way to prosecute and defend their respective cases even though good cause exists to protect the pertinent privacy interests. Given the implications of a privacy order that prevents both parties from making any use of the relevant documents, PDJ must modify protective order to allow limited use of FBI documents by both parties. In re Attorney E, 78 P.3d 300 (Colo. 2003).

Under this rule, the fact that a hearing board has imposed a particular sanction after a public hearing is a matter of public record. In re Attorney F, 2012 CO 57, 285 P.3d 322.

Suppressing a hearing board's disposition in a case pending resolution of an appeal would impair the transparency and public accountability in the disciplinary system. In re Attorney F, 2012 CO 57, 285 P.3d 322.

PDJ did not err in denying attorney's motion to compel removal of disciplinary information from website. PDJ did not err by denying attorney's motion to compel the office of attorney regulation counsel to remove from its website information disclosing hearing board's determination that a public censure was warranted in attorney's case. In re Attorney F, 2012 CO 57, 285 P.3d 322.

District attorney may obtain access to grievance committee's files provided that fol-

lowing requirements are met: first, the district attorney's request must be made pursuant to an ongoing criminal investigation; and second, the prosecution's request must set forth the evidence or information required which must relate to the charges being investigated. People v. Pacheco, 199 Colo. 470, 618 P.2d 1102 (1980); People v. Smith, 773 P.2d 522 (Colo. 1989).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of the disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Reference to confidential disciplinary proceedings in civil action constituted violation and, in conjunction with violation of other disciplinary rules, warranted suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 251.32. General Provisions

(a) Quorum. A majority of the members of the committee or a Hearing Board shall constitute a quorum of such body, and the action of a majority of those present and comprising such a quorum shall be the action of the committee or Hearing Board.

(b) Notice and Service of Process. Except as may be otherwise provided by these Rules or by order of the Supreme Court, notice shall be in writing, and the giving of notice and service of process shall be sufficient when made either personally upon the attorney or by certified mail, sent to the attorney at both the attorney's last known address as provided by the attorney pursuant to C.R.C.P. 227 or such later address as may be known to the person effecting service.

If the attorney is not licensed to practice law in this state but was specially admitted by a court of this state for a particular proceeding, notice and service shall be effected as provided in this section, and if service is by certified mail, it shall be made to the attorney's last known address.

(c) Number of Copies Filed. Unless otherwise provided in these rules, in all cases where a party files documents with the Presiding Disciplinary Judge or a Hearing Board, the committee, or the Regulation Counsel, an original and three copies must be filed. When documents are filed with the Supreme Court, an original and ten copies must be filed.

(d) Costs.

(1) Disciplinary Proceedings. In all cases where discipline is imposed by the Hearing Board, it may assess against the respondent all or any part of the costs incurred in connection with the disciplinary proceedings. If the Supreme Court imposes discipline, the Supreme Court may also assess against the respondent all or any part of the costs of the proceedings. If the committee imposes discipline as provided by these rules, it may also assess against the respondent all or any part of the costs of the proceedings.

(2) Reinstatement and Readmission Proceedings After Discipline. An attorney who petitions for reinstatement from a suspension or readmission after disbarment must bear the cost of such proceedings, as required by C.R.C.P. 251.29(i).

(3) Disability Proceedings. The Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court, in its discretion, may order the attorney to bear the cost of all or any part of the disability proceedings, including the cost of any examinations ordered.

(4) Reinstatement Proceedings After Transfer to Disability Inactive Status. The Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court, in its discretion, may order an attorney who petitions for reinstatement after transfer to disability inactive status to pay the cost of all or any part of the proceedings conducted pursuant to C.R.C.P. 251.30, including the cost of any examinations ordered.

(e) Immunity. Testimony given in disciplinary proceedings or communications relating to attorney misconduct, lack of professionalism or disability made to the Supreme Court, the committee, the Regulation Counsel, the Presiding Disciplinary Judge, members of the Hearing Board, mediators acting pursuant to C.R.C.P. 251.3(c)(11), or monitors enlisted to assist with probation or diversion, as authorized by C.R.C.P. 251.13, shall be

absolutely privileged and no lawsuit shall be predicated thereon. If the matter is confidential as provided in these rules, and if the person who testified or communicated does not maintain confidentiality, then the testimony or communications shall be qualifiedly privileged, such that an action may lie against the person whose testimony or communications were made in bad faith or with reckless disregard of their truth or falsity. Persons performing official duties under the provisions of this Chapter, including but not limited to the Presiding Disciplinary Judge and staff; members of the Hearing Board; the committee; the Regulation Counsel and staff; mediators appointed by the Supreme Court pursuant to C.R.C.P. 251.3(c)(11); monitors enlisted to assist with diversion as authorized by C.R.C.P. 251.13; members of the Bar working in connection with disciplinary proceedings or under the direction of the Presiding Disciplinary Judge, or the committee; and health care professionals working in connection with disciplinary proceedings shall be immune from suit for all conduct in the course of their official duties.

(f) Termination of Proceedings. No disciplinary or disability proceeding may be terminated except as provided by these Rules.

(g) Pending Litigation. All disciplinary proceedings which involve complaints with material allegations substantially similar to the material allegations of a criminal prosecution pending against the respondent may in the discretion of the committee, the Presiding Disciplinary Judge, or a Hearing Board be deferred until the conclusion of such prosecution.

Disciplinary proceedings involving complaints with material allegations which are substantially similar to those made against the respondent in pending civil litigation may in the discretion of the committee, the Presiding Disciplinary Judge, or a Hearing Board be deferred until the conclusion of such litigation. If the disciplinary proceeding is deferred pending the conclusion of civil litigation, the respondent shall make all reasonable efforts to obtain a prompt trial and final disposition of the pending litigation. If the respondent fails to take steps to assure a prompt disposition of the civil litigation, the disciplinary proceeding may be immediately resumed.

The acquittal of a respondent on criminal charges or a verdict or judgment in the respondent's favor in civil litigation involving substantially similar material allegations shall not alone justify the termination of disciplinary proceedings pending against the respondent upon the same material allegations.

(h) Protective Appointment of Counsel. When an attorney has been transferred to disability inactive status; or when an attorney has disappeared; or when an attorney has died; or when an attorney has been suspended or disbarred and there is evidence that the attorney has not complied with the provisions of C.R.C.P. 251.28, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is known to exist, the chief judge of any judicial district in which the attorney maintained his office, upon the request of the Regulation Counsel, shall appoint legal counsel to inventory the files of the lawyer in question and to take any steps necessary to protect the interests of the attorney in question and the attorney's clients. Counsel appointed pursuant to this Rule shall not disclose any information contained in the files so inventoried without the consent of the client to whom such files relate, except as necessary to carry out the order of the court that appointed the counsel to make such inventory.

(i) Statute of Limitations. A request for investigation against an attorney shall be filed within five years of the time that the complaining witness discovers or reasonably should have discovered the misconduct. There shall be no statute of limitations for misconduct alleging fraud, conversion, or conviction of a serious crime, or for an offense the discovery of which has been prevented by concealment by the attorney.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.25.

ANNOTATION

Law reviews. For note, ''Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility'', see 50 Den. L.J. 207 (1973).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Immunity for persons seeking attorney discipline does not violate right to access court. Attorney disbarment for prosecution of individuals seeking discipline is appropriate and does not violate civil rights of attorney. In re Smith, 989 P.2d 165 (Colo. 1999).

Constructive service is appropriate where attorney failed to provide an address and actively concealed his whereabouts. People v. Richards, 748 P.2d 341 (Colo. 1987).

Attorney who claimed costs and damages for complaint against him subject to public censure. Where attorney violated this rule by claiming costs and damages for defending grievance filed against him and violated other disciplinary rules, public censure is appropriate. People v. Dalton, 840 P.2d 351 (Colo. 1992).

Reference to confidential disciplinary proceedings in civil action constituted violation and, in conjunction with violation of other disciplinary rules, warranted suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

The assessment of the entire amount of the complainant's expert witness fees against a respondent is appropriate even where the complainant's expert testified to matters other than the injury the respondent's misconduct caused if such testimony was relevant. In re Cimino, 3 P.3d 398 (Colo. 2000).

Applied in People v. Harfmann, 638 P.2d 745 (Colo. 1981) (decided under former C.R.C.P. 259); People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 251.33. Expunction of Records

(a) Expunction - Self-Executing. Except for records relating to proceedings that have become public pursuant to C.R.C.P. 251.31, all records relating to proceedings conducted pursuant to these Rules, which proceedings were dismissed, shall be expunged from the files of the committee, the Presiding Disciplinary Judge, and Regulation Counsel three years after the end of the year in which the dismissal occurred.

(b) Definition. The terms ''expunge'' and ''expunction'' shall mean the destruction of all records or other evidence of any type, including, but not limited to, the request for investigation, the response, Investigator's notes, and the report of investigation.

(c) Notice to Respondent. If proceedings conducted pursuant to these Rules (or their predecessor) were commenced, the attorney in question shall be given prompt notice of the expunction.

(d) Effect of Expunction. After expunction, the proceedings shall be deemed never to have occurred. Upon either general or specific inquiry concerning the existence of proceedings which have been expunged, the committee or the Regulation Counsel shall respond by stating that no record of the proceedings exists. The attorney in question may properly respond to any general inquiry about proceedings which have been expunged by stating that no record of the proceedings exists. The attorney in question may properly respond to any inquiry requiring reference to a specific proceeding which has been expunged by stating only that the proceeding was dismissed and that the record of the proceeding was expunged pursuant to this Rule. After a response as provided in this Rule is given to an inquirer, no further response to an inquiry into the nature or scope of the proceedings which have been expunged need be made.

(e) Retention of Records. Upon written application to the committee, for good cause and with written notice to the attorney in question and opportunity to such attorney to be heard, the Regulation Counsel may request that records which would otherwise be expunged under this Rule be retained for such additional period of time not to exceed three years as the committee deems appropriate. The Regulation Counsel may seek further extensions of the period for which retention of the records is authorized whenever a previous application has been granted.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.26.

Rule 251.34. Advisory Committee

(a) Advisory Committee. The Supreme Court Advisory Committee is hereby established. The Advisory Committee shall serve as a permanent committee of the Supreme Court.

(1) Members. The Advisory Committee shall be composed of the Chair and Vice-Chair of the Attorney Regulation Committee. Two Supreme Court justices who serve as liaison to the attorney regulation system, eight members of the Bar, and a member of the public shall also serve as members of the Advisory Committee. The membership shall include one member from the Colorado Bar Association's Ethics Committee, one Respondent Bar member of the Colorado Bar Association's Attorney Regulation Policy Committee, and one member of the Hearing Board pool. Diversity shall be a consideration in making the appointments.

The members of the Advisory Committee shall serve at the pleasure of the Supreme Court and may be dismissed from the Advisory Committee at any time by order of the Supreme Court. A member of the Advisory Committee may resign at any time.

(2) Vacancy. In the event of a vacancy on the Advisory Committee, the Supreme Court shall fill the vacancy to serve at the pleasure of the Supreme Court.

(3) Chair. The court shall appoint a member of the Advisory Committee to serve as its chair. The chair shall exercise overall supervisory control of the Advisory Committee.

(4) Reimbursement of Advisory Committee Members. The members of the Advisory Committee shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Powers and Duties of the Advisory Committee. The Advisory Committee shall be authorized and empowered to act in accordance with these Rules and to:

(1) Assist the Supreme Court in making appointments as described in these Rules;

(2) Oversee the management committee in the coordination of administrative matters within all programs of the attorney regulation system. The management committee shall be composed of the Clerk of the Supreme Court, who shall serve as its chair, the Regulation Counsel, and the Presiding Disciplinary Judge. The management committee's functions are limited to considering administrative matters;

(3) Review the productivity, effectiveness, and efficiency of the Supreme Court's attorney regulation system including that of the Presiding Disciplinary Judge and peer assistance programs and report its findings to the Supreme Court;

(4) Review the resources of the system for the purpose of making recommendations to the Supreme Court;

(5) Periodically report to the Supreme Court on the operation of the Advisory Committee;

(6) Recommend to the Supreme Court proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings;

(7) Assist the Supreme Court in such matters as the court may direct; and

(8) Repealed.

(9) Select one or more health assistance programs as designated providers.

To be eligible for designation by the Advisory Committee, an attorney's health assistance program shall provide for the education of attorneys with respect to the recognition and prevention of physical, emotional, and psychological problems and provide for intervention when necessary; offer assistance to an attorney in identifying physical, emotional, or psychological problems; evaluate the extent of physical, emotional, or psychological problems and refer the attorney for appropriate treatment; monitor the status of an attorney who has been referred for treatment; provide counseling and support for the attorney referred for treatment; agree to receive referrals from the Advisory Committee or the Regulation Counsel; and agree to make their services available to all active licensed Colorado attorneys.

Nothing in this section or section 9.5 shall be construed to create any liability on the Advisory Committee or the Supreme Court for the actions of the Advisory Committee in funding assistance programs, and no civil action may be brought or maintained against the committee or the Supreme Court for an injury alleged to have been the result of the

activities of any committee-selected assistance program or court approved lawyers' peer assistance program, or the result of an act or omission of an attorney participating in or referred by a committee-selected assistance program.

(9.5) Make recommendations concerning approval of lawyers' peer assistance program.

A. Any lawyers' peer assistance program that wishes to provide services to Colorado lawyers and have protection from the reporting requirements of Colo. RPC 8.3, must be approved by the Colorado Supreme Court. To request such approval, a description of the program must be submitted to the Advisory Committee who shall then review the program and make a recommendation to the Colorado Supreme Court as to approval.

B. The description shall contain the following information:

i. The type of organization, e.g. corporation, limited liability company, etc.;

ii. The mission statement for the program;

iii. The funding for the program;

iv. A list of the volunteers and/or paid employees, together with their qualifications and backgrounds, working for or together with the program; and,

v. An explanation of the type and frequency of training for the volunteers and/or paid employees.

C. Approval of a lawyer peer assistance program is for a period of two years subject to revocation at any time by the Colorado Supreme Court. In order to be reapproved, the program must file a request for renewal with the Clerk of the Colorado Supreme Court, containing the information listed in subparagraph B, and explain any changes that occurred in the program since its initial approval by the Colorado Supreme Court. The Clerk shall then forward the request for renewal to the Advisory Committee for recommendations to the Colorado Supreme Court. Unless renewed by the Colorado Supreme Court at the conclusion of the two years, the program shall lose its approved status.

(10) Adopt such practices as may from time to time become necessary to govern the internal operation of the Advisory Committee as approved by the Supreme Court.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (b)(7)-(b)(9) amended and adopted May 13, 1999, effective July 1, 1999; entire rule amended and effective September 1, 2000; (b)(9) corrected January 8, 2001, effective September 12, 2000; entire rule amended and adopted November 22, 2000, effective January 1, 2001; (b)(8) repealed and adopted and (b)(9) amended and adopted June 7, 2001, effective July 1, 2001; (b)(9) amended and adopted and (b)(9.5) added and adopted June 19, 2003, effective July 1, 2003; (a)(1) amended and adopted September 30, 2004, effective January 1, 2005.

Rule 252. Colorado Rules of Procedure Regarding Attorneys' Fund for Client Protection

Rule 252.1. Purpose and Scope

The purpose of the Colorado Attorneys' Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by mitigating losses caused by the dishonest conduct of attorneys admitted and licensed to practice law in the courts of this state occurring in the course of attorney-client or court-appointed fiduciary relationship between the attorney and the claimant.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Editor's note: Letter designation "(a)" removed on revision (2018).

ANNOTATION

Law reviews. For article, "The Colorado Attorneys' Fund for Client Protection", see 32 Colo. Law. 27 (November 2003).

Rule 252.2. Establishment

(a) There is established the Colorado Attorneys' Fund for Client Protection to mitigate claimants for losses caused by dishonest conduct committed by attorneys admitted to practice in this state.

(b) There is established, under the supervision of the Supreme Court of Colorado, the Colorado Attorneys' Fund for Client Protection Board of Trustees, which shall receive, hold, manage and disburse from the fund such funds as may from time to time be allocated to the fund.

(c) These Rules shall be effective for claims filed with the board on or after July 1, 1999, and the Board shall not pay claims for losses incurred as a result of dishonest conduct committed prior thereto.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.3. Funding

(a) The Supreme Court shall provide for funding by the attorneys of the state through the attorney registration fee established in C.R.C.P. 227(A)(1)(a) and (c).

(b) An attorney whose dishonest conduct has resulted in any payment by the fund to a claimant shall make restitution to the fund including interest and the expense incurred by the fund in processing the claim and pursuing restitution. An attorney's failure to make full restitution may be cause for additional discipline or denial of an application for reinstatement or readmission.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.4. Funds

All money or other assets of the fund shall constitute a trust and shall be held in the name of the fund, subject to the direction of the Board.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.5. Composition and Officers of the Board

(a) The Board of Trustees shall consist of five member Trustees, a Chair and a Vice Chair.

(1) The Board shall be composed of five attorneys and two public members appointed by the Supreme Court. Diversity shall be a consideration in making the appointment.

(2) Trustees may serve one term of seven years but may be dismissed from the Board at any time by order of the Supreme Court.

(3) The terms of the Trustees shall be staggered to provide, so far as possible, for expiration each year of the term of one Trustee. Trustees may resign at any time. In the event of a vacancy on the Board, the Supreme Court shall appoint a successor to serve the remainder of the unexpired term.

(4) The Chair and Vice-Chair shall be members of the Bar of Colorado. The Supreme Court shall appoint the Chair and Vice-Chair. The Chair and Vice-Chair may be appointed to a second seven-year term.

(b) Trustees shall serve without compensation, but shall be reimbursed for actual and necessary expenses incurred in the discharge of their duties.

Source: Added and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective January 24, 2019.

Rule 252.6. Board Meetings

(a) The Board shall meet as frequently as necessary to conduct the business of the fund and to process claims in a timely manner.

(b) The chairperson shall call a meeting at any reasonable time or upon the request of at least two trustees.

(c) A quorum for any meeting of the Board shall be four trustees.

(d) Minutes of meetings shall be taken and permanently maintained by the secretary.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.7. Duties and Responsibilities of the Board

(a) The Board shall have the following duties and responsibilities:

(1) To receive, and in its sole discretion evaluate, investigate, determine and pay claims;

(2) To promulgate rules of procedure not inconsistent with these rules;

(3) In its discretion, if warranted and prudent, to fix a maximum amount of payment per claim payable from the fund and/or of the aggregate amount which may be paid because of the dishonest conduct of any one attorney;

(4) To solicit and receive funds from donations and other sources in addition to annual attorney registration fees;

(5) To invest prudently such portions of the funds as may not be needed currently to pay losses;

(6) To provide a full report annually to the Supreme Court and to make other reports as necessary;

(7) To publicize its activities to the public and the Bar;

(8) To retain and compensate consultants, actuaries, agents, legal counsel and other persons as necessary;

(9) To pursue claims for restitution to which the Fund is entitled;

(10) To engage in studies and programs for client protection and prevention of dishonest conduct by attorneys; and

(11) To perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the fund.

(b) Regulation Counsel shall assist the Board in the effective and efficient performance of its functions, including but not limited to investigation of claims.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.8. Conflict of Interest

(a) A Trustee who has or has had an attorney-client relationship or a financial relationship with a claimant or attorney who is the subject of a claim shall not participate in the investigation or adjudication of a claim involving that claimant or attorney.

(b) A Trustee with a past or present relationship, other than as provided in section (a), with a claimant or the attorney who is the subject of the claim, shall either voluntarily abstain from participating or disclose such relationship to the Board and, if the Board deems appropriate, that Trustee shall not participate in any proceeding relating to such claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.9. Immunity

The Trustees, employees and agents of the Board shall be absolutely immune from civil liability for all acts performed in the course of their official duties. Absolute immunity shall also extend to claimants and attorneys who assist claimants for all communications to the fund.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.10. Eligible Claims

(a) The loss must be caused by the dishonest conduct of the attorney or, in such circumstance as described below in the death or disability of the attorney, and shall have arisen out of and by reason of an attorney-client relationship or a court-appointed fiduciary relationship between the attorney and the claimant.

(b) The claim shall have been filed no later than three years after the claimant knew or should have known of the dishonest conduct of the attorney.

(c) As used in these rules, ''dishonest conduct'' means one or more wrongful acts committed by an attorney in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to:

(1) Refusal to refund unearned fees received in advance as required by Rule 1.16 of the Colorado Rules of Professional Conduct; and

(2) The borrowing of money from a client without intention to repay it, or with disregard of the attorney's inability or reasonably anticipated inability to repay it.

(d) Except as provided by section (e) of this rule, the following losses shall not be eligible:

(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of attorney(s) causing the losses;

(2) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;

(3) Losses incurred by any financial institution which are recoverable under a ''banker's blanket bond'' or similar commonly available insurance or surety contract;

(4) Losses incurred by any business entity controlled by the attorney;

(5) Losses incurred by any governmental entity or agency;

(6) Losses arising from the activities of an attorney not having an office or residence in Colorado where those activities do not have substantial contacts with Colorado; and,

(7) Interest on the loss or any type of consequential damages or punitive damages or costs.

(e) In cases of extreme hardship or special and unusual circumstances, the Board may, in its discretion, recognize a claim which would otherwise be excluded under these rules. The Board may also pay a claim when client funds are no longer in the attorney's trust account and, due to the attorney's death or court ordered transfer to disability inactive status, the Board is unable to determine whether the attorney earned the funds or engaged in dishonesty.

(f) In cases in which it appears that there will be unjust enrichment or multiple recovery or the claimant unreasonably or knowingly contributed to the loss, the Board may, in its discretion, deny the claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999; (a), (e), and (f) amended and effective October 4, 2018.

Rule 252.11. Procedures for Filing Claims

(a) The Board shall prepare and approve a form for claiming reimbursement and shall designate the place and manner for filing a claim.

(b) The claimant must agree to cooperate with the Board in reference to the claim and in reference to civil actions which may be brought in the name of the Board pursuant to a subrogation and assignment clause which shall also be contained within the claim.

(c) The claimant shall have the responsibility to complete the claim form and provide satisfactory evidence to support the claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.12. Procedures for Processing Claims

(a) Whenever it appears that a claim is not eligible for reimbursement pursuant to these rules, the claimant shall be advised of the reasons why the claim may not be eligible

for reimbursement, and that, unless additional facts to support eligibility are submitted to the Fund, the claim file shall be closed.

(b) A certified copy of an order disciplining an attorney for the same dishonest act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability therefor, shall be conclusive evidence that the attorney committed such dishonest act or conduct.

(c) Regulation Counsel shall be promptly notified of the claim and requested to furnish a report of its investigation, if any, on the matter to the Board. The Regulation Counsel shall allow the Fund's representatives access to its records during an investigation of a claim. The Board shall evaluate whether the investigation is complete and determine whether the Board should conduct additional investigation or await the conclusion of any disciplinary investigation or proceeding involving the same act or conduct that is alleged in the claim.

(d) The Board may conduct its own investigation when it deems it appropriate and may seek and obtain the assistance of the Regulation Counsel, the Attorney Regulation Committee, the Board of Law Examiners, the Board of Continuing Legal Education, and the Attorney Registration Office, irrespective of any confidentiality requirements of those offices, subject to rule 252.15.

(e) The Board or an individual trustee or counsel designated to act on behalf of the trustees, upon determining that any person has knowledge or is in possession or custody of books, papers, documents or other objects relevant to the disposition of a claim, may issue a subpoena requiring such person to appear and testify or to produce such books, papers, documents or other objects before the Board or counsel designated to act on behalf of the trustees, at the time and place specified therein. Subpoenas shall be subject to the provisions of C.R.C.P. 45.

(f) If any person, without adequate excuse, shall fail to obey a subpoena, the Board or an individual trustee or counsel designated to act on their behalf, may file with the Supreme Court a verified statement setting forth the facts establishing such disobedience, and the Court may then, in its discretion, institute contempt proceedings. If such person is found guilty of contempt, the Court may compel payment of the costs of the contempt proceedings to be taxed by the Court.

(g) If, by the completion of the investigation, the attorney or the attorney's representative has not been notified of the claim and given an opportunity to respond to the claim, a copy of the claim shall be served upon the attorney, or the attorney's representative. The attorney or representative shall have 21 days in which to respond.

(h) The Board may request that testimony be presented to complete the record. Upon request, the claimant or attorney, or their representatives, will be given an opportunity to be heard.

(i) The Board may make a finding of dishonest conduct for purposes of adjudicating a claim. Such a determination is not a finding of dishonest conduct for purposes of professional discipline or other purposes.

(j) When the record is complete, the claim shall be determined on the basis of all available evidence, and notice shall be given to the claimant and the attorney of the Board's determination and the reasons therefor. The approval or denial of a claim shall require the affirmative votes of at least four trustees. Payment of a claim may be made in a lump sum or in installments in the discretion of the Board.

(k) Any proceeding upon a claim need not be conducted according to technical rules relating to evidence, procedure and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court proceedings.

(l) The Board shall determine the order and manner of payment and pay all approved claims, but unless the Board directs otherwise, no claim should be approved during the pendency of a disciplinary proceeding involving the same act or conduct that is alleged in the claim if the attorney disputes the pertinent allegations.

(m) Both the claimant and the attorney shall be advised of the status of the Board's consideration of the claim and shall be informed of the final determination.

(n) The claimant may request in writing reconsideration within 35 days of the denial or determination of the amount of a claim. If the claimant fails to make a request or the request is denied, the decision of the Board is final.

Source: Added and adopted June 25, 1998, effective January 1, 1999; (g) and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 252.13. Reimbursement from Fund is a Matter of Grace

No person shall have the legal right to payment from the fund whether as claimant, third-party beneficiary, or otherwise. The decisions and actions of the Board of Trustees are not reviewable on any ground in any court or other tribunal.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.14. Restitution and Subrogation

(a) An attorney whose dishonest conduct results in payment to a claimant shall be liable to the Fund for restitution; and the Board may bring such action as it deems advisable to enforce such obligation, including costs of such action.

(b) As a condition of payment, a claimant shall be required to provide the fund with a transfer of the claimant's rights up to the amount paid by the Fund against the attorney, the attorney's legal representative, estate or assigns; and of the claimant's rights against any third party or entity who may be liable for the claimant's loss.

(c) Upon commencement of an action by the Board as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unpaid losses.

(d) In the event that the claimant commences an action to recover unpaid losses against the attorney or another entity who may be liable for the claimant's loss, the claimant shall be required to notify the Board of such action.

(e) The claimant shall be required to agree to cooperate in all efforts that the Board undertakes to achieve restitution for the Fund.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

ANNOTATION

Ratification of unauthorized action. Claimant's acceptance of moneys from the fund does not constitute ratification of his attorney's unauthorized settlement with a third party if claimant was not aware of the consequences of accepting the fund moneys. Siener v. Zeff, 194 P.3d 467 (Colo. App. 2008).

Rule 252.15. Confidentiality

(a) The Board and its agents shall keep claims, proceedings and reports involving claims for reimbursement confidential until the Board authorizes reimbursement to the claimant, except as provided below. After payment of the reimbursement, the Board shall publicize the nature of the claim, the amount of reimbursement, and the name of the attorney. The name and the address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant.

(b) This rule shall not be construed to deny access to relevant information by the Regulation Counsel or other professional discipline agencies or other law enforcement authorities as the Board shall authorize, or the release of statistical information which does not disclose the identity of the attorney or the claimant.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.16. Compensation for Representing Claimants

No attorney shall accept any payment for prosecuting a claim to the Fund on behalf of a claimant, unless such payment has been approved by the Board.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 254. Colorado Lawyer Assistance Program

(1) Colorado Lawyer Assistance Program. The Colorado Supreme Court hereby establishes an independent Colorado Lawyer Assistance Program (''COLAP''). The goal of such program is:

(a) To protect the interests of clients, litigants and the general public from harm caused by impaired attorneys or judges;

(b) To assist impaired members of the legal profession to begin and continue recovery; and

(c) To educate the bench, bar and law schools to the causes of and remedies for impairments affecting members of the legal profession. Such program and its director shall be under the supervision of the Supreme Court Advisory Committee (''Advisory Committee'') as set forth in C.R.C.P. 251.34(b)(3).

(2) COLAP Services. The Attorney Assistance Program shall provide the following services:

(a) Immediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice;

(b) Planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and, to convey an understanding of appropriate ways of interacting with affected individuals;

(c) Investigation, planning and participation in interventions with members of the legal profession in need of assistance;

(d) Aftercare services upon request, by order, or under contract that may include the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings; and assistance in obtaining a primary care physician or local peer counselor; and

(e) Monitoring services that may include the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve step meeting attendance; providing documentation of compliance; and providing such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program.

(3) Director. The Advisory Committee shall recruit, retain, and supervise a COLAP Director. The Director shall serve at the pleasure of the Advisory Committee as an at-will employee. The Advisory Committee shall set the Director's annual salary subject to periodic review. The Director shall have the same employee benefits as the employees of the Colorado Judicial Department. The Director shall coordinate the annual budget of COLAP with the Advisory Committee. A portion of the annual attorney registration fee shall be used to establish and administer COLAP.

(4) Qualifications. The director shall have sufficient experience and training to enable the director to identify and assist impaired members of the legal profession.

(5) Powers and Duties. The COLAP Director shall act in accordance with these Rules and shall:

(a) Provide initial response to help line calls.

(b) Help Attorneys, judges, law firms, courts and others to identify and intervene with impaired members of the legal profession.

(c) Help members of the legal profession to secure expert counseling and treatment for chemical dependency and other illnesses, maintaining current information on available treatment services, both those that are available without charge as well as paid services.

(d) Establish and maintain regular contact with other bar associations, agencies and committees that serve either as sources of referral or resources in providing help.

(e) Establish and oversee monitoring services with respect to recovery of members of the legal profession for whom monitoring is appropriate.

(f) Plan and deliver educational programs for the legal community with respect to all sources of potential impairment as well as treatment and preventative measures.

(h) Perform such other duties as the Supreme Court or Advisory Committee may direct.

(6) Confidentiality.

(a) Information and actions taken by COLAP shall be privileged and held in strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of COLAP, unless such disclosure is authorized by the member of the legal profession to whom it relates. Such information and actions shall be excluded as evidence in any complaint, investigation or proceeding before the Supreme Court Attorney Regulation Committee, the Presiding Disciplinary Judge of the Supreme Court, or the Colorado Supreme Court.

(b) COLAP employees, and volunteers recruited under this rule shall be deemed to be participating in a lawyer's peer assistance program approved by the Colorado Supreme Court as provided in Colo. RPC 8.3(c).

(7) Immunity.

(a) Any person reporting information to COLAP employees or agents including volunteers recruited under rule 254 shall be entitled to the immunities and presumptions under C.R.C.P. 251.32(e).

(b) COLAP members, employees and agents including volunteers recruited under rule 254 shall be entitled to the immunities and presumptions under C.R.C.P. 251.32(e).

(c) COLAP members, employees and agents including volunteers recruited under rule are relieved of the duty of disclosure of information to authorities as imposed by Rule 8.3(a).

Source: Entire rule added and effective June 16, 2011.

Rule 255. Colorado Attorney Mentor Program

(1) Colorado Attorney Mentor Program. The Colorado Supreme Court hereby establishes a Colorado Attorney Mentor Program (''CAMP''). Through the fostering of mentoring relationships between lawyers new to the practice of law and lawyers experienced in the practice of law, the goals of such program are to assist:

(a) Lawyers during the transition from law student to practitioner;

(b) Lawyers to adopt and uphold the professional qualities of honesty, integrity, fairness, and civility in the legal profession;

(c) Lawyers to adopt high standards for client representation;

(d) Lawyers to acquire the knowledge of how to exercise professional judgment and carry out the highest ideals in the practice of law;

(e) Lawyers in the development of practical legal skills, knowledge of legal customs, and the use of best practices; and

(f) Lawyers in the appreciation of the law practice tradition of community service and *pro bono* activities.

CAMP and its director shall be under the supervision of the Supreme Court Advisory Committee (''Advisory Committee'') as set forth in C.R.C.P. 251.34(b)(3).

(2) CAMP Services. The Colorado Attorney Mentor Program shall provide the following services throughout the state of Colorado:

(a) Promotion and support of lawyer mentoring generally within the legal community;

(b) Programming to increase the awareness and understanding of CAMP-approved programs and their benefits;

(c) Establishment and maintenance of a mentoring resource library of hard copy and electronic materials for the development of educational programs, including but not limited to the following purposes: to promote professionalism, to teach lawyer practical skills, to increase knowledge of legal procedures and best practices and to otherwise improve new-lawyer legal abilities and professional judgment;

(d) Programming to increase mentoring skills within the legal profession;

(e) Assistance to lawyer groups and organizations that are developing CAMP-approved mentoring programs;
(f) Support services for lawyer groups and organizations in maintaining a successful CAMP-approved mentoring program;
(g) Support services and resources for successful mentoring relationships, and to increase mentoring skills;
(h) Oversight of CAMP-approved programs to ensure compliance with CAMP protocols, policies and procedures; and
(i) Maintenance and amendment of policies and procedures guiding CAMP-approved programs.

(3) Director. The Advisory Committee shall recruit, retain, and supervise a CAMP Director. The Director shall serve at the pleasure of the Advisory Committee as an at-will employee. The Advisory Committee shall set the Director's annual salary subject to periodic review. The Director shall have the same employee benefits as the employees of the Colorado Supreme Court Office of Attorney Regulation. The Director shall prepare the annual budget of CAMP in coordination with the Supreme Court Regulation Counsel. A portion of the annual attorney registration fee shall be used to establish and administer CAMP.

(4) Qualifications. The director shall have a Juris Doctor (''J.D.'') degree; at least five years of legal experience; and sufficient supervisory, management and training experience that may be necessary to properly administer CAMP.

(5) Powers and Duties. The CAMP Director shall act in accordance with these Rules and shall:
(a) Collaborate with existing mentoring programs in Colorado to further the goals of CAMP outside of CAMP-approved programs;
(b) Create, modify and maintain all requisite forms, agreements and online resources for administration of CAMP;
(c) Receive, review, and, where appropriate, approve organizations' submissions of their mentoring programs for preapproval to be a part of CAMP;
(d) Review and decide petitions to participate from new lawyers not otherwise eligible to participate in CAMP programs;
(e) Receive, screen, and recommend mentor applicants for appointment;
(f) Receive, review, approve where appropriate, and transmit to the Board of Continuing Legal and Judicial Education (Attorney Registration/CLE office) the certificates of completion, certificates of partial completion, and CLE affidavits;
(g) Coordinate and perform ongoing monitoring and evaluation of the effectiveness of CAMP programs, and make recommendations accordingly;
(h) Recruit, hire, train, and supervise appropriate staff in administering CAMP;
(i) Recruit, select, and train lawyer volunteers for assistance in administering CAMP;
(j) Establish and maintain an office to carry out the above duties and responsibilities;
(k) Maintain all records necessary for the successful administration of CAMP;
(l) Prepare and present the annual budget of CAMP in coordination with the Advisory Committee;
(m) Establish appropriate policies to assure that participants in CAMP shall be protected from any forms of discrimination or harassment;
(n) Perform all other tasks necessary to facilitate administration of the CAMP; and
(o) Perform such other related duties as the Supreme Court and the Advisory Committee may direct.

Source: Entire rule added and effective May 15, 2013.

Rule 256. The Colorado Lawyer Self-Assessment Program

(1) The Colorado Supreme Court Lawyer Self-Assessment Program. The Colorado Supreme Court hereby establishes the Colorado Lawyer Self-Assessment Program. The Colorado Lawyer Self-Assessment Program allows lawyers and law firms to evaluate confidentially and voluntarily the systems and procedures they have in place to promote compliance with professional obligations. The program gives lawyers and law firms the

opportunity to improve the quality of legal services offered and to build greater client satisfaction through proactive practice review. This program also promotes access to justice, as well as inclusivity and well-being among lawyers and their staff.

Lawyer participation in this program furthers the objectives in the Preamble to Chapters 18-20 of the Colorado Rules of Civil Procedure.

The Colorado Supreme Court additionally finds that maintaining the confidentiality of information prepared, created, or communicated by a lawyer or by a law firm administrator, employee, or consultant acting under the direction of a lawyer, in connection with a lawyer self-assessment will enhance participation in the Colorado Lawyer Self-Assessment Program, which will further the objectives referenced above.

(2) Definitions. As used in this rule:

(a) ''Confidential information'' means any information, including, but not limited to, documents, notations, notes, records, writings, and responses prepared or created by a lawyer or by a law firm administrator, law firm employee, or consultant under the direction of a lawyer, in connection with a lawyer self-assessment. Confidential information includes any conclusions or evaluations made by a lawyer or by a law firm administrator, law firm employee, or consultant acting under the direction of a lawyer, in connection with a lawyer self-assessment. Confidential information also includes any oral, written, or electronic communication by or to a lawyer or law firm administrator, law firm employee, or consultant acting under the direction of a lawyer, in connection with a lawyer self-assessment. Confidential information further includes any information generated or communicated as part of a law practice review.

(b) ''Lawyer self-assessment'' means any lawyer self-assessment tool approved by the Colorado Supreme Court Advisory Committee. This includes both the online survey self-assessment tool and the downloadable and printable survey tool available at www.coloradosupremecourt.com.

(c) ''Law practice review'' means any oral, written, or electronic communications between a lawyer who has completed a lawyer self-assessment and one or more law practice reviewers for purposes of obtaining feedback and guidance on that lawyer's practice.

(d) ''Law practice reviewer'' means a lawyer, and any consultant acting under the direction of a lawyer, who agrees to provide practice feedback and guidance to a lawyer following completion of a lawyer self-assessment.

(3) Program Administration. The Office of Attorney Regulation Counsel shall be responsible for the administration of the Colorado Lawyer Self-Assessment Program.

(4) Confidentiality.

(a) Confidential information shall not be utilized in any disciplinary or disability complaint or investigation, and shall be excluded as evidence in any disciplinary or disability proceeding before the Supreme Court Attorney Regulation Committee, the Presiding Disciplinary Judge of the Supreme Court, or the Colorado Supreme Court.

(b) Confidential information that lawyers or staff within a law firm communicate with other lawyers or staff in the same law firm and concerning a lawyer self-assessment shall be kept strictly confidential, shall not be utilized in any disciplinary or disability complaint or investigation, and shall be excluded as evidence in any disciplinary or disability proceeding before the Supreme Court Attorney Regulation Committee, the Presiding Disciplinary Judge of the Supreme Court, or the Colorado Supreme Court.

(c) The Office of Attorney Regulation Counsel shall not collect any personally-attributable answer data from lawyers who participate in the Colorado Lawyer Self-Assessment Program, nor shall any confidential information be used in any investigation or any disciplinary or disability proceeding initiated by the Office of Attorney Regulation Counsel.

(5) Immunity. Any law practice reviewer is immune from suit and liability for damages in any legal proceeding related to participation in law practice review, provided the law practice reviewer acted in good faith. Law practice reviewers shall be relieved of the duty of disclosure of information to authorities imposed by Colo. RPC 8.3(a).

Source: Entire rule added and effective June 28, 2018.

Rule 260. Mandatory Continuing Legal and Judicial Education

PREAMBLE: Statement of Purpose

This preamble is repealed and replaced by the preamble to C.R.C.P. 250.

Source: Entire rule amended and adopted December 14, 2000, effective January 1, 2001; entire rule repealed March 15, 2018, effective July 1, 2018.

Editor's note: Rules 260.1 to 260.5 and 260.7 and 260.8 were repealed, replaced, and relocated to Rules 250.1 to 250.10, effective July 1, 2018, in accordance with Rule Change 2018(04).

ANNOTATION

Law reviews. For article, ''Reduced Malpractice and Augmented Competence: A Proposal'', see 12 Colo. Law. 1444 (1983). For article, ''Mandatory Continuing Legal Education Update'', see 17 Colo. Law. 2351 (1988).

Rule 260.1. Definitions

(1) This subsection (1) is repealed and replaced by C.R.C.P. 250.1(5).
(2) This subsection (2) is repealed and replaced by C.R.C.P. 250.1(2).
(3) Repealed.
(4) This subsection (4) is repealed and replaced by C.R.C.P. 250.1(11).
(5) This subsection (5) is repealed and replaced by C.R.C.P. 250.1(8).
(6) This subsection (6) is repealed and replaced by C.R.C.P. 250.1(13).
(7) This subsection (7) is repealed and replaced by C.R.C.P. 250.1(3).

Source: Entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.2. CLE Requirements

(1) This subsection (1) is repealed and replaced by C.R.C.P. 250.2(1).
(2) This subsection (2) is repealed and replaced by C.R.C.P. 250.2(1).
(3) This subsection (3) is repealed and replaced by C.R.C.P. 250.2(2).
(4) This subsection (4) is repealed and replaced by C.R.C.P. 203.2(6) [now 203.1(8)], 203.3(4), and 203.4(6).
(5) This subsection (5) is repealed and replaced by C.R.C.P. 250.2(4) and 250.2(5).
(6) This subsection (6) is repealed and replaced by C.R.C.P. 250.2(6).

Source: (2) amended June 20, 1991, effective January 1, 1992; entire rule amended October 13, 1994, effective January 1, 1995; (4) amended and adopted effective April 23, 1998; (4) repealed and adopted March 21, 2003, effective July 1, 2003; entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.3. Board of Continuing Legal and Judicial Education

(1) This subsection (1) is repealed and replaced by C.R.C.P. 250.3(2) and 250.3(3).
(2) Repealed.
(3) This subsection (3) is repealed and replaced by C.R.C.P. 250.3 and 250.4.

Source: (3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.4. Accreditation

(1) This subsection (1) is repealed and replaced by C.R.C.P. 250.6(1).
(2) This subsection (2) is repealed and replaced by C.R.C.P. 250.2(8) and 250.6(2).

(3) This subsection (3) is repealed and replaced by C.R.C.P. 250.6(4).
(4) This subsection (4) is repealed and replaced by C.R.C.P. 250.1(3) and 250.6(5).
(5) This subsection (5) is repealed and replaced by C.R.C.P. 250.6(6).
(6) This subsection (6) is repealed and replaced by C.R.C.P. 250.3(2)(c) and 250.6(2).
(7) This subsection (7) is repealed and replaced by C.R.C.P. 250.6(7).
(8) This subsection (8) is repealed and replaced by C.R.C.P. 250.6(2).

Source: Entire rule amended and adopted December 14, 2000, effective January 1, 2001; entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.5. Exemptions

Repealed and replaced by C.R.C.P. 250.2(7)(b).

Source: Entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.6. Compliance

(1) Repealed.
(2) This subsection (2) is repealed and replaced by C.R.C.P. 250.7(1) and (2).
(3) This subsection (3) is repealed and replaced by C.R.C.P. 250.7(1) and (2).
(4) This subsection (4) is repealed and replaced by C.R.C.P. 250.7(2).
(5) This subsection (5) is repealed and replaced by C.R.C.P. 250.7(3) and (4).
(6) This subsection (6) is repealed and replaced by C.R.C.P. 250.7(4).
(7) This subsection (7) is repealed and replaced by C.R.C.P. 250.7(5).
(8) This subsection (8) is repealed and replaced by C.R.C.P. 250.7(6).
(9) This subsection (9) is repealed and replaced by C.R.C.P. 250.7(7) and (8).
(10) This subsection (10) is repealed and replaced by C.R.C.P. 250.7(8).
(11) This subsection (11) is repealed and replaced by C.R.C.P. 250.2(5).
(12) This subsection (12) is repealed and replaced by C.R.C.P. 250.7(9).
(13) This subsection (13) is repealed and replaced by C.R.C.P. 250.7(10).

Source: Entire rule amended and effective December 4, 2003; IP(5), (6), (7), (8), (9)(a), and (13) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (5)(a) and (6) amended and effective January 14, 2015; entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.7. Confidentiality

Repealed and replaced by C.R.C.P. 250.8.

Source: Entire rule repealed March 15, 2018, effective July 1, 2018.

Rule 260.8. Direct Representation and Mentoring in Pro Bono Civil Legal Matters

Repealed and replaced by C.R.C.P. 250.9.

Source: Entire rule added and adopted November 10, 2004, effective January 1, 2005; entire rule repealed March 15, 2018, effective July 1, 2018.

APPENDIX TO CHAPTERS 18 TO 20

The Colorado Rules of Professional Conduct

Adopted by the

SUPREME COURT OF COLORADO

May 7, 1992,

Effective January 1, 1993

Editor's note: (1) Effective January 1, 1993, the Colorado Rules of Professional Conduct replaced the Code of Professional Responsibility.

(2) Effective January 1, 2008, the entire Appendix was repealed and readopted.

ANALYSIS BY RULE

ADVOCATE

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

LAW FIRMS AND ASSOCIATIONS

PUBLIC SERVICE

INFORMATION ABOUT LEGAL SERVICES

MAINTAINING THE INTEGRITY OF THE PROFESSION

APPENDIX TO CHAPTERS 18 TO 20

COLORADO RULES OF PROFESSIONAL CONDUCT

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms ''shall'' or ''shall not.'' These define proper conduct for purposes of professional discipline. Others, generally cast in the term ''may,'' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constructive and descriptive in that they define a lawyer's

professional role. Many of the Comments use the term ''should.'' Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self- assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ANNOTATION

The rules of professional conduct do not create a fiduciary duty, but they may evidence standards of care. The court may look to the rules to determine whether an attorney failed to adhere to a particular standard of care and thus breached his or her fiduciary duty to a client. Moye White LLP v. Beren, 2013 COA 89, 320 P.3d 373.

Rule 1.0. Terminology

(a) ''Belief'' or ''believes'' denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) ''Confirmed in writing,'' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of ''informed consent.'' If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(b-1) ''Document'' includes e-mail or other electronic modes of communication subject to being read or put into readable form.

(c) ''Firm'' or ''law firm'' denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) ''Fraud'' or ''fraudulent'' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) ''Informed consent'' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) ''Knowingly,'' ''known,'' or ''knows'' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) ''Partner'' denotes a member of a partnership, an owner of a professional company, or a member of an association authorized to practice law.

(1) ''Professional company'' has the meaning ascribed to the term in C.R.C.P. 265.

(h) ''Reasonable'' or ''reasonably'' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) ''Reasonable belief'' or ''reasonably believes'' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) ''Reasonably should know'' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) ''Screened'' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) ''Substantial'' when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) ''Tribunal'' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) ''Writing'' or ''written'' denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A ''signed'' writing includes an

electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Source: Amended October 17, 1997, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (c) and (g) amended and effective February 26, 2009; (b-1) added, (n) and comment [9] amended, effective April 6, 2016.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms ''fraud'' or ''fraudulent'' refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the

type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of ''writing'' and ''confirmed in writing,'' see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of ''signed,'' see paragraph (n).

Knowingly, Known or Knows

[7A] In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated, ''with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes.'' *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also *People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA *Standards for Imposing Lawyer Sanctions*, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a Rule of Professional Conduct specifically requires the mental state of ''knowledge,'' recklessness will not be sufficient to establish a violation of that Rule and to that extent, the *Egbune* line of cases will not be followed.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10(e), 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

ANNOTATION

Law reviews. For article, ''Private Screening'', see 38 Colo. Law. 59 (June 2009). For article, ''The Ethical Preparation of Witnesses'', see 42 Colo. Law. 51 (May 2013). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016).

CLIENT-LAWYER RELATIONSHIP

Law reviews: For article, ''Colorado's New Rules of Professional Conduct: A More Comprehensive and Useful Guide for Lawyers'', see 21 Colo. Law. 2101 (1992); for article, ''Colorado's Rules of Professional Conduct: Implications for Criminal Lawyers'', see 21 Colo. Law. 2559 (1992); for article, ''So You Want to Be a 'Temp': Ethics and Temporary Attorney Relationships'', see 24 Colo. Law. 805 (1995); for article, ''The New Colorado Rules of Professional Conduct: A Survey of the Most Important Changes'', see 36 Colo. Law. 71 (August 2007); for article, ''Contract Lawyering:

Benefits and Obstacles'', see 37 Colo. Law. 61 (January 2008); for article, ''Temporal and Substantive Choice of Law Under the Colorado Rules of Professional Conduct'', see 39 Colo. Law. 35 (April 2010).

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [6] amended, and Comment [7] and [8] added, effective April 6, 2016.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among

them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

ANNOTATION

Law reviews. For article, ''Representing the Debtor: Counsel Beware!'', see 23 Colo. Law. 539 (1994). For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Professionalism and E-Discovery: Considerations Post-Zubulake'', see 41 Colo. Law. 65 (June 2012). For article, ''The Ethical Preparation of Witnesses'', see 42 Colo. Law. 51 (May 2013). For article, ''Third-Party Opinion Letters: Limiting the Liability of Opinion Givers'', see 42 Colo. Law. 93 (Nov. 2013). For article, ''Client-Drafted Engagement Letters and Outside Counsel Policies'', see 43 Colo. Law. 33 (Feb. 2014). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016). For article, ''Attorney-Client Privilege and the Work Product Doctrine: Is Confidentiality Lost in Email?'', see 46 Colo. Law. 32 (Nov. 2017). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018).

Annotator's note. Rule 1.1 is similar to Rule 1.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Disbarment was appropriate discipline for attorney who borrowed or otherwise obtained money from elderly and vulnerable client where attorney failed (a) to disclose that the likelihood of repayment was remote and the inadequacy of security purportedly given to secure loans; (b) to provide client with adequate legal documentation to ensure repayment; and (c) to obtain client's consent to possible conflicts of interest. People v. Schindelar, 845 P.2d 1146 (Colo. 1993).

Duty of competence imposed by this rule violated by attorney's failure to adequately supervise and monitor non-attorney employee's actions on behalf of clients in bankruptcy proceedings. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Attorney conduct violating this rule in conjunction with other rules sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Nine-month suspension stayed upon the requirement to pay restitution to clients is justified when violating this rule in conjunction with other disciplinary rules, particularly given the substantial and continuous incompetence, advancement of meritless claims, and significant financial harm that conduct caused clients. People v. Bontrager, 407 P.3d 1235 (Colo. O.P.D.J. 2017).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. Attorney neglected to provide competent representation by failing to take action to secure survivor benefits for client. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest or selfish motive and exhibited a co-

operative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel warranted a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Thirty-day suspension warranted where attorney, with previous history of discipline and experience in practicing law, neglected a civil rights suit by failing to provide an accounting with respect to fees charged and by failing to return unearned fees. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998).

Public censure warranted where respondent negligently filed an involuntary bankruptcy petition that was ill-advised and without factual or legal basis. Mitigating factors included the fact that respondent's mental state was one of negligence rather than knowing misconduct, respondent had not been disciplined before, and respondent cooperated in the discipline action. People v. Moskowitz, 944 P.2d 76 (Colo. 1997).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Beecher, 350 P.3d 310 (Colo. O.P.D.J. 2015).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Lindley, 349 P.3d 304 (Colo. O.P.D.J. 2015); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 6-101.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Criminal Procedure'', which discusses Tenth Circuit decisions dealing with effective assistance of counsel, see 61 Den. L.J. 303 (1984). For article, ''Third-Party Malpractice Claims Against Real Estate Lawyers'', see 13 Colo. Law. 996 (1984).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

Attorney has burden of proving his own incompetence. Attorney who is appointed to represent criminal defendant and who believes he is incompetent to handle case has burden of

proving his incompetence to the court and if attorney carries the burden, the trial court must decide whether attorney is capable of becoming competent on his own or whether appointment of co-counsel is necessary until attorney becomes competent. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Claim of ineffective assistance of counsel by court-appointed attorney is premature before representation has occurred and, therefore, attorney was not entitled to withdraw from case. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

An attorney's personal problems cannot excuse his negligence or professional misconduct, for discipline is required not only to punish the attorney but also to protect the public. People v. Morgan, 194 Colo. 260, 574 P.2d 79 (1977); People v. Belina, 765 P.2d 121 (Colo. 1988).

The right to effective assistance of counsel is not a right to acquittal. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

When cross-examination is permitted by defense counsel on previous felony convictions that the defendant has suffered without a prior foundation which establishes that defendant had counsel at the time he was convicted, counsel's representation is competent when the defendant brought his prior convictions to the jury's attention and made no claim that he was not represented by counsel. Steward v. People, 179 Colo. 31, 498 P.2d 933 (1972).

Agreeing to have depositions read at trial, rather than to have forceful live testimony, is a trial strategy decision for counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Clients' business simply must be processed in apt time. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980); People v. Pooley, 774 P.2d 239 (Colo. 1989).

An attorney violates his obligations to his client in not filing suit until almost four years after retained, in not proceeding with the lawsuit during the period thereafter, in not procuring the client's permission to transfer the case to another attorney, and in not supervising its handling by that attorney, all of which actions constitute gross negligence and unprofessional conduct. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

A lawyer's failure to prepare a will for at least eight months after being employed to do so, especially where client is aged person, is grossly negligent and shows total lack of responsibility. People v. James, 180 Colo. 133, 502 P.2d 1105 (1972).

Attorney's only preparation for hearing in dissolution of marriage action occurring in car on way to courthouse constituted handling a legal matter without adequate preparation in violation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney violated this rule and C.R.P.C. 8.4(d) when he prepared and filed child support worksheets that failed to properly reflect the new stipulation concerning custody. People v. Davies, 926 P.2d 572 (Colo. 1996).

Suspension for one year and one day was warranted for attorney who violated this rule and C.R.P.C. 8.4(d) by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P.2d 572 (Colo. 1996).

Attorney violated this rule by taking no action on client's tort claim and by failing to file client's workers' compensation claim until July, 1985, although retained in 1984 to do so. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney neglected legal matter entrusted to her by taking no action on client's claim which resulted in claim being barred by the statute of limitations. People v. Felker, 770 P.2d 402 (Colo. 1989).

Hindsight cannot replace a decision which counsel makes in the heat of trial. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

There was insufficient evidence to establish incompetence of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Goss, 646 P.2d 334 (Colo. 1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People v. Leader, 193 Colo. 402, 567 P.2d 800 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Haddock, 200 Colo. 218, 613 P.2d 335 (1980);

People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Gerdes, 782 P.2d 2 (Colo. 1989).

II. DISCIPLINARY ACTIONS.

A. Public Censure.

When a lawyer is negligent in handling estates, a public reprimand is warranted for his dereliction of duty. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Attorney was negligent in closing two different estates in an untimely manner. Public censure is an appropriate sanction when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Undertaking to provide services to clients in areas in which one lacks experience, which would ordinarily result in a reprimand, warrants a 30-day suspension when coupled with continued neglect after private censure. People v. Frank, 752 P.2d 539 (Colo. 1988).

Delay in handling and closing decedents' estates and failure to properly prepare inheritance tax returns, following prior letters of admonition, justify public censure. People v. Clark, 681 P.2d 482 (Colo. 1984).

An attorney's neglect and delay in handling an adoption proceeding, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires the imposition of public censure when such conduct is repeated after three letters of admonition. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Evidence sufficient to warrant public reprimand for dereliction of duty. People v. Atencio, 177 Colo. 439, 494 P.2d 837 (1972); People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

Failure to obtain an order for service by publication, failing to return client phone calls, and failure to set a case for trial justify public censure. People v. Barr, 805 P.2d 440 (Colo. 1991).

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Public censure appropriate where attorney delayed hiring experts for case, neglected to familiarize himself and comply with the criminal discovery rules, inadequately prepared for trial, and proceeded to trial without knowing whether his own experts' testimony would support his client's defense. People v. Silvola, 888 P.2d 244 (Colo. 1995).

Public censure was appropriate where attorney's failure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure justified where attorney failed to attend to bankruptcy proceeding and scheduled meetings, failed to timely file pleadings and responses, and allowed his paralegal to engage in unauthorized practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Sadler, 831 P.2d 887 (Colo. 1992); People v. Fry, 875 P.2d 222 (Colo. 1994); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Smith, 757 P.2d 628 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Smith, 769 P.2d 1078 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Richardson, 820 P.2d 1120 (Colo. 1991); People v. Odom, 829 P.2d 855 (Colo. 1992).

B. Suspension.

The failure for more than five years to record a deed and to return it and the abstract constitutes gross professional negligence and carelessness warranting a suspension of one

year from the practice of law. People v. James, 176 Colo. 299, 490 P.2d 291 (1971).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Where counsel appears to be totally oblivious to obligations to render the services for which he is paid, this crass irresponsibility or callous indifference in the handling of a client's affairs is inexcusable under any circumstances and warrants indefinite suspension from the bar. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, and failure to answer letter of complaint from the grievance committee constitute a violation of this rule, and, with other offenses of the code of professional responsibility. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Suspension of lawyer for three years, which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension for three years is appropriate where lawyer failed to respond to motions or appear at hearing, resulting in dismissal of clients' bankruptcy proceeding, thereby increasing clients' debts tenfold. The hearing board further found that the attorney engaged in bad faith obstruction of the disciplinary proceedings and refused to acknowledge the wrongful nature of his conduct or the vulnerability of his clients. People v. Farrant, 883 P.2d 1 (Colo. 1994).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Eighteen-month suspension warranted where attorney failed to notify client of an actual conflict of interest and subsequently neglected a matter, but did so without dishonest or selfish motive. People v. Watson, 833 P.2d 50 (Colo. 1992).

Failure to appear after accepting retainer justifies suspension. Where, after accepting a retainer for the defense of an action, an attorney failed to appear or advise his client of the fact that he was not going to appear and thereby prejudiced his client's case, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Failure to respond to repeated inquiries from client and client's parents, failure to monitor client's case in the court system, including failure to respond to calls from the court clerk, and failure to return client's urgent calls after client was arrested and jailed constitutes a pattern of neglect and warrants 30 day suspension. People v. O'Leary, 752 P.2d 530 (Colo. 1988).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1988).

Initiation of unnecessary proceeding and legal incompetence warrant suspension. Where lawyer initiates unnecessary probate proceeding, as well as fails to meet minimum standards of legal competence for corporate and mining law problems which he has undertaken, his professional misconduct warrants suspension from the bar. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Failure to designate record on appeal, causing nine-month delay in criminal appeal, considered with other violations, justifies sus-

pension. People v. May, 745 P.2d 218 (Colo. 1987).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstance and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering misconduct in light of proper mitigating factors, suspension was appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

There is evidence to warrant indefinite suspension. People v. Stewart, 178 Colo. 352, 497 P.2d 1003 (1972).

More severe sanction of 90-day suspension rather than public censure appropriate discipline for attorney who neglected client matter, caused potential injury to client, and engaged in conduct prejudicial to the administration of justice when aggravated by a history of five prior instances of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 (Colo. 1991).

Pattern of inaction, including failure to perform adequate research on statute of limitations problem, violated sections (A)(2) and (A)(3) and other disciplinary rules, justifying six-month suspension. People v. Barber, 799 P.2d 936 (Colo. 1990).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Failing to obtain substitute counsel after accepting a retainer while under suspension constitutes neglect of a legal matter. People v. Redman, 819 P.2d 495 (Colo. 1991).

Failure to file bankruptcy petition warrants suspension from the practice of law for a period of 90 days. The respondent's misconduct was compounded by his prolonged refusal to respond to his client's inquiries and his failure to inform his client of domicile issues bearing on her desire to obtain a discharge in bankruptcy in Colorado. People v. Cain, 791 P.2d 1133 (Colo. 1990).

Delay in filing bankruptcy petition and failing to file complaint or return retainer warrants six-month suspension. People v. Archuleta, 898 P.2d 1064 (Colo. 1995).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 888 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, failure to investigate clients' case, failure to attend one hearing and being late for another hearing, and refusing client an accounting and a refund of the unused portion of attorney fee, justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Ninety-day suspension warranted where attorney neglected client's legal matter, failed to pay for court reporting services, and showed complete disregard of grievance proceedings. People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Suspension for 90 days is warranted for attorney's continued practice of law during a period of suspension in view of prior record and substantial experience in practice of law even if attorney incorrectly believed that he had been reinstated. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension of one year and one day warranted for attorney whose misconduct included neglect of legal matter, failure to seek lawful objectives of client, intentional failure to carry out employment contract resulting in intentional prejudice or damage to client, and who also pled guilty to class 5 felony of failure to pay employee income tax withheld. People v. Franks, 866 P.2d 1375 (Colo. 1994).

Absent mitigating or aggravating factors, suspension appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. People v. Glaess, 884 P.2d 722 (Colo. 1994).

It was appropriate to require an attorney to petition for reinstatement under C.R.C.P. 241.22 (b) to (d), even though his period of suspension for violating section (A)(3) did not exceed one year, where the extraordinary number of previous matters in which the attorney was cited for neglect showed the need for a demonstration that he had been rehabilitated. People v. C De Baca, 862 P.2d 273 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991), 854 P.2d 782 (Colo. 1993); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Stevens, 866 P.2d 1378 (Colo. 1994); People v. Butler, 875 P.2d 219 (Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Pittam, 889 P.2d 678 (Colo. 1995); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Yost, 752 P.2d 542 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Dolan, 771 P.2d 505 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. App. 1989); People v. Emeson, 775 P.2d 1166 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990); People v. Hensley-Martin, 795 P.2d 262 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Grossenbach, 803 P.2d 961 (Colo. 1990); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Williams, 824 P.2d 813 (Colo. 1992); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Farrant, 883 P.2d 1 (Colo. 1994); People v. Singer, 897 P.2d 798 (Colo. 1995); People v. Williams, 915 P.2d 669 (Colo. 1996).

C. Disbarment.

Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Failure to file bankruptcy petition for eight months justifies disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Failure to timely file estate tax returns on behalf of personal representative of estate, failure to be adequately prepared for argument at scheduled hearing, failure to file timely notice of alibi, and failure to notify opposing counsel constitutes continuing pattern of neglect causing risk of serious injury to clients and justifies disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Failing to commence any action on behalf of a client, exploiting a client's friendship and trust to extort funds for one's personal use, and failing to cooperate with the grievance committee in its investigation of complaints with respect to such matters is conduct warranting disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Continuing to practice law while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Disbarment proper remedy for lawyer who, shortly after admission to bar and continuing for two years, embarked on a course of conduct resulting in ten separate instances of professional misconduct, some of which presented the potential for serious harm to clients and to the administration of justice. People v. Murray, 887 P.2d 1016 (Colo. 1994).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Pattern of misconduct involving failure to render services, multiple offenses, and conversion of clients' property sufficient to warrant disbarrment. People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Disbarment appropriate where attorney converted client funds, neglected a legal matter entrusted to him, and had a history of discipline. People v. Grossenbach, 814 P.2d 810 (Colo. 1991).

Disbarment appropriate when attorney neglected numerous legal matters and engaged in other conduct prejudicial to client and the administration of justice. People v. Theodore, 926 P.2d 1237 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Singer, 955 P.2d 1005 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992).

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment,

does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Source: (a), (c), and comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; comment [14] added and effective March 24, 2014; comment [5A] and [5B] added and effective April 6, 2016.

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is

undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (Jan. 2000). For article, ''Limited Representation in Criminal Defense Cases'', see 29 Colo. Law. 77 (Oct. 2000). For article, ''Ethical Considerations and Client Identity'', see 30 Colo. Law. 51 (Apr. 2001). For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For comment, ''Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans'', see 72 U. Colo. L. Rev. 459 (2001). For article, ''Ethical Guidelines for Settlement Negotiations'', see 34 Colo. Law. 11 (Feb. 2005). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct.

2005). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Litigating Disputes Involving the Medical Marijuana Industry'', see 41 Colo. Law. 103 (Aug. 2012). For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012). For article, ''Advising Clients Who Want to Grow Hemp'', see 43 Colo. Law. 71 (July 2014). For casenote, ''A Colorado Child's Best Interests: Examining the Gabriesheski Decision and Future Policy Implications'', see 85 U. Colo. L. Rev. 537 (2014). For article, ''Representing Clients in the Marijuana Industry: Navigating State and Federal Rules'', see 44 Colo. Law. 61 (Aug. 2015). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019).

Annotator's note. Rule 1.2 is similar to Rule 1.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Even though section (c) of this rule allows unbundling of legal services, an attorney remains obligated to comply with C.R.C.P. 11(b). In re Merriam, 250 B.R. 724 (B.R. D. Colo. 2000).

Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is disingenuous and far below the level of candor that must be met by members of the bar. Such conduct is contrary to section (d) of this rule. Johnson v. Bd. of County Comm'rs of Fremont, 868 F. Supp. 1226 (D. Colo. 1994).

Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy, including a provision that purports to prohibit the client from unreasonably refusing to settle. A client's right to reject settlement is absolute and unqualified; parties to litigation have the right to control their own cases. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

Representing to client that a case had been settled, on terms that the client had not agreed to, violated section (a). People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

The decision to enter a guilty plea or withdraw a guilty plea is one of the few fundamental choices that must be decided by the defendant alone. People v. Davis, 2012 COA 1, __ P.3d __, rev'd on other grounds, 2015 CO 36M, 352 P.3d 950.

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years appropriate when attorney circumvented proper channels for the adoption of a child by falsely listing her own husband as the birth father on the baby's birth certificate, counseled her husband to engage in fraudulent conduct, and provided false information on a petition for stepparent adoption. People v. Ritland, 327 P.3d 914 (Colo. O.P.D.J. 2014).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

If prosecution witness advises the prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension, stayed upon completion of one-year period of probation with conditions. People v. Bendinelli, 329 P.3d 300 (Colo. O.P.D.J. 2014).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Sousa, 943 P.2d 448 (Colo. 1997).

Cases Decided Under Former DR 2-110.

Law reviews. For article, ''Coping with the Paper Avalanche: A Survey on the Disposition

of Client Files'', see 16 Colo. Law. 1787 (1987).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Attorney who undertakes to conduct action impliedly agrees that he will pursue it to some conclusion; and he is not free to abandon it without reasonable cause. Sobol v. District Court, 619 P.2d 765 (Colo. 1980); Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

Even where cause may exist, attorney's withdrawal must be undertaken in proper manner, duly protective of his client's rights and liabilities. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Attorney's withdrawal from employment was improper where attorney gave clients insufficient notice of her intention to withdraw, failed to return the file of one client, and took no steps to avoid foreseeable injury to the clients' interests. People v. Felker, 770 P.2d 402 (Colo. 1989).

Trial dates accepted shall be honored before withdrawal from employment. When public defender or a busy defense lawyer finds that his representation of one client is inimical to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of a case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's withdrawal is within trial court's discretion. The question of whether an attorney should be permitted to withdraw his general appearance on behalf of a litigant in a civil case is, under ordinary circumstances, within the discretion of the trial court; and its decision will not be reversed unless this discretion has been demonstrably abused. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Motions for withdrawal of counsel are addressed to the discretion of the court and will not be reversed unless clear error or abuse is shown. Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

A decision as to whether counsel should be permitted to withdraw must lie within the sound discretion of the trial judge. As long as the trial court has a reasonable basis for believing that the lawyer-client relation has not deteriorated to the point where counsel is unable to give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

The question of whether a lawyer may withdraw during course of trial due to the client's conduct is within the trial court's discretion and court must balance need for orderly administration of justice with facts underlying request for withdrawal. People v. Rubanowitz, 688 P.2d 231 (Colo. 1984).

The trial court's decision will not be disturbed on review absent abuse. The decision of the trial court to deny a motion to withdraw will not be disturbed on review absent a clear abuse of discretion. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Disagreement concerning counsel's refusal to call witnesses is insufficient grounds. A disagreement between defense counsel and the accused concerning counsel's refusal to call certain witnesses is not sufficient to require the trial judge to grant the motion to withdraw and replace defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Filing of a grievance because of disagreement as to trial tactics is insufficient grounds. Mere filing of grievance concerning counsel's refusal to file certain motions and refusal to file a civil action is not sufficient to require trial judge to grant the motion to withdraw and replace defense counsel. People v. Martinez, 722 P.2d 445 (Colo. App. 1986).

Counsel should request permission to withdraw where client insists on presenting perjured testimony. When a serious disagreement arises between the defense counsel and the accused, and counsel is unable to dissuade his client from insisting that fabricated testimony be presented by a witness, counsel should request permission to withdraw from the case in accordance with the procedures set forth in this opinion. If the motion to withdraw is denied, however, he must continue to serve as defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

When confronted with a client who insists upon presenting perjured testimony as to an alibi, counsel may only state, in the motion to withdraw, that he has an irreconcilable conflict with his client. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B), DR 9-102, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Failure to withdraw for over a year after being discharged by client, accompanied by protracted failure to return client's file, justifies suspension. People v. Hodge, 752 P.2d 533 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify public censure. People v. Vsetecka, 893 P.2d 1309 (Colo. 1995).

Failing to return the file of a client while at the same time neglecting to make further filings in such client's case during a period of suspension for similar acts of misconduct warrants further suspension from the practice of law. People v. Hodge, 782 P.2d 25 (Colo. 1989).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warrant suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Regan, 871 P.2d 1184 (Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Geller, 753 P.2d 235 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Fritsche, 897 P.2d 805 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Johnson, 199 Colo. 248, 612 P.2d 1097 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Archuleta, 638 P.2d 255 (Colo. 1981).

Cases Decided Under Former DR 7-101.

Law reviews. For article, ''The Ethical Aspects of Compromise, Settlement and Arbitration'', see 25 Rocky Mt. L. Rev. 454 (1953). For article, ''Incriminating Evidence: What to Do With a Hot Potato'', see 11 Colo. Law. 880 (1982). For article, ''Third-Party Malpractice Claims against Real Estate Lawyers'', see 13 Colo. Law. 996 (1984). For article, ''The Role of Parents' Counsel in Dependency and Neglect Proceedings — Part I'', see 14 Colo. Law. 568 (1985). For article, ''The Ethical Duty to Consider Alternatives to Litigation'', see 19 Colo. Law. 249 (1990).

Lawyers are required by the obligations of their office to act with diligence in the affairs of their clients and in judicial proceedings. People v. Heyer, 176 Colo. 188, 489 P.2d 1042 (1971).

Failure to take any action on behalf of his client after he was retained and entrusted with work and after making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Defense counsel may waive right to confront witnesses. The right to confront witnesses is a fundamental right and waiver of such a right is not to be lightly found, but this decision is properly the responsibility of defense counsel, and therefore, the decision of defense counsel to allow the prosecution to use depositions of witnesses in court is an effective waiver. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Matters of trial conduct and strategy are the responsibility of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Defendant cannot complain when it falls short of accomplishing an acquittal. It is not error to deny a motion for a new trial based on incompetence of trial counsel where the incompetence claimed arises out of defense counsel's failure to call certain witnesses that the defendant suggested, because defense counsel is responsible for trial strategy, and the defendant will not be heard to complain when trial strategy falls short of accomplishing an acquittal. People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973).

If every decision in a contested trial had to be made by the accused, he would be denied effective assistance and the judgment of his trial counsel; the defendant's attorney is the expert at trial, not the defendant. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Continued and chronic neglect over a period of two years must be considered willful and supports finding of intentional prejudice or damage to clients. People v. Barber, 799 P.2d 936 (Colo. 1990).

Trial court did not abuse its discretion by imposing sanctions on attorney who, at direction of clients, failed to advise opposing party of clients' bankruptcy and automatic stay in advance of trial. Under such circumstances the attorney was faced with an irreconcilable conflict between his duty to his clients and his professional obligations to opposing counsel and would have been justified in requesting permission to withdraw. Parker v. Davis, 888 P.2d 324 (Colo. App. 1994).

Inappropriate personal relationship with a client may prejudice or damage client under this rule. People v. Gibbons, 685 P.2d 168 (Colo. 1984).

Where an attorney requests, on the day of trial, dismissal of federal court proceedings because of lack of jurisdictional amount while representing plaintiff, fails to appear in court when scheduled, shows gross indifference and disregard toward the court, the jurors, and opposing counsel, and fails to keep appointments with the grievance committee assigned to investigate charges against him, a public reprimand for dereliction of duty is called for. People v. Heyer, 176 Colo. 188, 489 P.2d 1042 (1971).

Public censure was appropriate where attorney's failure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Conduct of attorney warranted public censure under paragraph (A)(1). People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Smith, 819 P.2d 497 (Colo. 1991).

Conduct of attorney warranted public reprimand under paragraph (A)(2). People v. Atencio, 177 Colo. 439, 494 P.2d 837 (1972).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996).

Conduct violating this rule sufficient to justify public censure. People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Wyman, 769 P.2d 1076 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1989).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Suspension of lawyer for three years which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to the client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Knowing failure to prosecute client's claim or to obtain client's informed consent to abandon the claim and neglecting to pursue settlement negotiations damaged client and constitutes intentional failure to carry out contract of employment sufficient to justify suspension. People v. Honaker, 814 P.2d 785 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to warrant suspension. People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793

P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Schaefer, 938 P.2d 147 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Brackett, 667 P.2d 1357 (Colo. 1983); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. 1989); People v. Pooley, 774 P.2d 239 (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Failure to file bankruptcy petition for eight months justifies disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Disbarment was the proper remedy where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients, and the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Converting trust funds to one's own use in the amount of $13,100 and refusing to make payments on a promissory note taken as restitution was conduct intentionally prejudicial to the client sufficient to justify disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Converting trust funds, along with other misconduct, sufficient to justify disbarment. Where attorney withdraws $62,550 from trust without beneficiaries' knowledge or permission, fails to repay a $5,000 loan from the trustee, prepares fictional quarterly trust reports, disburses principal to beneficiaries in lieu of interest and lies regarding the amount of principal remaining in the trust, there is conduct sufficiently prejudicial to the client to justify disbarment. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

When attorney converted client's funds, named himself trustee, misrepresented to banks that the funds were his own, engaged in self-dealing, and maintained custody of the client's investment accounts, disbarment was warranted. There were no mitigating factors. People v. Warner, 8873 P.2d 724 (Colo. 1994).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client. People v. Bowman, 887 P.2d 18 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Skaalerud, 963 P.2d 341 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Gibbons, 685 P.2d 168 (Colo. 1984); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. James, 731 P.2d 698 (Colo. 1987); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Stewart, 752 P.2d 528 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989).

Conduct violating this rule sufficient to justify disbarment. People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 43 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980); People ex rel. Silverman, v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Castro, 657 P.2d 932 (Colo. 1982); People v. Emmert, 676 P.2d 672 (Colo. 1983); People v. Simon, 698 P.2d 228 (Colo. 1985).

Cases Decided Under Former DR 7-102.

Law reviews. For article, ''The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client'', see 59 Den. L.J. 75 (1981). For article, ''Incriminating Evidence: What to do With a Hot Potato'', see 11 Colo. Law. 880 (1982). For article, ''Ethics, Tax Fraud and the General Practitioner'', see 11 Colo. Law. 939 (1982). For article, ''The Search for Truth Continued: More Disclosure, Less Privilege'', see 54 U. Colo. L. Rev. 51 (1982). For article, ''The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel'', see 54 U. Colo. L. Rev. 67 (1982). For casenote, ''Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege'', see 55 U. Colo. L. Rev. 319 (1984). For article, ''Defending the Federal Drug or Racketeering Charge'', see 16 Colo. Law. 605 (1987). For article, ''A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II'', see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For comment, ''Attorney-Client Confidences: Punishing the Innocent'', see 61 U. Colo. L. Rev. 185 (1990).

Attorney-client relationship required. Rule requires the existence of an attorney-client relationship as an essential element of the proscribed professional misconduct. People v. Morley, 725 P.2d 510 (Colo. 1986).

A client is a person who employs or retains an attorney for advice or assistance on a matter relating to legal business. People v. Morley, 725 P.2d 510 (Colo. 1986).

The relationship of an attorney and client can be inferred from the conduct of the parties. People v. Morley, 725 P.2d 510 (Colo. 1986).

The relationship is sufficiently established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

If he does so, he commits subornation of perjury. A lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in the subornation of perjury. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Unauthorized recordation of telephone conversation establishes unethical conduct. Telephone conversation, which attorney initiated and recorded without the permission of other party to conversation, established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Planned course of conduct which is unresponsive to civil discovery constitutes intent to deceive, and such conduct is prejudicial to the administration of justice. People v. Haase, 781 P.2d 80 (Colo. 1989).

In fulfilling the duty under Canon 7 of the Code of Professional Responsibility to zealously represent a client, a lawyer may advance a claim or defense not recognized under existing law if it can be supported by a good faith argument for an extension, modification, or reversal of existing law. Sullivan v. Lutz, 827 P.2d 626 (Colo. App. 1992).

Unsuccessful appeal is not necessarily frivolous. Because a lawyer may present a supportable argument which is extremely unlikely to prevail on appeal, it cannot be said that an unsuccessful appeal is necessarily frivolous. Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984).

An attorney should not pursue frivolous appeals. An attorney's decision not to pursue a frivolous appeal complies with his ethical responsibilities to his client. Hodges v. Barry, 701 P.2d 1240 (Colo. 1985).

Failure to inform arbitrators of errors in expert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and ttorney made closing arguments based on uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

False testimony and counselling such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Sims, 913 P.2d 526 (Colo. 1996).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Cases Decided Under Former DR 9-101.

Law reviews. For article, ''The Conflicted Attorney'', see 11 Colo. Law. 2589 (1982). For article, ''Access and Friendship with Local Decision-makers — May a Lawyer Exploit'', see 16 Colo. Law. 482 (1987). For article, ''Coping with the Paper Avalanche: A Survey on the Disposition of Client Files'', see 16 Colo. Law. 1787 (1987).

Since employment in a public defender's office is not the type of public employment contemplated in paragraph (B) of this rule, no conflict of interest can be perceived in the representation of a defendant by a deputy public defender and the subsequent representation by the same attorney in a private capacity of the defendant in the same case. Coles, Manter & Watson v. Denver Dist. Court, 177 Colo. 210, 493 P.2d 374 (1972).

Disqualification of former district attorney and his firm was appropriate. Disqualification of former district attorney and his firm from representing client in case in which former district attorney had done investigation under this canon was clearly appropriate. Osburn v. District Court, 619 P.2d 41 (Colo. 1980).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Where a lawyer knows or should know that he is dealing improperly with a client's property and causes potential injury to the client, a suspension from the practice of law, at the very least, is an appropriate sanction. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Where there is no evidence of a specific identifiable impropriety, there is no basis for disqualification under this canon. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Factors for determining "an appearance of impropriety" discussed in Cleary v. District Court, 704 P.2d 866 (Colo. 1985).

"Substantial responsibility" requirement of paragraph (B) of this rule applied in Cleary v. District Court, 704 P.2d 866 (Colo. 1985); People v. Anaya, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988).

Conduct violating this rule sufficient to justify disbarment. People v. Dulaney, 785 P.2d 1302 (Colo. 1990).

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated

to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 251.32(h).

ANNOTATION

Law reviews. For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (November 2005). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (Oct. 2012). For article, ''Third-Party Opinion Letters: Limiting the Liability of Opinion Givers'', see 42 Colo. Law. 93 (Nov. 2013). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018).

Annotator's note. Rule 1.3 is similar to Rule 1.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done noting on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

More severe sanction of public censure rather than private censure warranted where attorney continued to rely on methods of communication which had previously failed even after it became evident that the settlement agreement would be withdrawn and the client's interests would be harmed. People v. Podoll, 855 P.2d 1389 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure and monitoring conditions for one year, rather than private censure, were appropriate where attorney had a history of private sanctions indicating a pattern of misconduct. The attorney had also had a six-month suspension entered against him during the same time period in which the acts giving rise to censure occurred. Had the acts occurred following the suspension, public censure would be too lenient. People v. Field, 967 P.2d 1035 (Colo. 1998).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary process through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure appropriate where attorney allowed the statute of limitations to run before filing a complaint on the client's personal injury claim. People v. Hockley, 968 P.2d 109 (Colo. 1998).

Public censure appropriate where neglect extended over a long period of time, respondent

had no prior history of discipline, and the actual harm caused by the misconduct was slight. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate for failure to submit settlement papers to client and to take any further action in the matter, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure with additional conditions imposed on lawyer who neglected client's matter and then misinformed client of its status. People v. Kram, 966 P.2d 1065 (Colo. 1998).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest or selfish motive and exhibited a cooperative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when lawyer neglects matters of multiple clients and charges unreasonable fees. People v. Reedy, 966 P.2d 1057 (Colo. 1998).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997).

Disbarment appropriate remedy for attorney who neglected client's legal matter, failed to return retainer after being requested to do so, abandoned law practice, evaded process, and failed to respond to request of grievance committee. People v. Williams, 845 P.2d 1150 (Colo. 1993).

Attorney who failed to make sufficient efforts to ensure that his client received timely payments from the trust for which he was the trustee violated this rule. People v. DeRose, 945 P.2d 412 (Colo. 1997).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Attorney's failure to take prompt measures to secure client's rights to share of former spouse's retirement benefits constitutes neglect of a legal matter in violation of this rule. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Duty of diligence imposed by this rule violated by attorney's failure to adequately supervise and monitor non-attorney employee's actions on behalf of clients in bankruptcy proceedings. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to jus-

tify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Podoll, 855 P.2d 1389 (Colo. 1993); People v. Essling, 893 P.2d 1308 (Colo. 1995); People v. Belsches, 918 P.2d 559 (Colo. 1996); People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Mohar, 935 P.2d 19 (Colo. 1997); People v. White, 951 P.2d 483 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Wright, 947 P.2d 941 (Colo. 1997); People v. de Baca, 948 P.2d 1 (Colo. 1997); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018); People v. Fagan, 423 P.3d 412 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Fiore, 301 P.3d 1250 (Colo. O.P.D.J. 2013); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013); People v. Lindley, 349 P.3d 304 (Colo. O.P.D.J. 2015); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015). People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015); People v. Weatherford, 357 P.3d 1251 (Colo. O.P.D.J. 2015).

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when

the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Source: Comment amended April 20, 2000, effective July 1, 2000; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [4] amended, and Comment [6A] and [6B] added, effective April 6, 2016.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[6A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[6B] Regarding communications with clients and with lawyers outside of the lawyer's

firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Explanation of Fees and Expenses

[7A] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5(b).

ANNOTATION

Law reviews. For article, ''The Evolving Doctrine of Informed Consent in Colorado'', see 23 Colo. Law. 591 (1994). For article, ''Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5'', see 29 Colo. Law. 27 (June 2000). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct. 2005). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''Attorney-Client Communications in Colorado'', see 38 Colo. Law. 59 (Apr. 2009). For article, ''Informed Consent Under the Rules of Professional Conduct'', see 40 Colo. Law. 109 (July 2011). For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (Oct. 2012). For article, ''Clients' Rights During Transitions Between Attorneys'', see 43 Colo. Law. 39 (Oct. 2014). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016). For article, ''A Lawyer's Duty to Disclose Errors to the Client'', see 46 Colo. Law. 39 (June 2017). For article, ''Ethical Duties of an Insurance Defense Lawyer'', see 46 Colo. Law. 40 (Oct. 2017). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018).

Annotator's note. Rule 1.4 is similar to Rule 1.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary process through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Failing to inform client that limitation period had expired, or that attorney had not actually settled the case, violated section (a)(3). People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Moving for a voluntary dismissal of client's claim without prejudice, whether characterized as a strategic decision within the attorney's purview or a fundamental decision reserved for the client, was one that the attorney was obligated to disclose and discuss with the client beforehand. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Broad terms of a power of attorney do not obviate the attorney's duty to keep the client informed in accordance with section (a)(3). People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Duty to communicate imposed by this rule violated by attorney's failure to keep clients in bankruptcy proceedings reasonably notified about the status of the case, including the dismissal of their first bankruptcy petition and the filing of their second. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Belsches, 918 P.2d 559 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension, stayed upon completion of one-year period of probation with conditions. People v. Bendinelli, 329 P.3d 300 (Colo. O.P.D.J. 2014).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Sather, 936 P.2d 576 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Wright, 947 P.2d 941 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015); People v. Bontrager, 407 P.3d 1235 (Colo. O.P.D.J. 2017); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018); People v. Fagan, 423 P.3d 412 (Colo. O.P.D.J. 2018).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938

P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Fiore, 301 P.3d 1250 (Colo. O.P.D.J. 2013); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015); People v. Weatherford, 357 P.3d 1251 (Colo. O.P.D.J. 2015).

Conduct violating rule sufficient to justify disbarment. People v. Robnett, 859 P.2d 872 (Colo. 1993).

Cases Decided Under Former DR 9-102.

Law reviews. For series of articles, ''Interest on Lawyer Trust Accounts Program: A Primer for Lawyers'', see 12 Colo. Law 577 (1983). For article, ''Ethical Problem Areas for Probate Lawyers'', see 19 Colo. Law. 1069 (1990).

Paragraphs (A) and (B)(3) require as a minimum standard of conduct that a lawyer segregate his clients' funds from his own and keep them in identifiable bank trust accounts. People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Schubert, 799 P.2d 388 (Colo. 1990).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers. The most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Wolfe, 748 P.2d 789 (Colo. 1987).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

Disbarment is the presumed sanction for misappropriation of funds barring significant mitigating circumstances. People v. Young, 864 P.2d 563 (Colo. 1993); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B) (now C.R.C.P. 241.6), DR 2-110, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Attorney obligated to forward client's file upon request. Failure to forward client's file a year after a request is made constitutes conduct violative of disciplinary rules. People v. Belina, 765 P.2d 121 (Colo. 1988).

Failing to provide a client with an accounting of charges applied against a retainer after the client's request therefor, in conjunction with other instances of neglect, is conduct warranting public censure. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Failure to make proper accounting to client with respect to trust funds and failure to promptly deliver to the client funds to which she is entitled warrants public censure. People v. Robnett, 737 P.2d 1389 (Colo. 1987).

Failure to deposit funds in trust account, to notify client of receipt of funds and provide accounting, and to forward file promptly to new attorney constitute a violation of this rule and, with other offenses, warrants public censure. People v. Swan, 764 P.2d 54 (Colo. 1988).

Violation of duty to account for and promptly return client property upon request over a three-year period warrants public censure. People v. Shunneson, 814 P.2d 800 (Colo. 1991).

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Sadler, 831 P.2d 887 (Colo. 1992).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Wright, 698 P.2d 1317 (Colo. 1985); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Schaiberger, 731 P.2d 728 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988).

Two-year unjustified retention of one client's file, coupled with failure to withdraw at request of said client and refusal to forward a second client's file to subsequent counsel, resulting in both clients sustaining injuries, justifies suspension for the period of a year and a day. People v. Hodge, 752 P.2d 533 (Colo. 1988).

Failure to account for money collected on behalf of client, despite numerous client requests for accounting, and failure to adhere to terms of agreement with client regarding representation, coupled with prior, ongoing suspension, warrants additional six-month suspension. People v. Yost, 752 P.2d 542 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Lamberson, 802 P.2d 1098 (Colo. 1990); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992). People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Calvert, 721 P.2d 1189 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. McGrath, 780 P.2d 492 (Colo. 1989).

Derelictions in fiduciary duties by an attorney which go beyond mere negligence warrant disbarment. People v. Roads, 180 Colo. 192, 503 P.2d 1024 (1972).

Attorney failed to deliver property of a client in violation of this rule by ignoring requests for client's files made by the client, the client's attorney, and the grievance committee. People v. Felker, 770 P.2d 402 (Colo. 1989).

Refusal to provide accounting for money and jewelry delivered to him and refusal to itemize the services performed and the costs incurred warrant disbarment. People v. Lanza, 660 P.2d 881 (Colo. 1983).

Commingling and appropriation of funds warrants disbarment. When a lawyer collects $3000 on behalf of a client in connection with a sale of real estate and commingles it with his other trust funds and unlawfully converts it to his own use, his flagrant disregard of his professional obligation warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and, before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980).

Commingling a client's funds with those of the lawyer is a serious violation of the Code of Professional Responsibility, even in the absence of an actual loss to the client, because the act of commingling subjects the client's funds to the claims of the lawyer's creditors. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Costello, 781 P.2d 85 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Alcoholism not excuse. Efforts at alcoholism rehabilitation do not excuse conduct which includes dishonesty and fraud, failing to preserve identity of client funds, and failing to properly pay or deliver client funds, and which otherwise warrants disbarment. People v. Shafer, 765 P.2d 1025 (Colo. 1988).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several request by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client. People v. Bowman, 887 P.2d 18 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Rule is violated when attorney "knowingly" converts client funds; there is no requirement that the attorney intend to permanently deprive the client of the funds. People v. Varallo, 913 P.2d 1 (Colo. 1996).

Disbarment was appropriate where attorney converted $25,000 of client funds on seven different occasions over a period of four months and did not restore any of the missing funds until after he was detected. People v. Robbins, 869 P.2d 517 (Colo. 1994).

Disbarment was appropriate where the balance of the respondent's trust accounts fell below the amount necessary to pay settlements on at least 45 occasions and where the respondent withdrew attorney fees on at least 68 occasions from trust accounts before receiving the funds from which the fees were to be taken. People v. Lefly, 902 P.2d 361 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. James, 731 P.2d 698 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Young, 864 P.2d 563 (Colo. 1993).

Failure to transfer file to new attorney after repeated requests constitutes a violation of this rule. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Davis, 620 P.2d 725 (Colo. 1980); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Turner, 746 P.2d 49 (Colo. 1987).

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, ''Rules Governing Contingent Fees.''

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15B(a)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15A(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

(h) A ''flat fee'' is a fee for specified legal services for which the client agrees to pay a fixed amount, regardless of the time or effort involved.

(1) The terms of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) A description of the services the lawyer agrees to perform;

(ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

(iii) If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and

(iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15A(c) with respect to any portion of the flat fee that is in dispute.

(3) The form Flat Fee Agreement following the comment to this Rule may be used for flat fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule.

Source: (b) and Comment amended April 20, 2000, effective July 1, 2000; (d) amended and adopted April 18, 2001, effective July 1, 2001; entire rule and Comment amended and adopted May 30, 2002, effective July 1, 2002; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [7] amended and effective November 6, 2008; (b) amended and Comment [3A] repealed March 10, 2011, effective July 1, 2011;

(f) and Comment [7] and [8] amended, effective April 6, 2016; (h) and Form Flat Fee Agreement added and Comment [2], [5], [11], [12], and [14] to [16] amended, effective January 31, 2019.

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible, but when there has been a change from their previous understanding the basis or rate of the fee should be promptly communicated in writing. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier communication substantially inaccurate, a revised written communication should be provided to the client. All flat fee arrangements must be in writing and must comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] Repealed.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] A fee agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] [No Colorado comment.]

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement,

including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (d) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b) or (h), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

[12] Advances of unearned fees, including advances of all or a portion of a flat fee, are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.5(f), the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advance flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee [*i.e.,* a flat fee] constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should

expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

Form Flat Fee Agreement

The client _____ (''Client'') retains _____ (''Lawyer'' [or ''Firm'']) to perform the legal services specified in Section I, below, for a flat fee as described below.

I. Legal Services to Be Performed.

In exchange for the fee described in this Agreement, Lawyer will perform the following legal services (''Services''): *[Insert specific description of the scope and/or objective of the representation. Examples:* Represent Client in DUI criminal case in Jefferson County; Prepare a Will [or Power of Attorney or contract]]

II. Flat Fee.

This is a flat fee agreement. Client will pay Lawyer [or Firm] $_____ for Lawyer's [or Firm's] performance of the Services described in Section I, above, plus costs as described in Section VI, below. Client understands that Client is NOT entering into an hourly fee arrangement. This means that Lawyer [or Firm] will devote such time to the representation as is necessary, but the Lawyer's [or Firm's] fee will not be increased or decreased based upon the number of hours spent.

III. When Fee Is Earned.

The flat fee will be earned in increments, as follows:

Description of increment: _____ Amount earned: _____
Description of increment: _____ Amount earned: _____
Description of increment: _____ Amount earned: _____
Description of increment: _____ Amount earned: _____
Description of increment: _____ Amount earned: _____

[*Alternatively:* The flat fee will be earned when Lawyer [or Firm] provides Client with [*Select one:* the Will, the Power of Attorney, the contract, *other specified description of work*].

IV. When Fee Is Payable.

Client shall pay Lawyer [or Firm] [*Select one:* in advance, as billed, or as the services are completed]. Fees paid in advance shall be placed in Lawyer's [or Firm's] trust account and shall remain the property of Client until they are earned. When the fee or part of the fee is earned pursuant to this Agreement, it becomes the property of Lawyer [or Firm].

V. Right to Terminate Representation and Fees on Termination.

Client has the right to terminate the representation at any time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. In the event that Client terminates the representation without wrongful conduct by Lawyer [or Firm] that would cause Lawyer [or Firm] to forfeit any fee, or Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the

time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer's motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of $_____] [the percentage of the task completed] [*other specified method*]. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

VI. Costs.

Client is liable to Lawyer [or Firm] for reasonable expenses and disbursements. Examples of such expenses and disbursements are fees payable to the Court and expenses involved in preparing exhibits. Such expenses and disbursements are estimated to be $_____ . Client authorizes Lawyer [or Firm] to incur expenses and disbursements up to a maximum of $_____ , which limitation will not be exceeded without Client's further written authorization. Client shall reimburse Lawyer for such expenditures [*Select one:* upon receipt of a billing, in specified installments, or upon completion of the Services].

Dated: _____

CLIENT: ATTORNEY [FIRM]:

_____ _____

Signature Signature

ANNOTATION

Law reviews. For article, ''Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5'', see 29 Colo. Law. 27 (June 2000). For article, ''Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part I'', see 31 Colo. Law. 35 (Mar. 2002). For article, ''Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part II'', see 31 Colo. Law. 35 (Apr. 2002). For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?'', see 35 Colo. Law. 95 (Jan. 2006). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''Midstream Fee and Expense Modifications Under the Colorado Ethics Rules'', see 40 Colo. Law. 79 (Aug. 2011). For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (Oct. 2012). For article, ''Formal Opinion 129: Ethical Duties of Lawyer Paid by One Other than the Client'', see 46 Colo. Law. 19 (May 2017). For article, ''Ethical Duties of an Insurance Defense Lawyer'', see 46 Colo. Law. 40 (Oct. 2017). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018).

Annotator's note. Rule 1.5 is similar to Rule 1.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Supreme court is exclusive tribunal for regulation of the practice of law, including reasonableness of fees, notwithstanding statutory provision allowing the director of the division of workers' compensation to determine reasonableness of fees in a workers' compensation case. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

The term "joint responsibility" in section (d)(1) involves two components: financial responsibility and ethical responsibility. Scott R. Larson, P.C. v. Grinnan, 2017 COA 85, __ P.3d __.

The test for financial responsibility is joint and several or vicarious liability for the trial specialist's legal malpractice. Scott R. Larson, P.C. v. Grinnan, 2017 COA 85, __ P.3d __.

Attorney assumed financial responsibility for case when he and another attorney entered into a joint venture for the purposes of representing clients and sharing in the fee. Vicarious malpractice liability flows from that arrangement. Scott R. Larson, P.C. v. Grinnan, 2017 COA 85, __ P.3d __.

To assume ethical responsibility, a referring lawyer must: (1) actively monitor the progress of the case; (2) make reasonable efforts to ensure that the firm of the lawyer to whom the case was referred has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct; and (3) remain available to the client to discuss the case and provide indepen-

dent judgment as to any concerns the client may have that the lawyer to whom the case was referred is acting in conformity with the rules of professional conduct. Scott R. Larson, P.C. v. Grinnan, 2017 COA 85, __ P.3d __.

Agreement for the division of fees between a firm and an attorney separating from the firm is valid and not against public policy. Where an attorney enters into a separation agreement with his or her firm upon departure and the agreement specifies the division of fees for clients continuing legal services with the departing attorney, the agreement is enforceable and does not implicate the policies behind this rule. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Further, clients benefit from separation agreements between a departing attorney and the firm because the client is not charged additional fees as a result of the agreement, nor is the client deceived or misled. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Lawyer's bills proper under this rule when lawyer billed attorney and secretarial services separately. Newport Pac. Capital Co. v. Waste, 878 P.2d 136 (Colo. App. 1994).

Public policy of protecting a client's right to control settlement will be better served by not treating a clause in a representation agreement that restricts the client's right to control settlement as severable from the provision for calculating fees. Where representation agreement provided alternate method of calculating the fees payable if the client unreasonably refused to settle, court refused to enforce either provision and allowed only reasonable value of services rendered by law firm. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that allowed his firm to collect 75 to 100 percent of the total fee generated by a case in which his firm did less than all the work. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure and restitution were appropriate in case of attorney who unilaterally charged client $1,000 in addition to previously agreed contingent fee. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. In re Green, 11 P.3d 1078 (Colo. 2000); People v. Dalton, 367 P.3d 126 (Colo. O.P.D.J. 2016).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Sather, 936 P.2d 576 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Lindley, 349 P.3d 304 (Colo. O.P.D.J. 2015); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 2-103.

Law reviews. For article, ''The Lawyer's Duty to Report Ethical Violations'', see 18 Colo. Law. 1915 (1989). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Attorney's conduct in paying inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v. Shipp, 793 P.2d 574 (Colo. 1990).

Attorney's conduct in allowing company selling living trust packages to provide his name, exclusively, to customers upon sale, in conjunction with other violations and aggravating factors justifies six-month suspension. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Cases Decided Under Former DR 2-106.

Law reviews. For article, ''Conflicts in Settlement of Personal Injury Cases'', see 11 Colo. Law. 399 (1982). For article, ''Attorney's Fees'', see 11 Colo. Law. 411 (1982). For article, ''Providing Legal Services for the Poor: A Dilemma and an Opportunity'', see 11 Colo. Law. 666 (1982). For article, ''Reduced Malpractice and Augmented Competency: A Proposal'', see 12 Colo. Law. 1444 (1983). For article, ''Ethical Problem Areas for Probate Lawyers'', see 19 Colo. Law. 1069 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of

Estate Planning Documents, see 19 Colo. Law. 1793 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Recovery of Attorney Fee by Lender Using In-House Counsel, see 20 Colo. Law. 697 (1991).

Where an attorney makes a uniform practice of imposing charges that exceed the statutory standards, such violates Canon 2. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney's charges for probate proceeding considered excessive on facts of case. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Attorney who assessed excessive legal fees and attempted to retain improperly charged fees, neglected clients' interests to their detriment, and made misrepresentations as to services actually performed on clients' cases was properly suspended for thirty days. Although attorney previously found to have engaged in professional misconduct, attorney suffered personal tragedy prior to misconduct and subsequently improved by engaging in activities beneficial to legal and professional community. People v. Brenner, 764 P.2d 1178 (Colo. 1988).

Charging client for costs of defending grievance proceeding violates DR 2-106(A) where disciplinary charges are not unfounded and there is no prior agreement to pay such costs. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Lawyer who billed client for the costs of defending a grievance violated this rule. There was no agreement between the attorney and the client to justify the billing, and the attorney's claim that the billing stemmed from the attorney's independent duty to protect the client was found by the grievance panel to be false. Therefore, the billing based on such a theory is deceptive and dishonest in violation of this rule. The appropriate sanction for the lawyer's conduct is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

Where attorney enters into a fee arrangement basing his compensation directly on royalties his client might receive from oil and gas wells, it is clear that the arrangement is not intended as compensation for legal services provided and therefore constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1984).

Contingent fee agreement in a probate proceeding is not unconscionable or unreasonable where it was openly made and supported by adequate consideration. In re Estate of Reid, 680 P.2d 1305 (Colo. App. 1983).

Excessive fees are basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Contract held not to violate prohibition against maintenance. Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972).

Evidence insufficient to establish excessive fee in violation of paragraph (A). People v. Lanza, 660 P.2d 881 (Colo. 1983).

Suspended or disbarred attorney does not lose right to assert a claim for fees earned prior to suspension or disbarment. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Suspended attorney was entitled to collect one-third share of contingency fee under an agreement to divide the fee with two other attorneys where the agreement was based on a good faith division of services and responsibility at the time it was entered into. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Suspension for one year and one day warranted where attorney billed for time that was not actually devoted to work contemplated by contract and for time not actually performed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Mills, 923 P.2d 116 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Fleming, 716 P.2d 1090 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Franks, 791 P.2d 1 (Colo. 1990); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Applied in Hartman v. Freedman, 197 Colo. 275, 591 P.2d 1318 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Coca, 732 P.2d 640 (Colo. 1987).

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or

(8) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [16], [17], and [18] added and effective November 6, 2008; (b)(4), (6), (7) amended, (c) added, and Comment amended, effective April 6, 2016.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through com-

pulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(2) permits disclosure regarding a client's intention to commit a crime in the future and authorizes the disclosure of information necessary to prevent the crime. This paragraph does not apply to completed crimes. Although paragraph (b)(2) does not require the lawyer to reveal the client's intention to commit a crime, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[7] Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules, other law, or a court order. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is

not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with these Rules, other law, or a court order. For example, Rule 1.6(b)(5) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if the information is protected by the attorney-client privilege or its disclosure is reasonably likely to materially prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(8), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client

about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(8) permits the lawyer to comply with the court's order.

[15A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and among those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules or law may require disclosure. For example, Rule 3.3 requires disclosure of certain information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the circumstances under which a lawyer representing an organization may disclose information, regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to a third party of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the Rules of Professional Conduct, except where this Rule does not permit those disclosures.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(8). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

Reasonable Measures to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to make reasonable efforts to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Comments [3] and [4] to Rule 5.3.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precau-

tions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, ''The Maverick Council Member: Protecting Privileged Attorney-Client Communications from Disclosure'', see 23 Colo. Law. 63 (1994). For article, ''Ethical Considerations and Client Identity'', see 30 Colo. Law. 51 (Apr. 2001). For article, ''Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice'', see 30 Colo. Law. 51 (May 2001). For article, ''Policing the Legal System: The Duty to Report Misconduct'', see 30 Colo. Law. 85 (Sept. 2001). For article, ''Am I My Brother's Keeper? Redefining the Attorney-Client Relationship'', see 32 Colo. Law. 11 (Apr. 2003). For article, ''Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications'', see 33 Colo. Law. 53 (Oct. 2004). For article, ''Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues'', see 34 Colo. Law. 65 (July 2005). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct. 2005). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges'', see 38 Colo. Law. 35 (Jan. 2009). For article, ''Attorney-Client Communications in Colorado'', see 38 Colo. Law. 59 (Apr. 2009). For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012). For article, ''Third-Party Opinion Letters: Limiting the Liability of Opinion Givers'', see 42 Colo. Law. 93 (Nov. 2013). For article, ''Client-Drafted Engagement Letters and Outside Counsel Policies'', see 43 Colo. Law. 33 (Feb. 2014). For casenote, ''A Colorado Child's Best Interests: Examining the Gabriesheski Decision and Future Policy Implications'', see 85 U. Colo. L. Rev. 537 (2014). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016). For article, ''Attorney-Client Privilege and the Work Product Doctrine: Is Confidentiality Lost in Email?'', see 46 Colo. Law. 32 (Nov. 2017). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018). For article, ''Defense Counsel's Duties in Juvenile Delinquency Cases: Should a Guardian ad Litem be Appointed?'', see 47 Colo. Law. 48 (Nov. 2018).

Annotator's note. Rule 1.6 is similar to Rule 1.6 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate discipline for lawyer who delivered document containing admissions of client to district attorney without first obtaining client's authorization. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

''Implied'' consent not encompassed by rule authorizing attorney to disclose client confidences or secrets. Such disclosure may be made only after full disclosure to and with consent of client. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Attorney must not reveal information related to the representation of a client in the absence of the client's consent. People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011).

But disclosing privileged communications to a personal representative of a client's estate who is the holder of the privilege does not itself violate the privilege. The right to claim the privilege passes to the personal representative of a client's estate, who becomes the holder of the privilege because a personal representative succeeds to the rights and obligations of the estate's decedent, effectively ''stepping into the shoes'' of the decedent. In re Estate of Rabin, 2018 COA 183, __ P.3d __.

By unnecessarily including information tending to show weakness in the client's case in a motion to voluntarily dismiss a claim without prejudice, an attorney discloses work product in violation of this rule. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Guardian ad litem (GAL) does not have an attorney-client relationship with child who is the subject of a dependency and neglect proceeding, and chief justice directive 04-06 does not designate an attorney-client relationship nor create an evidentiary privilege. The trial court erred in concluding that the evidentiary privilege in § 13-90-107 (1)(b) precluded the GAL's testimony concerning the child's communications. People v. Gabriesheski, 262 P.3d 653 (Colo. 2011).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension for nine months plus additional conditions. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lindley, 349 P.3d 304 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 4-101.

Law reviews. For article, ''The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client'', see 59 Den. L.J. 75 (1981). For article, ''Conflicts in Settlement of Personal Injury Cases'', see 11 Colo. Law. 399 (1982). For article, ''Incriminating Evidence: What to do With a Hot Potato'', see 11 Colo. Law. 880 (1982). For article, ''Ethics, Tax Fraud and the General Practitioner'', see 11 Colo. Law. 939 (1982). For article, ''Prior Representation: The Specter of Disqualification of Trial Counsel'', see 11 Colo. Law. 1214 (1982). For article, ''The Search for Truth Continued: More Disclosure, Less Privilege'', see 54 U. Colo. L. Rev. 51 (1982). For article, ''The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel'', see 54 U. Colo. L. Rev. 67 (1982). For article, ''Some Comments on Conflicts of Interest and the Corporate Lawyer'', see 12 Colo. Law. 60 (1983). For article, ''Protecting Technical Information: The Role of the General Practitioner'', see 12 Colo. Law. 1215 (1983). For article, ''Potential Liability for Lawyers Employing Law Clerks'', see 12 Colo. Law. 1243 (1983). For article, ''Attorney Disclosure: The Model Rules in the Corporate/Securities Area'', see 12 Colo. Law. 1975 (1983). For comment, ''Colorado's Approach to Searches and Seizures in Law Offices'', see 54 U. Colo. L. Rev. 571 (1983). For casenote, ''Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege'', see 55 U. Colo. L. Rev. 319 (1984). For article, ''Incest and Ethics: Confidentiality's Severest Test'', see 61 Den. L.J. 619 (1984). For article, ''Defending the Federal Drug or Racketeering Charge'', see 16 Colo. Law. 605 (1987). For article, ''Coping with the Paper Avalanche: A Survey on the Disposition of Client Files'', see 16 Colo. Law. 1787 (1987). For comment, ''Attorney-Client Confidences: Punishing the Innocent'', see 61 U. Colo. L. Rev. 185 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990). For article, ''Sex, Lawyers and Vilification'', see 21 Colo. Law. 469 (1992). For formal opinion of the Colorado Bar Association Ethics Committee on Preservation of Client Confidences in View of Modern Communications Technology, see 22 Colo. Law. 21 (1993).

Prevailing rule is that it will be presumed that confidences were reposed where an attorney-client relationship has been shown to have existed. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Ethical obligation to preserve client confidences continues after termination of attorney-client relationship. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Trustee in bankruptcy succeeds to a debtor's right to assert or waive the attorney-client privilege. In re Inv. Bankers, Inc., 30 B.R. 883 (Bankr. D. Colo. 1983).

Crime-fraud exception to attorney-client privilege recognized. The code of professional responsibility recognizes the crime-fraud exception to the attorney-client privilege and work-product doctrine. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

Attorney's failure to safeguard a draft letter to a client in which the attorney suggests that the client misrepresented his qualifications, and where federal prosecutor later used the letter during the client's trial on federal criminal charges, violated DR 4-101(B)(1). People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Bald assertion insufficient to warrant disqualification of district attorney. Bald assertion by defendant that he made confidential statements to the prosecutor during the existence of a prior attorney-client relationship was insufficient to warrant disqualification of the district attorney. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

An accused seeking to disqualify a prosecutor because of prior representation of a co-defendant by a member of the prosecutor's former firm must show that either the prosecutor or the firm member, by virtue of the prior professional relationship with the co-defendant, received confidential information about the accused which was substantially related to the pending criminal action. McFarlan v. District Court, 718 P.2d 247 (Colo. 1986).

It is no abuse of discretion for court to order public defender to withdraw from a defendant's case where public defender's prior representation of a prosecution witness and his present representation of defendant created a conflict of interest. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986); People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

Prior employment of plaintiff's attorney by defendant does not disqualify the attorney where the instant case is not substantially related to any matter in which the attorney previously represented the defendant. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client, aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister 814 P.2d 801 (Colo. 1991).

An attorney must disclose information to the court in camera if ordered to do so. People v. Salazar, 835 P.2d 592 (Colo. App. 1992).

Applied in People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Smith, 778 P.2d 685 (Colo. 1989).

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of ''informed consent'' and ''confirmed in writing,'' see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be ma-

terially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a

lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage or when there is a cohabiting relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family or cohabiting relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse (or in a cohabiting relationship with another lawyer,) ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship or a cohabiting relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a ''tribunal'' under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.

On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continu-

ing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles might conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, ''Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues'', see 34 Colo. Law. 65 (July 2005). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct. 2005). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''The New Rules of Profes-

sional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''Engagement Letters and Common Conflicts of Interest in Joint Representation'', see 38 Colo. Law. 43 (Feb. 2009). For article, ''Climate Change and Positional Conflicts of Interest'', see 40 Colo. Law. 43 (Oct. 2011). For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012). For article, ''Client-Drafted Engagement Letters and Outside Counsel Policies'', see 43 Colo. Law. 33 (Feb. 2014). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''Formal Opinion 129: Ethical Duties of Lawyer Paid by One Other than the Client'', see 46 Colo. Law. 19 (May 2017). For article, ''A Lawyer's Duty to Disclose Errors to the Client'', see 46 Colo. Law. 39 (June 2017). For article, ''Ethical Duties of an Insurance Defense Lawyer'', see 46 Colo. Law. 40 (Oct. 2017). For article, ''Between a Rock and a Hard Place: Law Firm Conflicts and Lateral Hires'', see 47 Colo. Law. 41 (Apr. 2018). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019). For article, ''Your Deal is in Litigation? It's Time to Call Someone Else'', see 48 Colo. Law. 30 (Mar. 2019).

Annotator's note. Rule 1.7 is similar to Rule 1.7 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Where there is a large group of clients who are not recognized as a single legal entity, an attorney has an attorney-client relationship with each individual member of the group. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Representation agreement that gives counsel the ability to negotiate settlement for each member of a large group of clients without providing him or her with personalized advisement and without obtaining individual authority to enter into a settlement agreement violates the professional and ethical standards created to regulate the legal profession in Colorado. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Any provision of an attorney-client agreement that deprives a client of a right to control his or her case is void as against public policy. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Valid client consent to waive the potential conflict of interest cannot be obtained under the circumstances. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Where counsel simultaneously represented company's interests as well as those of company's employees for a substantial period of time and the representation continued through the emergence of conflicts, counsel could continue to represent company because the company and the former clients, the employees, through counsel, consented to such representation after consultation and there was an indication that counsel reasonably believed that the continued representation would not adversely affect the relationship with the former clients. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 855 F. Supp. 330 (D. Colo. 1994).

Out-of-state law firm disqualified from representing plaintiff when defense counsel had previously consulted with a member of the firm about the case, including counsel's theory of the case and defense strategy. Liebnow v. Boston Enters. Inc., 2013 CO 8, 296 P.3d 108.

A defendant may waive the right to conflict-free counsel. The waiver is valid when: (1) The defendant is aware of the conflict and its likely effect on the attorney's ability to render effective assistance; and (2) the waiver is voluntary, knowing, and intelligent. A waiver is voluntary, knowing, and intelligent when the defendant is aware of and understands the various risks, has the capacity to make a decision on the basis of this information, and states unequivocally a desire to hazard those dangers. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

A waiver is not knowing and intelligent where a defendant gives merely pro forma answers to pro forma questions. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Balancing test to determine whether defendant may waive conflict-free representation. The trial court must examine: (1) The defendant's preference for particular counsel; (2) the public's interest in maintaining the integrity of the judicial process; and (3) the nature of the particular conflict. People v. Nozolino, 2013 CO 19, 298 P.3d 915.

Defendant does not have an absolute right to revoke waiver of conflict-free counsel at any time, but is subject to the same limitations as any defendant terminating counsel. The court may refuse to revoke an untimely waiver or to grant a revocation that is filed for improper purposes based upon evidence presented at the time of attempted revocation. People v. Maestas, 199 P.3d 713 (Colo. 2009).

Attorney violated paragraph (a) by simultaneously representing both a borrower and the purported lenders to a proposed transaction that he attempted to persuade both parties to enter

into. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Lawyer violated section (b) when his representation of a client was materially limited by his responsibilities to another client. He represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Critical inquiry when representation of one client may be limited by representation of another is whether a conflict is likely to arise, and, if so, whether it materially interferes with the lawyer's independent professional judgment. People in Interest of J.A.M., 907 P.2d 725 (Colo. App. 1995).

Actual conflict existed where criminal charges were pending against defense counsel in the same district in which his client was being prosecuted. People v. Edebohls, 944 P.2d 552 (Colo. App. 1996).

Attorney's representation of criminal defendant for whom attorney negotiated a plea bargain for testifying against another criminal defendant prohibited attorney from also representing the other criminal defendant where such other defendant did not consent to conflict-free counsel. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

Attorney who was the trustee of client's trust violated section (b) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Preparation of an extension agreement on the repayment of a loan made to a client by the attorney violated section (b) because certain exceptions were not satisfied. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. Attorney's ability to represent his client in a bankruptcy was materially limited by his own interest as a creditor in collecting attorney fees. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Good, 893 P.2d 101 (Colo. 1995); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Reed, 955 P.2d 65 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009); People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011); People v. Miller, 354 P.3d 1136 (Colo. O.P.D.J. 2015).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993); In re Lopez, 980 P.2d 983 (Colo. 1999); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Cases Decided Under Former DR 5-101.

Law reviews. For article, ''The Conflicted Attorney'', see 11 Colo. Law. 2589 (1982). For article, ''The Ethics of Moving for Disqualification of Opposing Counsel'', see 13 Colo. Law. 55 (1984). For article, ''Why Shouldn't an Attorney Go Into Business With a Client?'', see 13 Colo. Law. 431 (1984). For article, ''Avoiding Family Law Malpractice: Recognition and Prevention — Part I'', see 14 Colo. 787 (1985). For article, ''Conflicts of Interest'', see 15 Colo. Law. 2001 (1986). For article, ''Defending the Federal Drug or Racketeering Charge'', see 16 Colo. Law. 605 (1987). For article, ''Sex, Lawyers and Vilification'', see 21 Colo. Law. 469 (1992).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

A lawyer, by preparing 95 to 99 percent of the pleadings, continues to represent a client even though he has other attorneys sign the pleadings. People v. Garnett, 725 P.2d 1149 (Colo. 1986).

Public censure warranted where attorney engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

By investing trust funds in a venture in which the attorney was involved financially and professionally, he allowed his personal interests to affect the exercise of his professional judgment on behalf of his client in violation of DR 5-101(A), justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Representing client without full disclosure of potential conflict of interest violates disciplinary rule. People v. Watson, 787 P.2d 151 (Colo. 1990).

No violation of paragraph (A). Although disclosure was inadequate as to the nature of the business relationships between the attorney and his business-partner client, record does not support conclusion that attorney's business relationship with individual client would or reasonably might affect his professional judgment with respect to his representation of that client. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Violation of paragraph (B) where attorney knew, when he accepted employment in connection with his client's bankruptcy, that he could be a witness by virtue of his interests in the general and limited partnerships that were assets of the bankruptcy estate, and by his failure to transfer the partnership interests to his client's children prior to the filing of the bankruptcy. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Representation of client when the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests violates disciplinary rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Boyer, 934 P.2d 1361 (Colo. 1997); In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); Jones v. District Court, 617 P.2d 803 (Colo. 1980); McCall v. District Court, 783 P.2d 1223 (1989).

Cases Decided Under Former DR 5-102.

Law reviews. For article, ''Prior Representation: The Specter of Disqualification of Trial

Counsel'', see 11 Colo. Law. 1214 (1982). For article, ''The Ethics of Moving for Disqualification of Opposing Counsel'', see 13 Colo. Law. 55 (1984). For article, ''Defending the Federal Drug or Racketeering Charge'', see 16 Colo. Law. 605 (1987). For article, ''Ethical Problem Areas for Probate Lawyers'', see 19 Colo. Law. 1069 (1990).

A lawyer cannot act as an advocate on behalf of his client and yet give testimony adverse to the interests of that client in the same proceeding. Riley v. District Court, 181 Colo. 90, 507 P.2d 464 (1973).

Prosecution subpoena of accused's attorney may stand. A prosecutorial subpoena served on a criminal defendant's attorney can withstand a motion to quash only if the prosecution shows the following: (1) Defense counsel's testimony will be actually adverse to the accused; (2) the evidence will likely be admissible at trial; and (3) there is a compelling need for the evidence which cannot be satisfied from another source. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

The act of subpoenaing defense counsel is itself the functional equivalent of a motion to disqualify. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

Test applied in Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Paragraph (A) of this rule relates to potential testimony of a lawyer during the trial of a matter for which he is presently employed. People v. Rubanowitz, 688 P.2d 231 (Colo. 1984).

When deputy district attorney was endorsed as witness for prosecution, disqualification of deputy district attorney was proper, and disqualification of entire staff of county district attorney's office, under the circumstances, was not an abuse of discretion. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Dismissal of charge is not an appropriate remedy. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Motion to disqualify must set forth specific facts which point to a clear danger that either prejudices counsel's client or his adversary. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Paragraph (B) does not provide a tool for disqualifying counsel by the mere stratagem of suggesting that opposing counsel may be called as a witness during the trial. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Although the Code mandates that an attorney withdraw on the attorney's own initiative if the attorney violates paragraph (B), there are no provisions in this rule for the trial court to disqualify attorneys and this rule does not require a new trial if the attorney does not withdraw. Although plaintiff's attorneys testified for the defendant, the court found that plaintiff was bound by his counsel's decision not to withdraw and refused to grant plaintiff a new trial. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

Applied in Jones v. District Court, 617 P.2d 803 (Colo. 1980); Fed. Deposit Ins. v. Isham, 782 F. Supp. 524 (D. Colo. 1992).

Cases Decided Under Former DR 5-104.

Law reviews. For article, ''Why Shouldn't an Attorney Go Into Business With a Client?'', see 13 Colo. Law. 431 (1984). For article, ''Conflicts of Interest'', see 15 Colo. Law. 2001 (1986). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part I'', see 19 Colo. Law. 465 (1990). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part II'', see 19 Colo. Law. 647 (1990).

Attorney, with power to act as trustee, who obtains a loan from the trust through the actual trustee, but does not disclose conflict and does not discuss security for the loan with the actual trustee, violates this section. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

Public censure appropriate for lawyer who failed to make full disclosure to client of their differing interests prior to obtaining her consent for a loan to the lawyer. People v. Potter, 966 P.2d 1061 (Colo. 1998).

An attorney's conduct in lending money to a client, preparing a promissory note with an excessive interest rate, and failing to fully disclose his differing interest in the business transaction constitutes conduct violating this rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Exploiting a client's friendship and trust to extort funds for one's personal use is reprehensible conduct deserving of disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1988).

Lawyer's encouragement of a client to enter into a business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Sigley, 917 P.2d 1253 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Foster, 716 P.2d 1069 (Colo. 1986).

An attorney's conduct in borrowing money from his former clients and in failing to record

deeds of trust on their behalf to be used as security constitutes professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

An attorney's failure to disclose to his clients that he was a lender and holder of a long-term mortgage on their property and that his interests in the transaction were necessarily adverse to their interests constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1984).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Tanquary, 831 P.2d 889 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. McKie, 900 P.2d 768 (Colo. 1995).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Cases Decided Under Former DR 5-105.

Law reviews. For article, ''Conflicts in Settlement of Personal Injury Cases'', see 11 Colo. Law. 399 (1982). For article, ''Prior Representation: The Specter of Disqualification of Trial Counsel'', see 11 Colo. Law. 1214 (1982). For article, ''The Conflicted Attorney'', see 11 Colo. Law. 2589 (1982). For article, ''Some Comments on Conflicts of Interest and the Corporate Lawyer'', see 12 Colo. Law. 60 (1983). For article, ''The Professional Liability Insurer's Duty to Defend — Part II'', see 15 Colo. Law. 1029 (1986). For article, ''Conflicts of Interest'', see 15 Colo. Law. 2001 (1986). For article, ''Conflict of Interest Systems'', see 16 Colo. Law 628 (1987). For article, ''Corporate Fiduciary Surcharge Litigation'', see 16 Colo. Law. 983 (1987). For article, ''Ethics and the Estate Planning Lawyer'', see 17 Colo. Law. 241 (1988). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part I'', see 19 Colo. Law. 465 (1990). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part II'', see 19 Colo. Law. 647 (1990). For article, ''Ethical Problem Areas for Probate Lawyers'', see 19 Colo. Law. 1069 (1990).

Intent of rule is to guarantee the independence of counsel from the conflicting interests of other clients in order to preserve the integrity of the attorney's adversary role. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974).

Genuine conflicts of interest must be scrupulously avoided. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

It is of the utmost importance that an attorney's loyalty to his client not be diminished, fettered, or threatened in any manner by his loyalty to another client. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Conflict arises where parties would be opposed in subsequent contribution action. Where litigants in a negligence action are represented by the same attorneys, a conflict of interest arises if the plaintiff are considered opposing parties in the same action for purposes of a subsequent contribution action, because both parties would want to place a higher degree of fault on the other party. Nat'l Farmers Union Prop. & Gas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

Whenever a motion to withdraw is filed on the grounds that a conflict of interest may exist or may arise in the future, the trial judge must conduct a hearing to determine if a conflict of interest, or a potential conflict of interest, requires that counsel withdraw, and if, from the facts presented at the hearing, it appears that a substantial conflict of interest exists, or will in all probability arise in the course of counsel's representation, the motion to withdraw should be granted. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Consent of all parties may be insufficient. There are certain factual situations where the conflicts of interests between parties are so critically adverse to one another so as not to permit the representation of multiple parties by an attorney, even with the consent of all parties made after full disclosure. In re King Res. Co., 20 B.R. 191 (Bankr. D. Colo. 1982).

Attorney should evaluate potential for impropriety. The attorney should not only inform the parties of the former representations, but should evaluate for himself, as well as for his client, any potential for impropriety that might arise. In re King Res. Co., 20 B.R. 191 (Bankr. D. Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

It must be "obvious" that attorney can adequately represent clients. The general rule that a lawyer may represent clients with potentially conflicting interests with the consent of the clients is qualified in that it must be ''obvi-

ous'' that he can adequately do so. In re King Res. Co., 20 B.R. 191 (Bankr. D. Colo. 1982); People v. Chew, 830 P.2d 488 (Colo. 1992).

Attorney may represent individual officer of client corporation. When an individual director or officer of a corporation seeks representation from an attorney hired by the corporation, the attorney may serve the individual only if the lawyer is convinced that differing interests are not present. In re King Res. Co., 20 B.R. 191 (Bankr. D. Colo. 1982).

Knowledge of one attorney must be imputed to lawyers with whom he practices. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Imputed disqualification applies to public law firm. The same rule of imputed disqualification stated in subdivision (D) of this rule may be considered in determining the ethical standards for disqualification of a public law firm, such as a district attorney. People v. Garcia, 698 P.2d 801 (Colo. 1985); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Rule of imputed disqualification applies to public defenders. Allen v. District Court, 519 P.2d 351 (Colo. 1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Due to imputed disqualification, appellate division of state public defender's office must be permitted to withdraw from representing on appeal a defendant who claims ineffective counsel provided by local deputy public defender. McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Trial dates accepted should be honored before withdrawal from employment. When a public defender or a busy defense lawyer finds that his representation of one client is inimical to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of a case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's compensation may be denied. Where an attorney is shown to represent more than one party with conflicting interests, a court may deny him all compensation under a retainer agreement. In re King Res. Co., 20 B.R. 191 (Bankr. D. Colo. 1982).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Public censure is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client, causing injury or potential injury to a client. Attorney's representation of two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries violates this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Public censure was appropriate where attorney simultaneously represented one client in automobile accident case and another client, who was involved in the automobile accident, in a bankruptcy proceeding without listing the accident client as a creditor of the bankruptcy client, and where aggravating factors existed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Public censure warranted where attorney entered into compensated consulting agreement with law firm to which he referred client's cases, without full disclosure of agreement to client. People v. Mulvihill, 814 P.2d 805 (Colo. 1991).

An attorney is not always precluded from representing a client in a transaction with a former or currently inactive client. Whether an attorney properly may do so depends upon the nature and extent of the former legal work performed for the previous client as well as the possible relationship between the two transactions. Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Foster, 716 P.2d 1069 (Colo. 1986).

Three-month suspension appropriate for violation of DR 5-105 (A) and (B) and DR 5-101 (B). The interests of the client and the client's wife, from whom the client was then separated, were so adverse, or potentially adverse, that the conflicts could not be waived even had there been full disclosure. As such, it was not obvious that the attorney could represent the client, the client's estranged wife, and their children in the client's bankruptcy proceedings. Because the attorney knew of the conflicts involved when he undertook the multiple representation, a short period of suspension is warranted, but not the requirement of reinstatement proceedings. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Forty-five-day suspension appropriate for violation of this rule where pattern of misconduct and multiple offenses are factors in aggravation. People v. Chew, 830 P.2d 488 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996).

Public censure appropriate where attorney represented buyer and seller of restaurant and did not properly advise the buyer or protect the

buyer's interest. People v. Odom, 829 P.2d 855 (Colo. 1992).

Conduct violating this rule sufficient to justify public censure. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Butler, 875 P.2d 219 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Silver, 924 P.2d 159 (Colo. 1996); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Castro, 657 P.2d 932 (Colo. 1983); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. McDowell, 718 P.2d 541 (Colo. 1986).

Cases Decided Under Former DR 5-107.

Law reviews. For article, ''Conflicts in Settlement of Personal Injury Cases'', see 11 Colo. Law. 399 (1982). For article, ''Conflicts of Interest'', see 15 Colo. Law. 2001 (1986). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Rule 1.8. Conflict of Interest; Current Clients; Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize law suits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are

virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like

paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (b) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in paragraph (c) applies to all lawyers associated in the firm. The prohibitions set forth in paragraphs (a) and (j) are personal and are not applied to associated lawyers.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, ''Ethical Considerations of Attorney's Liens'', see 31 Colo. Law. 51 (Apr. 2002). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct. 2005). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (Oct. 2012). For article, ''Third-Party Opinion Letters: Limiting the Liability of Opinion Givers'', see 42 Colo. Law. 93 (Nov. 2013). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''Formal Opinion 129: Ethical Duties of Lawyer Paid by One Other than the Client'', see 46

Colo. Law. 19 (May 2017). For article, ''A Lawyer's Duty to Disclose Errors to the Client'', see 46 Colo. Law. 39 (June 2017).

Annotator's note. Rule 1.8 is similar to Rule 1.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Although the basis of this rule is to deter common law champerty and maintenance, the scope of the rule is not limited to conduct that would constitute champerty and maintenance. People v. Mason, 938 P.2d 133 (Colo. 1997).

This rule is a source of public policy and the purpose is to protect the interests of clients. Because this rule is an ethical rule, based on public policy, where an attorney violated this rule, an oral contract between the attorney and a former client was void and unenforceable. Calvert v. Mayberry, 2016 COA 60, __ P.3d __.

A violation of this rule is per se a false representation under 11 U.S.C. § 523(a)(2)(A) of the federal bankruptcy code. In re Waller, 210 B.R. 370 (Bankr. D. Colo. 1997).

Personal loan from client to attorney was not a standard commercial transaction exempt from the requirements of section (a) of this rule. In re Riebesell, 586 F.3d 782 (10th Cir. 2009).

Advancing an appellate-lawyer's fees for a client does not violate section (e). Paying another lawyer to appeal a case is an ''expense of litigation'', and, therefore, does not violate the rule against providing financial assistance to a client. Mercantile Adjustment Bureau v. Flood, 2012 CO 38, 278 P.3d 348.

Suspension for 60 days appropriate for lawyer who entered into an agreement with a client and failed to fully inform the client of the terms of the agreement in writing or obtain the client's consent to the transaction. People v. Foreman, 966 P.2d 1062 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Suspension is generally appropriate when a lawyer knows of a conflict of interest and fails to disclose to a client the possible effect of that conflict. Respondent admittedly and knowingly failed to fully disclose to a client the possible effect of a conflict of interest and was therefore suspended from the practice of law for ninety days, stayed upon the successful completion of a one-year period of probation. People v. Fischer, 237 P.3d 645 (Colo. O.P.D.J. 2010).

By acquiring promissory note and deed of trust in client's property, attorney acquired a pecuniary interest in client's property that was adverse to the client's interest. Therefore, attorney was obligated to comply with requirements of section (a). In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

When the attorney secured a promissory note with a deed of trust in client's residence, he acquired a proprietary interest in the subject matter of the litigation in violation of former section (j) (now section (i)). In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Business transaction between a lawyer and a company partly owned and controlled by a client, in which the lawyer obtained a possessory interest adverse to that of the client, triggered the requirements of this rule although it was not technically a transaction between the lawyer and the client. Matter of Wollrab, 2018 CO 64, 420 P.3d 960.

An option contract is a "business transaction" within the meaning of this rule. The fact that the option related to a larger transaction that ultimately was not consummated does not alter its status. Matter of Wollrab, 2018 CO 64, 420 P.3d 960.

If the client is independently represented for purposes of the transaction, the requirement to obtain the client's informed, written consent under section (a)(3) still applies. Comment 4 discusses the applicability of sections (a)(1) and (a)(2) in this situation but does not excuse the lawyer from compliance with section (a)(3). Matter of Wollrab, 2018 CO 64, 420 P.3d 960.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension, stayed upon completion of one-year period of probation with conditions. People v. Bendinelli, 329 P.3d 300 (Colo. O.P.D.J. 2014).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. In re Fisher, 202 P.3d 1186

(Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Attorney's conduct warrants punishment whether or not he knew conduct was improper under the rules. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Conduct violating this rule in conjuntion with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Ginsberg, 967 P.2d 151 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Applied in People v. Culter, 277 P.3d 954 (Colo. O.P.D.J. 2011).

Cases Decided Under Former DR 5-103.

Law reviews. For article, ''Conflicts of Interest'', see 15 Colo. Law. 2001 (1986).

The effect of Canon 5 is that whenever a contingent fee contract becomes a subject of litigation in the courts, the lawyer, by reason of the canon, understands that the court, under its general supervisory powers over attorneys as officers of the courts, will determine the reasonableness of the amount and will subject it to the test of quantum meruit. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

However, this does not mean that the court can or should remake the contract, but rather that it should determine from all the facts and circumstances the amount of time spent, the novelty of the questions of law, and the risks of nonreturn to the client as well as to the attorney in the situation. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Where the "legal services" rendered were for the most part those which are ordinarily performed by a business chance broker, the established commission payable to such broker at the time would be considered to determine reasonableness. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969) (shown to be 10 percent of purchase price).

Court cannot approve commission of 25 percent. In the exercise of supervisory powers over attorneys as officers of this court, the supreme court cannot approve — under the guise of a ''contingent fee'' contract for legal services — the payment of what in fact amounts to a broker's commission of 25 percent of the purchase price of the leasehold interest. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Attorney fees secured by a note which was secured by a deed of trust on property to be sold violated this rule when, upon receipt of a check at closing, the attorney was aware that he had encumbered the property in excess of his client's share of the equity. People v. Franco, 698 P.2d 230 (Colo. 1985).

Arrangement of counsel and clients in written fee agreement which assigned alleged interest in oil and gas properties in order to secure payment of legal fees did not endanger a fair trial. Trial court abused its discretion in granting a mistrial, disqualifying counsel, and assessing attorney fees. Gold Rush Invs. v. Ferrell, 778 P.2d 297 (Colo. App. 1989).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992); In re Polevoy, 980 P.2d 985 (Colo. 1999); People v. Miller, 354 P.3d 1136 (Colo. O.P.D.J. 2015).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 5-106.

Law reviews. For article, ''Conflicts in Settlement of Personal Injury Cases'', see 11 Colo. Law. 399 (1982).

Cases Decided Under Former DR 6-102.

Law reviews. For article, ''Limiting Liability to the Client'', see 11 Colo. Law. 2389 (1982). For article, ''Potential Liability for Lawyers Employing Law Clerks'', see 12 Colo. Law. 1243 (1983). For article, ''The Ethical Obligation to Disclose Attorney Negligence'', see 13 Colo. Law 232 (1984). For article, ''A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II'', see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Release and Settlement of Legal Malpractice Claims, see 19 Colo. Law. 1553 (1990).

Conduct violating this rule sufficient to justify suspension. People v. Foster, 716 P.2d 1069 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978).

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Source: IP(c) amended March 17, 1994, effective July 1, 1994; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a ''matter'' for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are ''substantially related'' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be

relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, ''Entity Foundation: Defining the Client And the Duty of Confidentiality'', see 34 Colo. Law. 77 (July 2005). For article, ''Engagement Letters and Common Conflicts of Interest in Joint Representation'', see 38 Colo. Law. 43 (Feb. 2009). For article, ''Ethical Considerations When Using Freelance Legal Services'', see 47 Colo. Law. 36 (June 2018).

Annotator's note. Rule 1.9 is similar to Rule 1.9 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The purpose of this rule and rule 1.10 is to protect a client's confidential communications with his attorney. Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

Motions to disqualify counsel rest within the sound discretion of the trial court. FDIC v. Sierra Res., Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

The severe remedy of disqualification of a criminal defendant's counsel of choice should be avoided whenever possible. People v. Hoskins, 2014 CO 70, 333 P.3d 828.

The party seeking disqualification under this rule must provide the court with specific facts to show that disqualification is necessary and he cannot rely on speculation or conjecture. FDIC v. Sierra Res., Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

Specifically, the moving party must show that: (1) An attorney-client relationship existed in the past; (2) the present litigation involves a matter that is ''substantially related'' to the prior litigation; (3) the present client's interests are materially adverse to the former client's interests; and (4) the former client has not consented to the disputed representation after consultation. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

Substantiality is present if the factual contexts of the two representations are similar or related. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Cole v. Ruidoso Municipal Sch., 43 F.3d 1373 (10th Cir. 1994); Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

A motion to disqualify under section (a) will rarely, if ever, raise an ''identical'' issue to a disqualification motion in another case because the analysis under section (a) of whether the prior and current matters are substantially related will differ in each case. Villas at HP, H.A. v. Villas at HP, LLC, 2017 CO 53, 394 P.3d 1144.

Trial court abused its discretion by disqualifying petitioner's retained counsel of choice in a criminal proceeding. The record was insufficient to support a finding that the parties' interests were materially adverse. People v. Hoskins, 2014 CO 70, 333 P.3d 828.

Trial court abused its discretion in relying on issue preclusion to deny the disqualification motion instead of conducting the requisite analysis under section (a). Villas at HP, H.A. v. Villas at HP, LLC, 2017 CO 53, 394 P.3d 1144-1159.

Attorney's former representation of the alternate suspect in criminal case prohibited him from representing the criminal defendant where the cases were substantially related because the murder victim in the present case was the informant in the former client's case. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

An attorney needs only to receive consent from his or her former client to represent a new client when the matter the attorney represented the former client in is substantially related to the representation of the new client. The two matters are ''substantially related'' when they involve the same transaction or legal dispute or if there is substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. The record does not support a finding that there was a substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. People v. Frisco, 119 P.3d 1093 (Colo. 2005).

Applied in English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F. Supp. 1498 (D. Colo. 1993).

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one in which the personally disqualified lawyer substantially participated;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

GENERAL RULE

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term ''firm'' denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associ-

ated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

ANNOTATION

Law reviews. For article, ''Private Screening'', see 38 Colo. Law. 59 (June 2009). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016).

Annotator's note. Rule 1.10 is similar to Rule 1.10 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The purpose of this rule and rule 1.9 is to protect a client's confidential communications with his attorney. Funplex Partnership v. FDIC, 19 F. Supp. 2d 1202 (D. Colo. 1998).

When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

The rule of imputed disqualification can be considered from the premise that a firm of attorneys is essentially one attorney for purposes of the rules governing loyalty to the client, or from the premise that each attorney is vicariously bound by the obligation of loyalty owed by each lawyer in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

And the rule of imputed disqualification applies with equal force to court-appointed attorneys. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the government agency to enable the government agency to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term ''confidential government information'' means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term ''matter'' includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency

under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a ''matter'' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

ANNOTATION

Law reviews. For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016).

Trial court abused its discretion in disqualifying entire state public defender's office from representing defendant where no direct conflict of interest existed because neither individual public defender representing defendant was involved in prior representation of witnesses, potential conflicts that may have existed with regard to other public defenders within the statewide office could not be imputed under this rule to individuals representing defendant, and defendant knowingly, intelligently, and voluntarily waived any conflict. People v. Shari, 204 P.3d 453 (Colo. 2009); People v. Nozolino, 2013 CO 19, 298 P.3d 915.

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or

other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the parties and any appropriate tribunal, to enable the parties and the tribunal to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [1] amended and effective July 11, 2012.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term ''personally and substantially'' signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term ''adjudicative officer'' includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Paragraph III(B) of the Application Section of the Colorado Code of Judicial Conduct provides that a part-time judge ''shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.'' Rule 2.11(A)(5)(a) of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association. Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(b) and (e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c) (1) does

not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [3] amended, effective April 6, 2016.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to

officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2), 1.6(b)(3) and 1.6(b)(4) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's

engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a client arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

ANNOTATION

Law Reviews. For article, ''Am I My Brother's Keeper? Redefining the Attorney-Client Relationship'', see 32 Colo. Law. 11 (Apr. 2003). For article, ''Entity Foundation: Defining the Client And the Duty of Confidentiality'', see 34 Colo. Law. 77 (July 2005). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Attorney-Client Communications in Colorado'', see 38 Colo. Law. 59 (Apr. 2009). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016).

There is no ethical violation in the attorney general suing the secretary of state where no

client confidences are involved and the attorney general is representing the broader institutional concerns of the state regarding allegedly unconstitutional legislation enacting a congressional redistricting plan. People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003), cert. denied, 79 U.S. 1221, 124 S. Ct. 2228, 159 L. Ed. 2d 260 (2004) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such

measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

ANNOTATION

Law reviews. For article, ''Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases'', see 24 Colo. Law. 2565 (1995). For article, ''Ethical Concerns When Dealing With the Elder Client'', see 34 Colo. Law. 27 (Oct. 2005). For article, ''Rule of Professional Conduct 1.14 and the Diminished-Capacity Client'', see 39 Colo. Law. 67 (May

2010). For casenote, ''A Colorado Child's Best Interests: Examining the Gabriesheski Decision and Future Policy Implications'', see 85 U. Colo. L. Rev. 537 (2014). For article, ''Guidance on Representing Clients with Diminished Capacity'', see 47 Colo. Law. 44 (Feb. 2018). For article, ''Defense Counsel's Duties in Juvenile Delinquency Cases: Should a Guardian ad Litem be Appointed?'', see 47 Colo. Law. 48 (Nov. 2018).

Annotator's note. Rule 1.14 is similar to Rule 1.14 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

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

Because wife's second attorney was allowed to simply withdraw the motion filed by wife's first attorney for the appointment of a guardian ad litem for his client, and because a factual question clearly existed regarding the wife's ability to understand the nature of the proceedings and direct counsel, trial court was required to hold an evidentiary hearing on the issue of wife's competency. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

The presence of a third party during attorney-client communications will ordinarily destroy the attorney-client privilege unless the third party's presence is reasonably necessary to the consultation. Fox v. Alfini, 2018 CO 94, 432 P.3d 596.

The presence of the client's parents at the client's consultation with her attorney was not reasonably necessary to the client's communication with the attorney where there was evidence that the client did not have diminished capacity to the extent necessitating the presence of her parents to assist her in the communication. Fox v. Alfini, 2018 CO 94, 432 P.3d 596.

Rule 1.15. Safekeeping Property

Repealed and readopted as Rules 1.15A - 1.15E, effective June 17, 2014.

Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

(b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation.

Source: Repealed Rule 1.15 and readopted as Rules 1.15A - 1.15E, effective June 17, 2014; Comment paragraph [7] added, adopted, and effective November 3, 2016.

COMMENT

Note: The following six comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation (''COLTAF''). A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in paragraph 1.15B(i).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account (''IOLTA'') programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account (as defined in Rule 1.15B(2)(b)). The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision applies even if there is no dispute as to ownership.

[7] What constitutes ''reasonable efforts,'' within the meaning of Colo. RPC 1.15B(k), will depend on whether the lawyer does not know the identity of the owner of certain funds held in a COLTAF account, or the lawyer knows the identity of the owner of the funds but not the owner's location or the location of a deceased owner's heirs or personal representative. When the lawyer does not know the identity of the owner of the funds or a deceased owner's heirs or personal representative, reasonable efforts include an audit of the COLTAF account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorneys' fees earned by the lawyer or expenses to be reimbursed to the lawyer or a third person. When the lawyer knows the identity but not the location of the owner of the funds or the location of the owner's heirs or personal representative, reasonable efforts include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner or the owner's heirs or personal representative, and conducting internet searches. After making reasonable but unsuccessful efforts to identify and locate the owner of the funds or the owner's heirs or personal representative, a lawyer's decision to continue to hold funds in a COLTAF or other trust account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(A) or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b). When COLTAF has made a refund to a lawyer following the lawyer's determination of the identity and the location of their owner or the identity and location of the owner's heirs or

personal representative, the lawyer's obligations with respect to those funds are set forth in Colo. RPC 1.15A or are subject to applicable probate procedures or orders. The disposition of unclaimed funds held in the COLTAF account of a deceased lawyer is to be determined in accordance with written procedures published by COLTAF.

ANNOTATION

Law reviews. For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For article, ''Problems with Trust Accounts that Come to the Attention of Regulation Counsel'', see 34 Colo. Law. 39 (Apr. 2005). For article, ''Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?'', see 35 Colo. Law. 95 (Jan. 2006). For article, ''New Colorado Rules on Retention of Client Files'', see 40 Colo. Law. 85 (Aug. 2011). For article, ''The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls'', see 41 Colo. Law. 71 (Oct. 2012). For article, ''Clients' Rights During Transitions Between Attorneys'', see 43 Colo. Law. 39 (Oct. 2014). For article, ''Disputed Funds in the Possession of a Lawyer'', see 44 Colo. Law. 47 (Feb. 2015). For article, ''Flat-Fee Arrangements: The Risks, the Rules, and Fee Recovery'', see 44 Colo. Law. 67 (Dec. 2015).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds, including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services (engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

Failure to provide accounting with respect to fees charged and failure to return unearned fees in conjunction with neglect of civil rights suit warranted a 30-day suspension. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Although a lawyer's possession of a third party's property in a Colorado Lawyer Turst Account Foundation (COLTAF) account gives rise to ethical obligations under this rule, it does not create a fiduciary duty to the third party. Third-party medical providers could not maintain a breach of fiduciary duty tort action against a lawyer based on the lawyer's obligations as trustee of a COLTAF account, even though the medical providers were owed money held in the COLTAF account. Accident & Injury Med. Sp. v. Mintz, 2012 CO 50, 279 P.3d 658.

Supreme court's conclusion that former § 12-5-120 (now § 13-93-115) does not authorize an attorney to assert a retaining lien over a United States passport and that the attorney was therefore obligated to return the passport pursuant to C.R.C.P. 1.16(d) applies equally to section (b), which requires an attorney to return to any ''client or third person any funds or other property that the client or third person is entitled to receive . . .''. Matter of Attorney G., 2013 CO 27, 302 P.3d 248.

Public censure appropriate for failure by respondent to return clients' original tax returns in a timely manner and to inform the clients that the tax returns were in fact missing, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate where the attorney filed the client's retainer in the operating account, rather than the trust account, and when the client fired the attorney and asked for a refund on the retainer, the attorney wrote the client a refund check that was returned for insufficient funds. People v. Pooley, 917 P.2d 712 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Commingling personal and client funds in trust account and writing 45 insufficient funds checks on trust account warrants six-

month suspension where court found that no clients complained about misuses of funds, all checks were eventually honored, and attorney agreed to make restitution to bank for fees and cooperated in disciplinary proceedings. Court found that 120 days would have been insufficient in light of attorney's two prior admonitions and one prior private censure. People v. Davis, 893 P.2d 775 (Colo. 1995).

Sufficient evidence that respondent converted client's funds for personal use because respondent's failure to disclose client's identity and the fee agreement warranted an adverse inference that respondent's client did not consent to respondent's use of funds. People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Fager, 925 P.2d 280 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. O.P.D.J. 2008); People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo. 1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Gallegos, 229 P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010); People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015); People v. Kleinsmith, 407 P.3d 1229 (Colo. O.P.D.J. 2016).

Conduct violating this rule is sufficient to justify disbarment. People v. Townshend, 933 P.2d 1327 (Colo. 1997).

Rule 1.15B. Account Requirements

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall

deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that have not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit, all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a ''business account,'' an ''office account,'' an ''operating account,'' or a ''professional account,'' or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation (''COLTAF'') account. A ''COLTAF account'' is a pooled trust account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a ''trust account,'' provided that each COLTAF account shall be designated as a ''COLTAF Trust Account.'' A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing by the lawyer that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest- bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an ''insured depository account'' shall mean a government insured account at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long

time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF, for the benefit of such client or third persons, of the interest or dividends in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

(k) If a lawyer discovers that the lawyer does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Note: See comments following Rule 1.15A.

Source: Repealed Rule 1.15 and readopted as Rules 1.15A - 1.15E, effective June 17, 2014; (k) added, adopted, and effective November 3, 2016.

ANNOTATION

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (Dec. 2001). For article, "Problems with Trust Accounts that Come to the Attention of Regulation Counsel", see 34 Colo. Law. 39 (Apr. 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (Jan. 2006). For article, "New Colorado Rules on Retention of Client Files", see 40 Colo. Law. 85 (Aug. 2011). For article, "The Rules of Professional Conduct: An Equal Opportunity for Ethical Pitfalls", see 41 Colo. Law. 71 (Oct. 2012).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds, including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services (engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

Although a lawyer's possession of a third party's property in a Colorado Lawyer Turst Account Foundation (COLTAF) account gives rise to ethical obligations under this rule, it does not create a fiduciary duty to the third party. Third-party medical providers could not maintain a breach of fiduciary duty tort action against a lawyer based on the lawyer's obligations as trustee of a COLTAF account, even though the medical providers were owed money held in the COLTAF account. Accident & Injury Med. Sp. v. Mintz, 2012 CO 50, 279 P.3d 658.

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Depositing personal funds into a COLTAF account to hide personal assets from creditors supports a 90-day suspension with conditions of reinstatement. People v. Alster, 221 P.3d 1088 (Colo. O.P.D.J. 2009).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Disbarment warranted where attorney intended to convert client funds, regardless of whether attorney intended to replace the funds at some point. Even consideration of attorney's personal and emotional problems was irrelevant where attorney violated this rule by knowingly converting client funds, as well as violating several other rules of professional conduct. People v. Marsh, 908 P.2d 1115 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. 2008); People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo. 1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Gallegos, 229

P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010); People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013).

Rule 1.15C. Use of Trust Accounts

(a) A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account. Cash withdrawals from trust accounts and checks drawn on trust accounts payable to ''Cash'' are prohibited. All trust account funds intended for deposit shall be deposited intact without deductions or ''cash out'' from the deposit, and the duplicate deposit slip that evidences the deposit shall be sufficiently detailed to identify each item deposited.

(b) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer. Such withdrawals and transfers may be made only by authorized bank or wire transfer or by check payable to a named payee. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(c) No less than quarterly, a lawyer admitted to practice law in this state or a person supervised by such a lawyer shall reconcile the trust account records both as to individual clients or other persons and in the aggregate with the bank statements issued by the bank in which the trust account is maintained.

Note: See comments following Rule 1.15A.

Source: Repealed Rule 1.15 and readopted as Rules 1.15A - 1.15E, effective June 17, 2014.

Rule 1.15D. Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and shall retain or cause the lawyer's law firm to retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

(C) For any unclaimed funds remitted to COLTAF pursuant to Rule 1.15B(k), the name and last known address of the owner of the funds, if the owner of the funds is known; the date of death of a deceased owner if the owner of the funds is known; the efforts made to identify or locate the owner of the funds or a deceased owner's heirs or personal representative; the amount of the funds remitted; the period of time during which the funds were held in the lawyer's or law firm's COLTAF account; and the date the funds were remitted.

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date,

payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalves;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) The records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, or the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of the lawyer or of the lawyer's law firm.

(c) Upon the dissolution of a law firm, the lawyers who rendered legal services through the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers remaining in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A.

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Note: See comments following Rule 1.15A.

Source: Repealed Rule 1.15 and readopted as Rules 1.15A - 1.15E, effective June 17, 2014; (a)(1)(C) added, adopted, and effective November 3, 2016.

ANNOTATION

Sufficient evidence that respondent converted client's funds for personal use because respondent's failure to disclose client's identity and the fee agreement warranted an adverse inference that respondent's client did not consent to respondent's use of funds. People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011) (decided under rule in effect prior to 2014 repeal and readoption).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018).

Rule 1.15E. Approved Institutions

(a) This Rule applies to each trust account that is subject to Rule 1.15B, other than a trust account that is maintained in other than an approved financial institution pursuant to the second sentence of Rule 1.15B(d).

(b) Each trust account shall be maintained at a financial institution that is approved by the Regulation Counsel, pursuant to the provisions and conditions contained in this Rule. The Regulation Counsel shall maintain a list of approved financial institutions, which it shall renew not less than annually. Offering a trust account or a COLTAF account is voluntary for financial institutions.

(c) The Regulation Counsel shall approve a financial institution for use for lawyers' trust accounts, including COLTAF accounts, if the financial institution files with the

Regulation Counsel an agreement, in a form provided by the Regulation Counsel, with the following provisions and on the following conditions:

(1) The financial institution does business in Colorado;

(2) The financial institution agrees to report to the Regulation Counsel in the event a properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. That agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days' notice in writing to the Regulation Counsel.

(3) The financial institution agrees that all reports made by the financial institution shall be in the following format: (i) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (ii) in the case of an instrument that is presented against insufficient funds but that is honored, the report shall identify the financial institution, the lawyer or law firm for whom the account is maintained, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Report of a dishonored instrument shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If no such time is provided by law for notice of dishonor, or if the financial institution has honored an instrument presented against insufficient funds, then the report shall be made within five banking days of the date of presentation of the instrument.

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(5) The financial institution agrees to cooperate with the COLTAF program and shall offer a COLTAF account to any lawyer or law firm who wishes to open one.

(6) With respect to COLTAF accounts, the financial institution agrees:

(A) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in subparagraph (c)(10) of this Rule, if any; and

(B) To transmit electronically with each remittance to COLTAF a statement showing, as to each COLTAF account, the name of the lawyer or law firm on whose account the remittance is sent; the account number; the remittance period; the rate or rates of interest or dividends applied; the account balance or balances on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably requested by COLTAF.

(7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividend rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(8) A COLTAF account may be established by a lawyer or law firm and a financial institution as:

(A) A checking account paying preferred interest rates, such as market-based or indexed rates;

(B) A public funds interest-bearing checking account, such as an account used for other non-profit organizations or government agencies;

(C) An interest-bearing checking account, such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(D) A business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government) and may be established only with an approved institution that is ''well-capitalized'' or ''adequately capitalized'' as those terms are defined by applicable federal statutes and regulations. A ''money market fund'' is a fund maintained as a money market fund by an investment company registered under the Investment Company Act of 1940, as amended, which fund is qualified to be held out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(9) In lieu of a rate set forth in paragraph (c)(7)(i), the financial institution may elect to pay on all deposits in its COLTAF accounts, a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional, and financial institutions may choose to maintain their eligibility by paying the rate set forth in paragraph (c)(7)(i).

(10) ''Allowable reasonable COLTAF fees'' are per-check charges, per-deposit charges, fees in lieu of minimum balances, federal deposit insurance fees, sweep fees, and reasonable COLTAF account administrative fees. The financial institution may deduct allowable reasonable COLTAF fees from interest or dividends earned on a COLTAF account, provided that such fees (other than COLTAF account administrative fees) are calculated and imposed in accordance with the approved institution's standard practice with respect to comparable non-COLTAF accounts. The financial institution agrees not to deduct allowable reasonable COLTAF fees accrued on one COLTAF account in excess of the earnings accrued on the COLTAF account for any period from the principal of any other COLTAF account or from interest or dividends accrued on any other COLTAF account. Any fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account.

(11) Nothing contained in this Rule shall preclude the financial institution from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by the financial institution's agreement with the Regulation Counsel or from electing to waive any or all fees associated with COLTAF accounts.

(12) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the comparability requirements set forth in paragraph (c)(7). COLTAF will make such determinations and at least annually will inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Rule.

(13) Each approved financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

Note: See comments following Rule 1.15A.

Source: Repealed Rule 1.15 and readopted as Rules 1.15A - 1.15E, effective June 17, 2014.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [9] amended, effective April 6, 2016.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Permissive Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.16(d).

ANNOTATION

Law reviews. For article, ''Am I My Brother's Keeper? Redefining the Attorney-Client Relationship'', see 32 Colo. Law. 11 (Apr. 2003). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''New Rule on Retaining Client Files—How to Avoid Potential Pitfalls'', see 41 Colo. Law. 69 (June 2012). For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012). For article, ''Clients' Rights During Transitions Between Attorneys'', see 43 Colo. Law. 39 (Oct. 2014). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019).

Annotator's note. Rule 1.16 is similar to Rule 1.16 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Attorney discharged without cause may not recover damages under a non-contingency contract for services not rendered before the discharge. It is important to balance the attorney-client relationship and the attorney's right to receive fair and adequate compensation. interests. Olsen & Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995).

Because former § 12-5-120 (now § 13-93-115) does not authorize an attorney to assert a lien on a United States passport, there is no "other law" under section (d) that would permit attorney to withhold passport of client's wife pending payment for legal services rendered. Accordingly, although the supreme court did not disturb the hearing board's dismissal of the complaint, it disapproved of its rationale. Matter of Attorney G., 2013 CO 27, 302 P.3d 248.

The decision as to whether defense counsel should be permitted to withdraw lies within the sound discretion of the court. If the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing to appoint new counsel. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Disagreement concerning the refusal of defense counsel to call certain witnesses is not sufficient per se to require the trial court to grant a motion to withdraw. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Among the factors a trial court must consider in determining whether withdrawal is warranted is the possibility that any new counsel will be confronted with the same irreconcilable conflict. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances, and the failure to withdraw upon client's request in one instance justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

An attorney is entitled only to compensation for the reasonable value of the services rendered if the attorney is employed under a fixed fee contract to render specific legal services and is discharged by the client without cause. The client was entitled to discharge the attorneys without cause and without incurring any further liability, other than payment for services rendered on a quantum meruit theory. Olsen & Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Under a flat fee agreement between an attorney and client, the attorney was entitled to a portion of the fee under a quantum meruit theory, and was not required to return the full advance payment to the client when the representation ended early. In re Gilbert, 2015 CO 22, 346 P.3d 1018.

Any contractual provision that constrains a client from exercising the right freely to discharge his or her attorney is unenforceable. A client has an unfettered right to discharge freely its attorney without incurring liability under ordinary breach of contract principles. Olsen & Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Suspension for one year and one day appropriate where attorney violated section (d) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Two-year suspension appropriate where attorney violated sections (a)(2) and (d), in conjunction with other disciplinary rules, causing her clients actual harm by failing to communicate with them. A formal reinstatement proceeding is required to demonstrate attorney's rehabilitation and fitness for practicing law. People v. Mendus, 360 P.3d 1049 (Colo. O.P.D.J. 2015).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Fagan, 423 P.3d 412 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan,

938 P.2d 1162 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010); People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Fiore, 301 P.3d 1250 (Colo. O.P.D.J. 2013); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 2-104.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Rule 1.16A. Client File Retention

(a) A lawyer in private practice shall retain a client's files respecting a matter unless:

(1) the lawyer delivers the file to the client or the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter; or

(2) the lawyer has given written notice to the client of the lawyer's intention to destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of the representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998, section 18-1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

Source: Entire rule and comment added and effective February 10, 2011; comment [1] and [3] amended, effective April 6, 2016.

COMMENT

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client ''property'' are distinct. Those obligations are addressed in Rules 1.15A and 1.16(d). ''Property'' generally refers

to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. ''Law firm'' is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to ''make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.'' Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed as public defenders or by a legal services organization or a government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order, or rules of a tribunal. The maintenance of law firm financial and accounting records is governed exclusively by Rules 1.15A and 1.15D. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, § 1-26(7) (two-year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[5] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given or the client has authorized the destruction of the files in a writing signed by the client. As provided in paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; for example, that policy could be contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.16A. Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

ANNOTATION

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015).

Rule 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) the seller ceases to engage in the private practice of law in Colorado, or in the area of practice in Colorado that has been sold;

(b) the entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) the seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice to the client at the client's last known address; and

(d) the fees charged clients shall not be increased by reason of the sale.

Source: Entire rule added June 12, 1997, effective July 1, 1997; (i) added and adopted and comment amended and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [5] amended and effective November 6, 2008.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(d). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of infor-

mation relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser written notice must be mailed to the client at the client's last known address. The notice must include the identity of the purchaser, and the client must be told that the decision to consent or make other arrangements must be made within 60 days of the mailing of the notice. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] [No Colorado comment.]

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (a), (b), Comment [1], [2], [4], [5], and [9] amended, effective April 6, 2016.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a ''prospective client.'' Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ''prospective client.''

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures

employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rules 1.15A and 1.15D.

ANNOTATION

Law reviews. For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016).

COUNSELOR

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [2] amended, effective December 1, 2016.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. In a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a

client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 201.1, which was similar to this rule.

District courts are without subject matter jurisdiction to entertain challenges to the application and enforcement of rules governing admission to the bar. Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005).

Rule 2.2. Intermediary

Repealed April 12, 2007, effective January 1, 2008.

Rule 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly

the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4. Lawyer Serving as Third-party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-

party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

ADVOCATE

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [3] amended, effective April 6, 2016.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. *See A.L.L. v. People ex rel. C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010) (addressing obligations of court-approved counsel for a respondent parent in a termination of parental rights appeal).

ANNOTATION

Law reviews. For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014).

Annotator's note. Rule 3.1 is similar to Rule 3.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The constitutional right to petition the government for a redress of grievances protects appeals from court decisions unless the sham exemption applies. Therefore, an attorney may not be disciplined unless the filing of an appeal is objectively without merit and the attorney subjectively intended an ulterior motive. In re Foster, 253 P.3d 1244 (Colo. 2011).

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

A violation of this rule must be proved by clear and convincing evidence in a disciplinary proceeding. Therefore, the fact that a district court had found by a preponderance of the evidence that an attorney had made a frivolous motion did not preclude the hearing board from determining that the attorney had not violated this rule. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Nine-month suspension stayed upon the requirement to pay restitution to clients is justified when violating this rule in conjunction with other disciplinary rules, particularly given the substantial and continuous incompetence, advancement of meritless claims, and significant financial harm conduct caused clients in this case. People v. Bontrager, 407 P.3d 1235 (Colo. O.P.D.J. 2017).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. Matter of Olsen, 2014 CO 42, 326 P.3d 1004.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 1-102.

I. General Consideration.
II. Disciplinary Actions.
A. Public Censure.
B. Suspension.
C. Disbarment.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Incriminating Evidence: What to do With a Hot Potato'', see 11 Colo. Law. 880 (1982). For article, ''The Ethical Obligation to Disclose Attorney Negligence'', see 13 Colo. Law. 232 (1984). For article, ''Indemnification or Contribution Among Counsel in Legal Malpractice Actions'', see 14 Colo. Law. 563 (1985). For article, ''The Lawyer's Duty to Report Ethical Violations'', see 18 Colo. Law. 1915 (1989). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part I'', see 19 Colo. Law. 465 (1990). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part II'', see 19 Colo. Law. 647 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990). For article, ''Punishing Ethical Violations: Aggravating and Mitigating Factors'', see 20 Colo. Law. 243 (1991). For article, ''Sex, Lawyers and Vilification'', see 21 Colo. Law. 469 (1992).

Constitutionality upheld. This rule is not unconstitutionally vague on its face or as applied. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standards used in determining a constitutional challenge to a statute are used in determining a constitutional challenge to this rule. People v. Morley, 725 P.2d 510 (Colo. 1986).

Presumption of constitutionality attaches to such enactment, and the burden is on the party challenging an enactment to demonstrate its unconstitutionality beyond a reasonable doubt. People v. Morley, 725 P.2d 510 (Colo. 1986).

Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney's psychological problems considered as aggravating and mitigating circumstances in arriving at a recommendation for discipline. The presence of psychological problems, however, does not automatically prevent the attorney from assisting in his own defense where evidence is shown to the contrary. People v. Belina, 765 P.2d 121 (Colo. 1988).

Attorney's conduct was so careless or reckless as to constitute sufficient showing of knowledge for violation of subsection (A)(4) of this disciplinary rule. People v. Rader, 822 P.2d 950 (Colo. 1992).

In order to find that attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this disciplinary rule, it must be shown that attorney had

culpable mental state greater than simple negligence. People v. Rader, 822 P.2d 950 (Colo. 1992).

Failure to respond to inquiries from referral service, to pay consultation charges and forwarding fees to service, and to return case status reports to service constitutes a violation of sections (A)(1), (A)(4), and (A)(6). People v. Taylor, 799 P.2d 930 (Colo. 1990).

Attorney's conduct violated section (A)(4), (A)(5), (A)(6), and DR 2-106(A), where the attorney's multiple billing practice resulted in the charging or collection of a clearly excessive fee because the compensation claimed bore no rational relationship to the work performed and exceeded the compensation authorized by law. People v. Walker, 832 P.2d 935 (Colo. 1992).

Attorney's conduct violated sections (A)(4) and (A)(5) where the attorney failed to file applications for approval of fees in a bankruptcy case, did not seek court approval of compensation after the bankruptcy petition was filed, and left the state while the case was pending without providing his client means of contacting him. These actions, aggravated by a previous public censure, warranted a 60-day suspension. People v. Mills, 923 P.2d 116 (Colo. 1996).

Hearing board should not have found violations of sections (A)(4) and (A)(5) where board absolved attorney of the charges the complaint advised him to defend. By failing to find a violation for the failure to disclose certain payments until ordered to do so, the board should not have proceeded with finding that attorney committed misconduct in not detailing the sources of the disputed income. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Board erred in concluding that attorney's representation of individual client with whom he had a business relationship constituted conduct adversely reflecting on attorney's fitness to practice law. Neither complainant's expert nor hearing board paid sufficient attention to the specific and unusual facts of the general and limited partnerships' actual or potential liabilities. The record does not support the board's findings that an actual conflict existed among the general and limited partners, including the attorney, or that potential for conflict was likely. In re Quiat, 979 P.2d 1029 (Colo. 1999).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted a violation of DR 1-102(A)(4). People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Attorney's effort to cause suppression of relevant evidence at driver license revocation proceeding in a manner not authorized by statute or other law constitutes conduct prejudicial to administration of justice and contrary to DR 1-102 (A)(5). People v. Attorney A., 861 P.2d 705 (Colo. 1993).

Attorney's effort to condition settlement of a malpractice claim upon client's agreement not to file a grievance against him constituted conduct prejudicial to the administration of justice in violation of paragraph (A)(5). People v. Moffitt, 801 P.2d 1197 (Colo. 1990).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which the department of housing and urban development (HUD) would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

As officers of the court, lawyers are charged with obedience to the laws of this state and to the laws of the United States, and intentional violation by them of these laws subjects them to the severest discipline. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

The crime with which an attorney is charged is one of serious consequences denoting moral turpitude and he is found guilty of such a crime, he cannot, in good conscience, be permitted to practice law in this state. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

It is unprofessional conduct and dishonorable to deal other than candidly with the facts in drawing affidavits and other documents. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

By filing false documents, an attorney perpetrates a fraud upon the court. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Where an attorney receives as a fee from one of his clients stolen property, then even though he does ask the client whether the item was stolen and receives a negative answer from him, he should make further inquiry as to the actual source of the item, and failure to do so constitutes a breach of his obligations as a member of the bar. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

An attorney must adhere with dedication to the highest standards of honesty and integrity in order that members of the public are assured that they may deal with attorneys with the knowledge that their matters will be handled with absolute propriety. People v. Golden, 654 P.2d 853 (Colo. 1982).

Client has right to expect competency and integrity from lawyer. A client has every right to expect that conduct taken on its behalf will be carried out with that competence and integrity ideally shared by every lawyer who is licensed to practice law in the jurisdiction. Williams v. Burns, 463 F. Supp. 1278 (D. Colo. 1979); People v. Pooley, 774 P.2d 239 (Colo. 1989).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Witt 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo. 1982).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

Where attorney, as trustee, withdrew $13,100 from the trust without the client-settlor's knowledge and refused to repay the money when given the opportunity by the client-settlor, attorney's conduct was sufficient to warrant disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Conversion of client funds cannot be tolerated regardless of the apparent fact that the attorney did not use such funds for personal gain but to pay the costs and expenses incident to handling a large practice that included many non-paying clients. People v. Franco, 698 P.2d 230 (Colo. 1985).

Fitness to practice law adversely reflected upon by attorney's business judgment and violations of the code of professional responsibility although his legal competence was not questioned. People v. Franco, 698 P.2d 230 (Colo. 1985).

Failure to represent a client also adversely reflects upon an attorney's fitness to practice law. People v. Coca, 732 P.2d 640 (Colo. 1987).

Attorney should never obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Haase, 781 P.2d 80 (Colo. 1989).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980).

Failure to take any action on behalf of his client after he was retained and entrusted with work and in making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Fact that attorney informed client that workers' compensation hearing was cancelled due to attorney's illness when attorney was actually abandoning practice constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Fabricating documents to justify conduct breaches attorney's ethical obligations to his client and to the bar. People v. Yost, 729 P.2d 348 (Colo. 1986).

Falsification of an adoption decree with the original intent to use it for a fraudulent purpose is forgery in violation of § 18-5-103 and is a violation of DR 1-102 and DR 7-102 whether of not the attorney who falsified the decree actually used or attempted to use the decree. People v. Marmon, 903 P.2d 651 (Colo. 1995).

Absence of contempt finding by trial court concerning attorney's willful failure to pay child support is a non-dispositive factor to be considered when imposing discipline. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Trial court's finding in child support hearing that attorney willfully violated child support order should be accorded collateral estoppel effect before the hearing board as long as court makes finding by clear and convincing evidence or beyond a reasonable doubt. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Attorney violated this rule and C.R.P.C. 1.1 when he prepared and filed child support worksheets that failed to properly reflect the new stipulation concerning custody. People v. Davies, 926 P.2d 572 (Colo. 1996).

Lawyer may not secretly record any conversation he has with another lawyer or person. People v. Selby, 198 Colo. 386, 606 P.2d 45 (1979).

Telephone conversation, which attorney initiated and recorded without the permission of

other party to conversation established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound. People v. Selby, 198 Colo. 386, 606 P.2d 45 (1979); People v. Smith, 778 P.2d 685 (Colo. 1989).

Suspension from practice in tax court is a determination of misconduct in another jurisdiction constituting grounds for discipline under these rules. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Unfounded assertion of attorney's lien violates professional code. The assertion of an attorney's lien in circumstances where the attorney has no statutory or legal foundation for a lien and, in fact, has only an uncertain claim to the fee on which the purported lien is founded violates the code of professional responsibility. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Willful and knowing failure to make a federal income tax return is an offense involving moral turpitude. People v. Emeson, 638 P.2d 293 (Colo. 1981).

Both the charges and the well pleaded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Attorney's representation of two estates where the beneficiaries of the estates had conflicting interests and the attorney fails to obtain waivers from the beneficiaries is a violation of this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney violated this rule by lying to grievance committee counsel regarding the return of client's files. People v. Felker, 770 P.2d 402 (Colo. 1989).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Sachs, 732 P.2d 633 (Colo. 1987); People v. Ross, 810 P.2d 659 (Colo. 1991).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Schermerhorn, 193 Colo. 364, 567 P.2d 799 (1977); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Kendrick, 619 P.2d 65 (Colo. 1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Tucker, 676 P.2d 680 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Smith, 778 P.2d 685 (Colo. 1989).

II. DISCIPLINARY ACTIONS.

A. Public Censure.

Violation of election laws sufficient to justify public censure. People v. Casias, 646 P.2d 391 (Colo. 1982).

Bigamy, an offense of moral turpitude, warrants public censure. People v. Tucker, 755 P.2d 452 (Colo. 1988).

An attorney's inaction in response to the grievance committee's request concerning informal complaint filed, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Where an attorney repeatedly issued checks from his law office account knowing that they would not be paid by the bank, such conduct, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Adjudicating, as a judge, the criminal case of a person who is his client in a divorce proceeding warrants public censure because it is the duty of an attorney-judge to promptly disclose conflicts of interest and to disqualify

himself without suggestion from anyone. People v. Perrott, 769 P.2d 1075 (Colo. 1989).

Conduct was prejudicial to the administration of justice and warranted public censure where, during the course of criminal proceedings, attorney made an offer to the deputy district attorney to dismiss a related civil action if the criminal charges against his client were dismissed. People v. Silvola, 888 P.2d 244 (Colo. 1995).

Use of racial epithet by prosecutor in discussing case with defense counsel for two Hispanic defendants constituted a violation of this section warranting public censure. People v. Sharpe, 781 P.2d 659 (Colo. 1989).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires imposition of public censure when such conduct is repeated after three letters of admonition. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Public censure was appropriate where an already suspended attorney was the subject of prior discipline for misdemeanor convictions of assault and driving while impaired and where an additional period of suspension would have little, if any, practical effect and would not have afforded a meaningful measure of protection for the public. People v. Flores, 871 P.2d 1182 (Colo. 1994).

Evidence sufficient to justify public censure. People v. Hertz, 638 P.2d 794 (Colo. 1982).

Public censure was appropriate where lawyer's actions involving criminal activity did not seriously affect the lawyer's fitness to practice law and mitigating factors were present in the absence of any aggravating factors. People v. Fahselt, 807 P.2d 586 (Colo. 1991).

Public censure was appropriate where multiple representations and neglect caused no actual harm and attorney was cooperative during disciplinary proceedings, had no prior discipline, and was relatively inexperienced at the time the misconduct occurred. People v. Ramseur, 897 P.2d 1391 (Colo. 1995).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Failure to timely file a paternity action constitutes neglect of a legal matter that warrants public censure. People v. Good, 790 P.2d 331 (Colo. 1990).

Public censure was warranted where attorney made false statements in the course of discovery in cases where the attorney was the plaintiff. Evidence showed that the attorney was suffering from a psychiatric condition at the time, and the assistant disciplinary counsel could not prove that the attorney's false statements were knowing, but only that they were negligent. People v. Dillings, 880 P.2d 1220 (Colo. 1994).

Public censure was appropriate where attorney failed to provide a critical document to opposing counsel after agreeing to do so and failed to reveal relevant information at the time of trial. People v. Wilder, 860 P.2d 523 (Colo. 1993).

Failure to inform arbitrators of errors in expert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and attorney made closing arguments based on uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993) (decided under DR 7-102).

Public censure was appropriate where attorney's failure to appear at three hearings violated subsection (A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure warranted where attorney engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

Discharging firearm in direction of spouse while intoxicated, although not a crime involving dishonesty, goes beyond mere negligence and public censure is appropriate. Mitigating factors, although present, were insufficient to warrant making censure private. People v. Senn, 824 P.2d 822 (Colo. 1992).

Public censure is appropriate for attorney's negligence in closing estates in an untimely manner and for representing two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney's unlawful assertion of charging lien against client's share of estate proceeds following client's demand for return of property is subject to public censure. People v. Mills, 861 P.2d 708 (Colo. 1993) (decided under DR 1-102 (A)(5)).

Public censure is appropriate where lawyer's predominant mental state was one of negligence and there was an absence of actual harm to the client. People v. Hickox, 889 P.2d 47 (Colo. 1995).

Public censure is appropriate if attorney's course of behavior exhibits a serious error in judgment going beyond simple negligence. People v. Blundell, 901 P.2d 1268 (Colo. 1995).

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Mulvihill, 814 P.2d 805 (Colo. 1991); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Richardson, 820 P.2d 1120 (Colo. 1991); People v. Dalton, 840 P.2d 351 (Colo. 1992); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Cohan, 913 P.2d 523 (Colo. 1996).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Schaiberger, 731 P.2d 728 (Colo. 1987); People v. Horn, 738 P.2d 1186 (Colo. 1987); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Fieman, 778 P.2d 830 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Barr, 805 P.2d 440 (Colo. 1991); People v. Shunneson, 814 P.2d 800 (Colo. 1991); People v. Reichman, 819 P.2d 1035 (Colo. 1991); People v. Gebauer, 821 P.2d 782 (Colo. 1991); People v. Dillings, 880 P.2d 1220 (Colo. 1994); People v. Wollrab, 909 P.2d 1093 (Colo. 1996).

B. Suspension.

Preparing false carbon copies of correspondence to a client and testifying falsely to grievance committee of the supreme court concerning these letters warrants suspension from practice of law for period of at least three years, but not disbarment. People v. Klein, 179 Colo. 408, 500 P.2d 1181 (1972).

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court, or that material information is improperly being withheld, takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding, or when a lawyer knows that he is violating a court order or rule and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding. People v. Walker, 832 P.2d 935 (Colo. 1992).

One-year suspension warranted where attorney failed to promptly respond to discovery requests, failed to inform client of case progress after custody hearing, failed to withdraw upon client's request, failed to advise client of child support modification hearing, misrepresented to the court that he was unable to contact client, and had been previously suspended for similar misconduct. People v. Regan, 871 P.2d 1184 (Colo. 1994).

Fraud, jury tampering, and excessive fees are basis for indefinite suspension. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, failure to answer letter of complaint from the grievance committee, and conviction of a misdemeanor. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

By commingling trust funds with his own, failing to maintain complete records of his client's funds, and failure to render appropriate accounts to his client, the attorney's conduct adversely reflected on his fitness to practice law, justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

For commingling of funds in trust account warranting suspension from practice, see People v. Calvert, 721 P.2d 1189 (Colo. 1986).

Recommendation of prosecution without legitimate interest warrants suspension. Where an attorney took advantage of his position of respect and status in a district attorney's office by repeatedly urging criminal prosecution in matters where his only legitimate professional interest could be in related civil matters, such actions are prejudicial to the administration of justice in violation of paragraph (A) (5). People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstances and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering proper mitigating factors such as attorney's lack of experience, absence of prior discipline, attorney's willingness to undergo psychiatric evaluation and accept transfer to disability inactive status, suspension without credit for time on disability inactive status is appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Suspension is appropriate for a lawyer addicted to alcohol and cocaine and who neglected a client's case resulting in the entry of default judgment, but who entered into an uncompelled restitution agreement and successfully completed substance abuse treatment. People v. Richtsmeier, 802 P.2d 471 (Colo. 1990).

Attorney misconduct of neglecting a guardianship matter and engaging in conduct prejudi-

cial to the administration of justice warrant 90-day suspension when aggravated by history of five prior instances of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 (Colo. 1991).

Conduct manifesting gross carelessness in representation of clients is sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983); People v. Fahrney, 782 P.2d 743 (Colo. 1989).

Attorney's neglect of dissolution case and misrepresentation to client concerning the filing of dissolution petition was especially egregious in view of client's desire to remarry. Such conduct in addition to number and severity of other instances of misconduct, taking into account mitigating factors, is sufficient for suspension. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Felony theft held sufficient grounds for suspension. People v. Petrie, 642 P.2d 519 (Colo. 1982).

Photocopying another attorney's securities opinion letter and presenting it as one's own, refusing to comply with discovery rules and court orders in litigation to which one is a party, and continuously failing to answer grievance complaint without good cause warrants suspension. People v. Spangler, 676 P.2d 674 (Colo. 1983).

An attorney's conduct in borrowing money from his former clients and in failing to record deeds of trust on their behalf to be used as security constitutes professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Where attorney engaged in a pattern of neglect, obvious conflict, and caused injury to his clients, suspension is warranted. People v. Belina, 765 P.2d 121 (Colo. 1988).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Both the charges and the well pleaded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. McMahill, 782 P.2d 336 (Colo. 1988).

Suspended attorney must demonstrate rehabilitation for readmittance to bar. Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (Colo. 1980).

Attorney's payment to inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v. Shipp, 793 P.2d 574 (Colo. 1990); People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Three-month suspension appropriate where attorney intentionally misrepresented that he possessed automobile insurance coverage to automobile accident victim, police officer, and grievance committee investigator, and where attorney was previously publicly censured for engaging in lengthy delay tactics. People v. Dowhan, 814 P.2d 822 (Colo. 1991).

Reckless disregard for the propriety of submitting multiple and duplicative billing in court-appointed cases constitutes knowing conduct warranting a 90-day suspension. People v. Walker, 832 P.2d 935 (Colo. 1992).

Repeated drawings of checks upon insufficient funds and misuse of trust account moneys constituted grounds for suspension. People v. Lamberson, 802 P.2d 1098 (Colo. 1990).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 888 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension of one year and one day necessary where lawyer engaged in sexual relationship with client, had been previously disciplined, and submitted false evidence to the hearing board concerning the sexual relationship. People v. Good, 893 P.2d 101 (Colo. 1995).

Suspension of one year and one day warranted in light of the seriousness of attorney's misconduct in conjunction with his noncooperation in the disciplinary proceedings and his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

Suspension for one year and one day warranted where attorney billed for time that was not actually devoted to work contemplated by contract and for time not actually performed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Suspension for one year and one day was warranted for attorney who violated this rule and C.R.P.C. 1.1 by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P.2d 572 (Colo. 1996).

Mental disability that caused misconduct is a mitigating factor which, when considered in conjunction with other factors, justifies suspension of attorney for conversion of funds that would otherwise warrant disbarment. People v. Lujan, 890 P.2d 109 (Colo. 1995).

District attorney's failure to prosecute personal friend for possession of marijuana violates paragraphs (A)(1), (A)(5), and (A)(6) of this rule and warrants three-year suspension. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Suspension of lawyer for three years, which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension justified where respondent violated federal and state laws by failing to file personal income tax returns, failing to pay withholding taxes, using cocaine, and using marihuana. People v. Holt, 832 P.2d 948 (Colo. 1992).

The fact that no specific client of the respondent was actually harmed by the respondent's misconduct misses the point in proceeding for suspension of an attorney. While the primary purpose of attorney discipline is the protection of the public and not to mete punishment to the offending lawyer, lawyers are, nonetheless, charged with obedience to the law, and intentional violation of those laws subjects an attorney to the severest discipline. People v. Holt, 832 P.2d 948 (Colo. 1992).

Felony convictions warrant suspension for attorney convicted of violating California Tax Code where numerous mitigating factors were found to exist. People v. Mandell, 813 P.2d 732 (Colo. 1991).

Three-year suspension appropriate where attorney was convicted for felony distribution of cocaine, but had no record of prior discipline, there was no selfish or dishonest motive associated with crime, and the attorney successfully participated in interim rehabilitation programs. People v. Rhodes, 829 P.2d 850 (Colo. 1992).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Abusive, insulting, and unprofessional conduct towards deponent and opposing counsel during deposition and repeated instances of using health as an excuse for continuances when respondent was ill-prepared for trial warrants six-month suspension. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which HUD would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

Attorney who employed devices to defraud, made untrue statements of material fact, and engaged in acts which operated as fraud or deceit upon persons in violation of the Securities and Exchange Act violated DR 1-102 (A)(4) and DR 1-102 (A)(6) for which suspension of two years is appropriate, considering mitigating factors. People v. Hanks, 967 P.2d 141 (Colo. 1998).

Attorney who conveyed real property to defraud creditors suspended from the practice of law. In mitigation, the attorney had fully cooperated with the board. People v. Koller, 873 P.2d 761 (Colo. 1994).

Respondent's multiple acts of violence are indicative of a dangerous volatility which might well prejudice his ability to effectively represent his client's interests. Although respondent had taken major steps towards rehabilitation the acts committed were of such gravity as to require a public censure and a three-month suspension. People v. Wallace, 837 P.2d 1223 (Colo. 1992).

Third-degree sexual assault of wife adequate basis for one-year and one day suspension. People v. Brailsford, 933 P.2d 592 (Colo. 1997).

Suspension for 180 days is warranted based upon conviction of third degree assault charges. People v. Knight, 883 P.2d 1055 (Colo. 1994).

Willful nonpayment of child support and failure to pay arrearages after ordered by court to do so are violations of sections (A)(5) and (A)(6) and constitute adequate basis for six-month suspension. People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Where deputy district attorney was convicted of possession of cocaine under federal law, one-year suspension is appropriate due to seriousness of offense and fact that attorney had higher responsibility to the public by virtue of engaging in law enforcement. People v. Robinson, 839 P.2d 4 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Masson, 782 P.2d 335 (Colo. 1989); People v. Chappell, 783 P.2d 838 (Colo. 1989); People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Barber, 799 P.2d 936 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Brown, 863 P.2d 288 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Davis, 893 P.2d 775 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. Boyer, 934 P.2d 1361 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Doolittle, 713 P.2d 834 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McPhee, 728 P.2d 1292 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. May, 745 P.2d 218 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Susman, 747 P.2d 667 (Colo. 1987); People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Preblud, 764 P.2d 822 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Bottinelli, 782 P.2d 746 (Colo. 1989); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Macy, 789 P.2d 188 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Abelman, 804 P.2d 859 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Barr, 818 P.2d 761 (Colo. 1991); People v. Nulan, 820 P.2d 111 (Colo. 1991); People v. Dieters, 825 P.2d 478 (Colo. 1992); People v. Larson, 828 P.2d 793 (Colo. 1992); People v. Tisdel, 828 P.2d 795 (Colo. 1992); People v. Rhodes, 829 P.2d 850 (Colo. 1992); People v. Walker, 832 P.2d 935 (Colo. 1992); People v. Koller, 873 P.2d 761 (Colo. 1994); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Kolbjornsen, 917 P.2d 277 (Colo. 1996); People v. Pierson, 917 P.2d 275 (Colo. 1996).

C. Disbarment.

Disbarment is discipline for lawyer guilty of crimes of moral turpitude. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Attorney disbarred for continued pattern of conduct involving neglect and misrepre-

sentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Continuing pattern of neglect, including failure to timely file tax returns on behalf of personal representative of estate, failure to file timely notice of alibi, failure to notify opposing counsel, and failure to be adequately prepared for argument, coupled with similar behavior resulting in previous suspension, warrants disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982).

A lawyer's knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation. People v. Lavenhar, 934 P.2d 1355 (Colo. 1997).

Lawyer's encouragement of a client to enter into a business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988).

Convictions for crimes of theft, theft-receiving, and conspiracy to commit theft are serious, involve moral turpitude, and are grounds for disbarment as opposed to an indefinite suspension. People v. Silvola, 195 Colo. 74, 575 P.2d 413 (1978).

Conviction of two counts of sexual assault on a child warrants no less a sanction than disbarment. People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

Disbarment warranted by attorney's conviction of conspiracy to deliver counterfeited federal reserve notes, serious neglect of several legal matters, unjustified retention of clients' property, failure to respond to the grievance committee, and previous disciplinary record. People v. Mayer, 752 P.2d 537 (Colo. 1988).

False testimony and counselling of such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Abandoning clients sufficient to justify disbarment. People v. Sanders, 713 P.2d 837 (Colo. 1985).

Abandoning clients without notice, causing them financial losses, and failing to cooperate with grievance committee justified disbarment despite lack of any prior professional misconduct. People v. Lovett, 753 P.2d 205 (Colo. 1988).

Abandoning law practice, engaging in multiple acts of misconduct involving dishonesty, fraud, deceit, and misrepresentation grounds for disbarment. People v. Greene, 773 P.2d 528 (Colo. 1989).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Use of license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible form of discipline. People v. Morley, 725 P.2d 510 (Colo. 1986).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Felony theft held sufficient grounds for disbarment in Colorado where respondent was convicted of crime and disbarred in another jurisdiction. Unless the disciplinary proceedings conducted in the foreign jurisdiction involved a denial of due process or other infirmity, or the imposition of the same discipline would result in a grave injustice, or the attorney's conduct warrants a substantially different discipline, the court is required to impose the same discipline. People v. Bradbury, 772 P.2d 46 (Colo. 1989).

Altering authentic dissolution decrees coupled with past attorney misconduct sufficient to warrant disbarment. People v. Blanck, 713 P.2d 832 (Colo. 1985).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Disbarment in another state warrants disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Attorney's failure to disclose felony conviction and subsequent disbarment in another state is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

A lawyer who enters into a conspiracy to violate the law by importing narcotic drugs for distribution should be disbarred. People v. Unruh, 621 P.2d 948 (Colo. 1980), cert. denied, 476 U.S. 1171, 106 S. Ct. 2894, 90 L. Ed. 2d 981 (1986).

Where a lawyer's conduct not only constitutes a violation of the code of professional responsibility, but also involves felonious conduct, clearly and convincingly proven by testimony of sheriff's officers, the grievance committee is justified in requiring disbarment. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Convictions for conspiring to commit fraud against the United States and impeding an officer of a United States court warrant disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Likewise, disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several requests by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is essentially automatic when a lawyer converts funds or property and there are no significant factors in mitigation. People v. Lujan, 890 P.2d 109 (Colo. 1995).

Entering guilty pleas to multiple counts of bank fraud evidences serious criminal conduct warranting disbarment. People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Payment of restitution required prior to petition for readmission. Where, in proceedings to enforce a debt, attorney fails to pay debt, appear for deposition, produce documents requested by subpoena duces tecum or appear at an examination pursuant to C.R.C.P. 69 and on separate occasions writes insufficient funds checks and fails to comply with requests for investigation, restitution is a proper condition of readmission and is to be made prior to petition for readmission. People v. Koransky, 830 P.2d 490 (Colo. 1992).

Where money was accepted for investment plans which were false, fictitious, and fraudulent and the presence of aggravating factors, including substantial experience by attorney, prior disciplinary offenses, dishonest or selfish motive, presence of multiple offenses, refusal to acknowledge the wrongful nature of conduct, and an indifference to making restitution, disbarment of attorney for violation of legal ethics was proper. People v. Kramer, 819 P.2d 77 (Colo. 1991).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Disbarment warranted where attorney was convicted of two separate sexual assaults on a client and a former client and attorney's previous dishonest conduct was an aggravating factor as well as findings of the attorney's selfish motive in engaging in the sexual misconduct, the two clients' vulnerability, the attor-

ney's more than 20 years practicing law, and the attorney's failure to acknowledge the wrongful nature of his conduct. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding, the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Disbarment appropriate when attorney engages in conduct prejudicial to client and the administration of justice and neglects numerous legal matters. People v. Theodore, 926 P.2d 1237 (Colo. 1996).

Notwithstanding financial stress and serious and costly medical problems, intentional conversion of law firm funds required disbarment. People v. Guyerson, 898 P.2d 1062 (Colo. 1995).

Propounding interrogatories to harass parties to a case and falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Nichols, 976 P.2d 966 (Colo. 1990); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Bannister, 814 P.2d 801 (Colo. 1991); People v. Grossenbach, 814 P.2d 810 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Tyler, 884 P.2d 694 (Colo. 1994); People v. Kolenc, 887 P.2d 1024 (Colo. 1994); People v. Fritsche, 897 P.2d 805 (Colo. 1995); People v. Sims, 913 P.2d 526 (Colo. 1996); People v. Allbrandt, 913 P.2d 532 (Colo. 1996); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Singer, 955 P.2d 1005 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Loseke, 698 P.2d 809 (Colo. 1985); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Rice, 728 P.2d 714 (Colo. 1986); People v. Young, 732 P.2d 1208 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Franco, 738 P.2d 1174 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Hanneman, 768 P.2d 709 (Colo. 1989); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Vernon, 782 P.2d 745 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Hedicke, 785 P.2d 918 (Colo. 1990); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Goens, 803 P.2d 480 (Colo. 1990); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Schwartz, 814 P.2d 793 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Kinkade, 831 P.2d 892 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995); People v. Gilbert, 921 P.2d 48 (Colo. 1996).

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

ANNOTATION

Law reviews. For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004).

Annotator's note. Rule 3.2 is similar to Rule 3.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012).

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of ''tribunal.'' It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is

testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examina-

tion or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

ANNOTATION

Law reviews. For article, ''The Attorney, the Client and the Criminal History: A Dangerous Trio'', see 23 Colo. Law. 569 (1994). For article, ''Exculpatory Evidence and Grand Juries'', see 28 Colo. Law. 47 (Apr. 1999). For article, ''Ethical Considerations and Client Identity'', see 30 Colo. Law. 51 (Apr. 2001). For article, ''Policing the Legal System: The Duty to Report Misconduct'', see 30 Colo. Law. 85 (Sept. 2001). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''The

Ethical Preparation of Witnesses'', see 42 Colo. Law. 51 (May 2013). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019). For article, ''Persuasion through Candor: An Appellate Lawyer's Duty and Opportunity'', see 48 Colo. Law. 20 (Feb. 2019).

Annotator's note. Rule 3.3 is similar to Rule 3.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

It was inappropriate for counsel to file a motion and not mention contrary legal authority that was decided by the chief judge when the existence of the authority was readily available to counsel. United States v. Crumpton, 23 F. Supp. 2d 1218 (D. Colo. 1998).

An attorney will not be held responsible for failing to inform the court of material information of which the attorney is unaware. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

A lawyer representing his own interests and not those of any clients cannot be found to have violated section (a)(1). People v. Head, 332 P.3d 117 (Colo. O.P.D.J. 2013).

An attorney cannot close her eyes to obvious facts, however, the duty to inform the court concerning her client's financial status does not obligate the attorney to undertake an affirmative investigation of her client's financial status. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

An attorney is not responsible for informing the court of every known change in a client's financial circumstances but she must inform the court of material changes that not disclosing to the court would work a fraud on the court. For the purpose of determining eligibility for court appointed counsel, material changes are those which clearly render the client capable, on a practical basis, of securing competent representation or reimbursing some or all of the expenses of court-appointed counsel and costs. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

Public censure is appropriate discipline for attorney who submitted falsified response to grievance committee's request for investigation, violated prohibition against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and revealed client confidences to district attorney without client's consent. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Public censure is appropriate discipline where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Suspension for three years appropriate when attorney circumvented proper channels for the adoption of a child by falsely listing her own husband as the birth father on the baby's birth certificate, counseled her husband to engage in fraudulent conduct, and provided false information on a petition for stepparent adoption. People v. Ritland, 327 P.3d 914 (Colo. O.P.D.J. 2014).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Rolfe, 962 P.2d 981 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008); People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Goodman, 334 P.3d 241 (Colo. O.P.D.J. 2014).

Cases Decided Under Former DR 7-106.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990).

Lawyers, as officers of the court, must maintain the respect due to courts and judicial officers. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

Willful nonpayment of child support and failure to pay arrearages after ordered by court to do so is a violation of subsection (A). People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Prosecutor engaged in professional misconduct where references to the defense theory as ''insulting'' or a ''lie'' and to the defense's challenge to the credibility of a prosecution witness as ''cheap innuendos'' were made for the obvious purpose of denigrating defense counsel. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Prosecutor made argument of a highly improper nature by implying to jurors that opposing counsel did not have a good faith belief in the innocence of her client and such an argument served no legitimate purpose but had the function only of erroneously diverting the attention of the jurors from the factual issues concerning defendant's guilt. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

An attorney's personal belief in the veracity of a witness' testimony is not a proper subject of closing argument. Consequently, the law requires that the prosecutor's personal opinion as to the truth or falsity of any testimony or as to guilt shall not be outwardly indicated nor presented to the jury as an interpretation based upon legitimate inferences which might be drawn from the evidence adduced at trial. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Dalton, 840 P.2d 351 (Colo. 1992).

Conduct violating this rule sufficient to justify public censure. People v. Fieman, 788 P.2d 830 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Cohan, 913 P.2d 523 (Colo. 1996); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Porter, 980 P.2d 536 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999).

Conduct violating this rule sufficient to justify suspension. People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Schaefer, 944 P.2d 78 (Colo. 1997).

Applied in People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Harfmann, 638 P.2d 745 (Colo. 1981); Wilson v. People, 743 P.2d 415 (Colo. 1987).

Cases Decided Under Former DR 7-107.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

Trial judge has power to punish summarily for contempt any lawyer who in his presence wilfully contributes to disorder or disruption in the courtroom. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

News releases by counsel held contrary to good practice. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

The participation of the district attorney and his deputy in an ill-timed radio interview which suggested a connection between the condominium fires and organized crime is not condoned. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. See Rule 16, Colorado Rules of Criminal Procedure.

ANNOTATION

Law reviews. For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004). For article, ''The Ethical Preparation of Witnesses'', see 42 Colo. Law. 51 (May 2013). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019).

Annotator's note. Rule 3.4 is similar to Rule 3.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

When section (b) of this rule and the rules of evidence overlap, the proper approach is for trial courts to balance the probative value of the evidence against the danger of unfair prejudice. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

In so doing, trial courts should not exclude testimony from improperly compensated witnesses unless they determine that the testimony's danger of unfair prejudice substantially outweighs its probative value. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

The trial court is best situated to decide on a case-by-case basis whether the testimony of a witness compensated under a contingent fee agreement so prejudices the fairness of the litigation that it requires exclusion of the improperly compensated witness's testimony. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Calling a witness who was testifying in exchange for a contingency fee is contrary to section (b) of this rule. Just in Case Bus. Lighthouse v. Murray, 2013 COA 112M, 383 P.3d 1, aff'd, 2016 CO 47M, 374 P.3d 443.

Expressions of personal opinion, personal knowledge, or inflammatory comments violate ethical standards. A prosecutor cannot communicate his or her opinion on the truth or falsity of witness testimony during final argument. The use of any form of the word ''lie'' is improper. However, an attorney may argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness's testimony. Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005); Crider v. People, 186 P.3d 39 (Colo. 2008).

Attorney violated section (c) when he knowingly violated orders of Colorado supreme court suspending him from practice of law for failing to comply with continuing legal education (CLE) requirements and for failing to pay attorney registration fees. People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Thirty-day suspension, petition for reinstatement requirement, and requirement of payment of costs of prior disciplinary proceedings justified where aggravating factors include attorney's previous public censure, refusal to acknowledge the wrongfulness of his conduct, substantial experience in the practice of law, and indifference to making restitution. In re Bauder, 980 P.2d 507 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion, without regard to whether this debt was subsequently discharged in attorney's bankruptcy proceedings. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Suspension of one year and one day appropriate when attorney failed to comply with court orders applicable to monthly spousal support and refused to produce required financial disclosures in his dissolution of marriage case. People v. McQuitty, 371 P.3d 279 (Colo. O.P.D.J. 2016).

Suspension for three years appropriate when attorney circumvented proper channels for the adoption of a child by falsely listing her own husband as the birth father on the baby's birth certificate, counseled her husband to engage in fraudulent conduct, and provided false information on a petition for stepparent adoption. People v. Ritland, 327 P.3d 914 (Colo. O.P.D.J. 2014).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney failed to comply with court orders applicable to his child support payments until after contempt citation was issued and attorney was ordered to report to jail to begin serving his sentence, and also committed numerous other violations consisting of knowingly commingling and misappropriating clients' funds, and neglecting multiple cases resulting in the entry of default judgments against attorney's clients. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. 2008); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. McNamara, 275 P.3d 792 (Colo. O.P.D.J. 2011); People v. Duggan, 282 P.3d 534 (Colo. O.P.D.J. 2012); People v. Verce, 286 P.3d 1107 (Colo. O.P.D.J. 2012); People v. Head, 332 P.3d 117 (Colo. O.P.D.J. 2013); People v. Quigley, 359 P.3d 1045 (Colo. O.P.D.J. 2015); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Singer, 955 P.2d 1005 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Kolhouse, 309 P.3d 963 (Colo. O.P.D.J. 2013); People v. Randolph, 310 P.3d 293 (Colo. O.P.D.J. 2013); People v. McNamara, 311 P.3d 622 (Colo. O.P.D.J. 2013); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015); People v. Kanwal, 357 P.3d 1236 (Colo. O.P.D.J. 2015); People v. Carrigan, 358 P.3d 650 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 7-104.

Rule held inapplicable to district attorney's communications with defendant when communications are unrelated to pending charges for which defendant had retained counsel. People v. Hyun Soo Son, 723 P.2d 1337 (Colo. 1986).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Zinn, 746 P.2d 970 (Colo. 1987).

Conduct violating this rule in conjunction with other disciplinary rules issufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979);In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981).

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (b) and Comment [2] amended and effective July 11, 2012.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Colorado Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. *See also* Cmt. [5]. Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(1) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if ''circumstances require it,'' ''the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication,'' and ''the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.'' Code of Jud. Conduct, Rule 2.9(A)(1). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(b)(''A judge may. . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication[.]''). The second exception does not authorize the lawyer to initiate such a communication. However, a judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(A)(1) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

ANNOTATION

Law reviews. For article, ''Ex Parte Communications with a Tribunal: From Both Sides'', see 29 Colo. Law. 55 (Apr. 2000).

Annotator's note. Rule 3.5 is similar to DR 7-101, DR 7-106, DR 7-108, DR 7-109, DR 7-110, and DR 8-101 as they existed prior to the 1992 repeal and reenactment of the code of professional responsibility. Relevant cases construing DR 7-108, DR 7-109, DR 7-100, and DR 8-101 have been included in the annotations to this rule. Cases construing DR 7-101 have been included under Rule 1.2 and cases construing DR 7-106 have been included under Rule 3.3.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension for one year and one day. People v. Brennan, 240 P.3d 887 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Maynard, 238

P.3d 672 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 7-108.

Jury tampering is basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Cases Decided Under Former DR 7-109.

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 7-110.

Suggesting that witness contact chief justice for attorney's benefit justifies public censure. Where an attorney suggested to a principal witness in a pending grievance proceeding against that attorney that he write a letter on behalf of the attorney to the chief justice of the state supreme court, substantially recanting his testimony in the grievance proceeding, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. Public censure is the appropriate discipline for this breach of professional obligations. People v. Hertz, 638 P.2d 794 (Colo. 1982).

The imposition of a one-year suspension in Illinois for the loaning of money to a judge warrants imposition of the same sanction in Colorado. People v. Chatz, 788 P.2d 157 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Cases Decided Under Former DR 8-101.

District attorney not tribunal. It is not the intent of paragraph (A)(2) to treat a district attorney or those acting under him as a tribunal. People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source: Entire rule and comment replaced and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; IP(b) and (c) amended and effective Febraury 10, 2011.

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for

the definition of ''confirmed in writing'' and Rule 1.0(e) for the definition of ''informed consent.''

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

ANNOTATION

Law reviews. For Formal Opinion No. 78 of the CBA Ethics Committee, ''Disqualification of the Advocate/Witness'', see 23 Colo. Law. 2087 (1994). For article, ''Your Deal is in Litigation? It's Time to Call Someone Else'', see 48 Colo. Law. 30 (Mar. 2019).

Annotator's note. Rule 3.7 is similar to Rule 3.7 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

A violation of section (a) of this rule ordinarily will require disqualification because the very purpose of the rule is to avoid the taint to a trial that results from jury confusion when a lawyer acts as both witness and advocate. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003).

Section (a) is a prohibition only against acting as an advocate at trial. It does not automatically require that a lawyer be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003).

Disqualification from pretrial matters may be appropriate, however, where that activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003).

Section (a)(1) allows an attorney to testify only regarding an uncontested issue and does not allow an attorney to testify to undisputed facts to support a disputed issue. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

A party seeking disqualification of any attorney as "likely to be a necessary witness" must show that "the advocate's testimony is necessary, and not merely cumulative". Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 945 F. Supp. 1470 (D. Colo. 1996).

This rule does not mandate a hearing where there is a possibility of a conflict of interest on the part of an attorney called as a witness against his or her client. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

This rule does not require the appointment of a special prosecutor for purposes of a hearing on a new trial motion when the jury has been excused and thus would never learn that members of the district attorney's office would act as both the prosecution and witnesses. People v. Ehrnstein, 2018 CO 40, 417 P.3d 813.

Rule requires that plaintiffs' counsel who is also their son be disqualified from appearing as an advocate because he is likely to be called as a witness at trial. Determining whether the moving party has demonstrated that opposing counsel is ''likely to be a necessary witness'' involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues. The moving party's burden is complete if he proves that opposing counsel is ''likely to be a witness'' at trial. Here, the facts and circumstances demonstrate that plaintiffs' son who is also their counsel and who was endorsed by plaintiffs as a fact witness is likely to be a necessary witness on his clients' and parents' behalf. The statements of plaintiffs' counsel and son is that he spoke with the defendant-doctor after the procedure performed on his plaintiff father and that the defendant made certain admissions against interest. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule permits a lawyer to maintain a dual role in the same proceeding if "disqualification would work substantial hardship on the client". Even if there is a risk of prejudice to both parties if the attorney is permitted to testify, court must balance the competing interests, affording ''due regard'' to the effect of disqualification on his clients. When determining whether disqualification would impose a substantial hardship on the client, court should consider all relevant factors in light of the specific facts before it, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, the time at which the attorney became aware of the likelihood of his testimony, and whether the client has secured alternate representation. Here, considering the specific facts and circumstances, trial court did not abuse its discretion in rejecting plaintiffs' substantial hardship claim. In light of ample justification in the record, trial court did not abuse

its discretion in disqualifying plaintiffs' counsel and son from his representation of his parents at trial. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

But trial court did not abuse discretion in disqualifying a lawyer where the lawyer was the sole source, other than the defendant, of potentially critical and outcome determinative information to be used to establish the defendant's defense and the court determined that allowing the lawyer to continue the representation would undermine the public's interest in maintaining the integrity in the judicial system. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

Court declines to issue a rule that would permit automatic participation by disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, trial court has discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of the rule. If, for example the attorney's dual role in a deposition proceeding would likely be revealed at trial, trial court may properly limit attorney's role in that activity. Here, trial court was given opportunity on remand to fashion its orders in a way dictated by facts of the case. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule does not impose automatic vicarious disqualification of the disqualified attorney's law firm. As such, the trial court must consider whether the requirements of C.R.C.P. 1.7 and 1.9 have been met. The inquiry is two-fold: (1) Whether the firm reasonably believes its representation of the plaintiffs will not be materially limited by its responsibilities to the attorney; and (2) the client's consent to the ongoing representation and whether that consent is objectively reasonable under the circumstances. The trial court has the authority to decline to honor the client's choice if the court concludes that the client should not agree to the representation under the circumstances of the case. In making that determination, the court may balance the clients' interests in the continuing representation against the nature of the anticipated testimony and the credibility issues that the testimony may pose. Here, record does not permit supreme court to determine whether trial court abused its discretion in disqualifying the law firm of plaintiffs' son from representing plaintiffs. Accordingly, remand is necessary to determine whether the requirements of C.R.C.P. 1.7 have been met. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Trial court's conclusion that defendant would likely have a compelling need to call his attorney to testify within its discretion. Although prosecution failed to demonstrate a compelling need for testimony of defendant's attorney, thus creating a conflict under this rule and need for disqualification, the trial court did not rule arbitrarily, unreasonably, or unfairly when it ruled to disqualify defendant's attorney. People v. Hagos, 250 P.3d 596 (Colo. App. 2009).

Court of appeals uses abuse of discretion standard to review trial court's decision to disqualify counsel under this rule. Haralampopoulos v. Kelly, 361 P.3d 978 (Colo. App. 2011), rev'd on other grounds, 2014 CO 46, 327 P.3d 255.

Court did not abuse discretion in disqualifying counsel from representing plaintiff at trial but allowing counsel to participate in pretrial preparation and allowing counsel's firm to represent plaintiff at trial. Counsel had been deposed and could be called as a witness but exclusion of counsel from pretrial preparation could create a substantial hardship for plaintiff. Haralampopoulos v. Kelly, 361 P.3d 978 (Colo. App. 2011), rev'd on other grounds, 2014 CO 46, 327 P.3d 255.

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c), and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (g) and (h) added and adopted, comment [1] amended and adopted, and comment [3A], [7], [7A], [8], [8A], [9], and [9A] added and adopted June 17, 2010, effective July 1, 2010; (f) and comment [5] amended and effective February 10, 2011.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or

Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes ''within a reasonable time'' will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (*see* C.R.S. §18-1-601 *et seq.* and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

ANNOTATION

Annotator's note. Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to

federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. U.S. v. Colo. Supreme Court, 988 F. Supp. 1368 (D. Colo. 1998), aff'd, 189 F.3d 1281 (10th Cir. 1999).

Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Violation of paragraph (d) requires mens rea of intent. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike foul ones, for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

Prosecutor's zealous prosecution of a case is not improper. People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

A prosecutor's duty is to seek justice, not merely to convict. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972); People v. Drake, 841 P.2d 364 (Colo. App. 1992).

If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt or reduce his punishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Prosecutor should see that justice is done by seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

No evidence proving defendant's innocence shall be withheld from him. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

The district attorney has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

Rule 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity. Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it and on the candor of the lawyer. For this reason the lawyer must conform to Rules

3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b) in such representation.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4] This Rule recognizes that the lawyer's conduct and communications described in Rules 3.9(b) and (c) may be protected by constitutional or other legal principles.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

False Statements

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements. For dishonest conduct generally see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule l.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

ANNOTATION

Law reviews. For article, ''Ethical Considerations and Client Identity'', see 30 Colo. Law. 51 (April 2001). For article, ''Third-Party Opinion Letters: Limiting the Liability of Opinion Givers'', see 42 Colo. Law. 93 (November 2013).

Annotator's note. Rule 4.1 is similar to Rule 4.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The plain language of this rule expressly limits its application to situations where a lawyer is acting as an advocate and is dealing with others on a client's behalf. People v. Head, 332 P.3d 117 (Colo. O.P.D.J. 2013).

Attorneys are responsible for ethical violation when their investigator failed to disclose to an employee of the defendant prior to an interview that the investigator worked for the attorneys. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

Suspension stayed, in view of respondent's cooperation and remorse, conditioned upon successful completion of six-month probationary period and ethics refresher course. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Conduct violating this rule in conjunction with other rules of disciplinary conduct sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997); In re Meyers, 981 P.2d 143 (Colo. 1999); People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jackson, 943 P.2d 450 (Colo. 1997); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015).

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person, such as a contractually-based right or obligation to give notice, is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with

the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[9A] A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b), and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ex Parte Contacts with Government Officials, see 23 Colo. Law. 329 (1994). For formal opinion of the Colorado Bar Association on Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, see 23 Colo. Law. 2297 (1994). For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (Jan. 2000). For article, ''Policing the Legal System: The Duty to Report Misconduct'', see 30 Colo. Law. 85 (Sept. 2001). For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For article, ''Investigative Tactics: They May Be Legal, But Are They Ethical?'', see 35 Colo. Law. 43 (Jan. 2006). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For formal opinion of the Colorado Bar Association on Propriety of Communicating With Employee or Former Employee of an Adverse Party, see 39 Colo. Law. 21 (Oct. 2010). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''The Ethics of Contacting Witnesses'', see 46 Colo. Law. 40 (Dec. 2017).

Annotator's note. Rule 4.2 is similar to Rule 4.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The protections of this rule attach only once an "adversarial relationship" sufficient to trigger an organization's right to counsel arises. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

The fact that an employee is a management level employee alone does not make him a "party" for purposes of this rule. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

Consent of opposing counsel to direct communication with client may be implied, and the scope of that implied consent presents a mixed question of fact and law. Therefore, the hearing board's conclusions on this issue may be reviewed de novo. Matter of Wollrab, 2018 CO 64, 420 P.3d 960.

Attorneys are responsible for ethical violation when their investigator, without the defendant's permission, contacted an employee of the defendant whose statements about the events surrounding a fight may constitute admissions

by the defendant. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

This rule does not require any greater or more specific limitations on the communications of government lawyers with suspects, or with indigent suspects in particular, than apply to attorney communications in general. The fact that the defendant was appointed counsel in a different matter does not automatically prohibit certain communications with prosecution investigators relating to a different matter. An assessment of compliance with this rule requires facts concerning the matters for which the public defender had already been appointed to represent the defendant and the subject of the subsequent interviews with the investigators. People v. Wright, 196 P.3d 1146 (Colo. 2008).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Revoking probation and activating suspension appropriate where lawyer purposely ignored his obligations under this rule by sending ex parte communications to the clients of another lawyer regarding the subject of their representation. People v. Underhill, 353 P.3d 936 (Colo. O.P.D.J. 2015).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Wotan, 944 P.2d 1257 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [1] amended, effective April 6, 2016.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the

lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[2A] The lawyer must comply with the requirements of this Rule for pro se parties to whom limited representation has been provided, in accordance with C.R.C.P. 11(b), C.R.C.P. 311(b), Rule 1.2, and Rule 4.2. Such parties are considered to be unrepresented for purposes of this Rule.

ANNOTATION

Law reviews. For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (Jan. 2000). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007).

Annotator's note. Rule 4.3 is similar to Rule 4.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Meyers, 981 P.2d 143 (Colo. 1999).

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [2] amended, effective April 6, 2016.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. A document is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of

whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, ''document'' includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as ''metadata''), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by applicable law or paragraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

ANNOTATION

Law reviews. For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004). For article, ''Inadvertent Disclosure of Confidential or Privileged Information'', see 40 Colo. Law. 65 (Jan. 2011). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016). For article, ''Attorney-Client Privilege and the Work Product Doctrine: Is Confidentiality Lost in Email?'', see 46 Colo. Law. 32 (Nov. 2017). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 4.5. Threatening Prosecution

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

Source: Entire rule and comment amended and adopted June 19, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For purposes of this Rule, a civil matter is a controversy or potential controversy over rights and duties of two or more persons under the law whether or not an action has been commenced.

[2] Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal, administrative or disciplinary process tends to diminish public confidence in our legal system.

[3] The Rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this Rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

[4] This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil pro-

ceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

[5] Moreover, this Rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person's conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

[6] While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

[7] Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relation exists, the communication likely constitutes a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

ANNOTATION

Law reviews. For article, ''Policing the Legal System: The Duty to Report Misconduct'', see 30 Colo. Law. 85 (Sept. 2001). For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For article, ''Colo. RPC 4.5: The Ethical Prohibition Against Threatening Prosecution'', see 35 Colo. Law. 99 (May 2006). For article, ''Litigating Disputes Involving the Medical Marijuana Industry'', see 41 Colo. Law. 103 (Aug. 2012).

Annotator's note. Rule 4.5 is similar to Rule 4.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Threatening client with criminal prosecution to obtain attorney fees violates this rule. People v. Farrant, 852 P.2d 452 (Colo. 1993).

Attorney threatened to present disciplinary charges to obtain an advantage in a civil action where the attorney, in response to a legal malpractice action, threatened to file a grievance against the attorney filing the action unless the action was dismissed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Applied in People v. Sigley, 951 P.2d 481 (Colo. 1998).

Cases Decided Under Former DR 7-105.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

ANNOTATION

Law reviews. For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007).

Rule 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

ANNOTATION

Annotator's note. Rule 5.2 is similar to Rule 5.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The protection afforded by subsection (b) for a subordinate who acts in accordance with a supervisory lawyer's direction is not available to an attorney who failed to disclose his client's true identity in violation of Rule 3.3(b). However, a good-faith but unsuccessful attempt to bring an ethical problem to a superior's attention to receive guidance may be a mitigating factor in superior's determining punishment. People v. Casey, 948 P.2d 1014 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993).

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment amended, effective April 6, 2016.

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

ANNOTATION

Law reviews. For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Investigative Tactics: They May Be Legal, But Are They Ethical?'', see 35 Colo. Law. 43 (Jan. 2006). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''Colorado Considers ABA's Ethics 20/20 Proj-

ect and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016).

This rule does not apply to attorney special advocates. In re Redmond, 131 P.3d 1167 (Colo. App. 2005) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Attorney violated section (b) by failing to supervise non-attorney employee's work on a bankruptcy case to ensure that it was sufficient to satisfy his professional obligations and to generally be aware of the work the employee was doing regarding other matters. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Trial court erred in ruling that the Uniform Debt-Management Services Act, part 2 of article 14.5 of title 12, regulates nonlawyer assistants in conflict with this rule. The rule requires that an attorney provide a nonlawyer assistant meaningful instruction and supervision. Likewise, the legal services exemption from regulation under the Act covers only nonlawyer assistants employed by a licensed attorney providing debt-management services in an attorney-client relationship. A nonlawyer assistant must act on behalf of an attorney to be covered under either the rule or the legal services exemption of the Act. Coffman v. Williamson, 2015 CO 35, 348 P.3d 929.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a ''nonlawyer'' includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), or (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

Source: Entire rule amended and adopted June 12, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (d) amended

and (e) and (f) added and Comment amended and effective February 26, 2009; IP(d) and (e) amended and effective February 22, 2018.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional company, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the. Lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

ANNOTATION

Annotator's note. Rule 5.4 is similar to Rule 5.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Transferring various ownership interests to lawyer employees of firm who did not

receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo. 1997).

Motion to dismiss should have been denied on the basis that a joint venturer cannot shield itself from liability on the grounds that the joint venture was prohibited by this rule of professional conduct. Bebo Constr. Co. v. Mattox & O'Brien, 998 P.2d 475 (Colo. App. 2000).

An attorney's attempt to share legal fees with nonlawyers is professional misconduct. People v. Easley, 956 P.2d 1257 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify suspension. People v. Easley, 956 P.2d 1257 (Colo. 1998).

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204 or C.R.C.P. 205 or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer, or the lawyer on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 251.28 or this Rule, then no additional notice is required.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (a)(1) and Comment [1] amended, effective April 6, 2016.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204 and C.R.C.P. 205 permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] Paragraph (a)(3) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governmental agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[3] A lawyer may employ or contract with a disbarred, suspended lawyer or a lawyer on disability inactive status, to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer directly supervises the work. Lawyers who are suspended but whose entire suspension has been stayed may engage in the practice of law, and the portion of the Rule limiting what suspended lawyers may do does not apply.

[4] The name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement must be removed from the firm name. A lawyer will be assisting in the unauthorized practice of law if the lawyer fails to remove such name.

[5] Disbarred, suspended lawyers or lawyers on disability inactive status may have contact with clients of the licensed lawyer so long as such lawyer and the licensed lawyer provide written notice to the client that the lawyer may not practice law. Written notice to the client shall include an advisement that the person may not give advice or engage in any other conduct considered the practice of law. Proof of service shall be maintained in the licensed lawyer's file for a minimum of two years.

[6] Separate and apart from the disbarred, suspended or disabled lawyer's obligation not to practice law, the licensed lawyer who employs or hires such person has an obligation to directly supervise that individual.

ANNOTATION

Law reviews. For article, ''Negotiations and the Unauthorized Practice of Law'', see 23 Colo. Law. 361 (1994). For comment, ''Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans'', see 72 U. Colo. L. Rev. 459 (2001). For article, ''Avoiding the Unauthorized Practice of Law by Non-lawyer Assistants'', see 32 Colo. Law. 27 (Mar. 2003). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007).

Annotator's note. Rule 5.5 is similar to Rule 5.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Disbarment appropriate for lawyer who practiced law without a license for more than three years, engaged in dishonest conduct, and failed to cooperate in disciplinary proceedings. Lawyer repeatedly violated this rule by holding himself out as a licensed attorney in the state, establishing multiple offices for his law practice, drafting legal documents, offering legal advice to or on behalf of clients, and engaging in the unlawful practice of law in another state. People v. Auer, 331 P.3d 136 (Colo. O.P.D.J. 2014).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted conduct involving the unauthorized practice of law. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

An attorney who is suspended for failure to comply with Continuing Legal Education (CLE) requirements is barred from practicing law under this rule and C.R.C.P. 241.21 (d), the same as if the attorney had been suspended following a disciplinary proceeding. Continuing to practice law after such an administrative suspension warranted an additional 18-month sus-

pension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Public censure justified where, although the attorney failed to notify opposing counsel and appeared in one hearing after imposition of the suspension, the attorney's involvement was minimal, it occurred only upon request by the client, it did not result in any harm to the client, and the attorney did not receive any benefit from the appearance. People v. Pittam, 917 P.2d 710 (Colo. 1996).

Public censure appropriate for practicing law while suspended where 90-day suspension ended four years before the unauthorized practice and where the attorney never applied for reinstatement. People v. Cain, 957 P.2d 346 (Colo. 1998).

Suspension of one year and one day warranted in light of the seriousness of attorney's misconduct in conjunction with his noncooperation in the disciplinary proceedings and his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other rules of professional conduct is sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010); People v. Snyder, 418 P.3d 550 (Colo. O.P.D.J. 2018).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995); People v. Ebbert, 925 P.2d 274 (Colo. 1996).

Counsel violated this rule by allowing his non-lawyer wife to conduct initial client interviews and to counsel clients concerning appropriate actions to take while in bankruptcy proceedings. This in conjunction with violation of other disciplinary rules was sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Kolhouse, 309 P.3d 963 (Colo. O.P.D.J. 2013); People v. Randolph, 310 P.3d 293 (Colo. O.P.D.J. 2013); People v. McNamara, 311 P.3d 622 (Colo. O.P.D.J. 2013); People v. Kanwal, 357 P.3d 1236 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 3-101.

Law reviews. For article, ''Potential Liability for Lawyers Employing Law Clerks'', see 12 Colo. Law. 1243 (1983). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for professional misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Services of an attorney not licensed in Colorado are compensable as attorney fees where no court appearances made and the work performed consisted of obtaining a variance from a municipal zoning code. Catoe v. Knox, 709 P.2d 964 (Colo. App. 1985).

Consulting services performed by an out-of-state lawyer do not constitute unauthorized practice of law and therefore may be compensated as attorney fees. Dietrich Corp. v. King Res. Co., 596 F.2d 422 (10th Cir. 1979).

Evidence sufficient to justify one-year suspension. People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Permitting law clerk to render legal advice to clients constitutes aiding a nonlawyer in the unauthorized practice of law. People v. Felker, 770 P.2d 402 (Colo. 1989).

Lawyer's review of living trusts which were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Although suspension is generally prescribed for this type of conduct, weighing fac-

tors in mitigation against the seriousness of the conduct, public censure is an appropriate sanction in this case. People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Laden, 893 P.2d 771 (Colo. 1995).

The counseling and sale of living trusts by nonlawyers constitutes the unauthorized practice of law. Lawyer's review of living trusts that were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Six-month suspension held justified in this case because of aggravating factors including selfish motive, multiple offenses, and refusal to acknowledge the wrongful nature of such conduct. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's practice of law while on inactive status constituted unauthorized practice of law. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Public censure justified where attorney failed to attend to bankruptcy proceeding and scheduled meetings, failed to timely file pleadings and responses, and allowed his paralegal to engage in unauthorized practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Attorney who continued to practice law while under suspension but did not harm any client was suspended. Attorney had been suspended from practice for three years when the court imposed an additional three-year suspension. People v. Ross, 873 P.2d 728 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Macy, 789 P.2d 188 (Colo. 1990).

Continuing to practice law while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997).

Conduct violating this rule sufficient to justify disbarment. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Rice, 728 P.2d 714 (Colo. 1986).

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Source: (a) and Comment amended and adopted June 12, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Practice Restrictions in Settlement Agreements, see 22 Colo. Law. 1673 (1993). For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For article, ''Non-Compete Agreements in Colorado'', see 40 Colo. Law. 63 (June 2011).

Rule 5.7. Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term ''law-related services'' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [9] amended and effective November 6, 2008.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agree-

ment for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients maybe served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

ANNOTATION

Law reviews. For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Lawyers Who Lobby: Cautions and Considerations'', see 45 Colo. Law. 41 (Apr. 2016).

PUBLIC SERVICE

Rule 6.1. Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional legal or public services through:

(1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organiza-

tions in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b).

Source: Entire rule repealed and readopted November 2, 1999, effective January 1, 2000; Comment amended and effective November 23, 2005; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment amended, effective April 6, 2016.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay. Indeed, the oath that Colorado lawyers take upon admittance to the Bar requires that a lawyer will never "reject, from any consideration personal to myself, the cause of the defenseless or oppressed." In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono under paragraph (a) if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the lawyer may satisfy the remaining commitment in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims

and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[8A] Government organizations are encouraged to adopt pro bono policies at their discretion. Individual government attorneys should provide pro bono legal services in accordance with their respective organizations' internal rules and policies. For further information, see the Colorado Bar Association Voluntary Pro Bono Public Service Policy for Government Attorneys, Suggested Program Guidelines, 29 *Colorado Lawyer* 79 (July 2000).

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility. There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to persons of limited means and organizations serving persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1) clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1);

(2) demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3) include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1) an annual goal of performing 50 hours of pro bono legal service by each Colorado licensed attorney in the firm, pro-rated for part-time attorneys, primarily for persons of limited means and/or organizations serving persons of limited means consistent with the definition of pro bono services as set forth in this Model Pro Bono Policy; and

(2) a statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation.

The Colorado Supreme Court will also recognize on an annual basis those Colorado law firms that voluntarily advise the Court by February 15 that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for persons of limited means or organizations serving persons of limited means consistent with the definition of pro bono services as set forth in this Model Pro Bono Policy.

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I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
>
> Preamble, Colorado Rules of Professional Conduct.

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services to (1) persons of limited means, or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means. Rule 6.1. The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1 encouraging and supporting pro bono legal endeavors;

2 reviewing, accepting and/or rejecting pro bono legal projects;

3 coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;

4 providing periodic reports on the firm's pro bono activities; and

5 creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

****[Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows:** "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to persons of limited means and the nonprofit organizations that assist them, in accordance with Rule 6.1. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. Representation of Low Income Persons. Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;

B. Civil Rights and Public Rights Law. Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. Representation of Charitable Organizations. Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. Community Economic Development. Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. Administration of Justice in the Court System. Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. Law-related Education. Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. Mentoring of Law Students and Lawyers on Pro Bono Matters. Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the client of limited means.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to persons of limited means or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above criteria.

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

****[Small firms may wish to only include the following paragraph in lieu of the above provisions:** The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, your pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1. there is no client or issue conflict or concern;
2. the legal issue raised is not frivolous or untenable;
3. the client does not have adequate funds to retain an attorney; and
4. the matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, and may agree that the repayment of such expenses may be contingent upon the outcome of the matter in accordance with Rule 1.8(e). The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine, significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to persons of limited means.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

C.R.C.P. 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of clients of limited means in a

civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the client of limited means. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the client of limited means. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under C.R.C.P. 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

Recommended Model Pro Bono Policy for Colorado In-House Legal Departments

Preface. Providing pro bono legal services to persons of limited means and organizations serving persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Colorado lawyers who work in in-house legal departments have, historically, been an untapped source of pro bono volunteers. Rule 6.1 applies equally to in-house lawyers; however, the Court recognizes that the work environment for in-house lawyers is distinct from that of lawyers in private law firms, and may limit the amount of pro bono work lawyers can accomplish while working in-house.

To encourage Colorado in-house lawyers to commit to providing pro bono legal services to persons and organizations of limited means, the Court has adopted rules to overcome some of the barriers impeding in-house counsel from performing pro bono legal work. For example, an in-house attorney who is not licensed to practice in Colorado may obtain a license to perform pro bono legal work, as a pro bono attorney under Rule 204.6. of Chapter 18, the Colorado Court Rules Governing Admission to the Bar. The attorney must pay a one-time fee of $50, and must act under the auspices of a Colorado nonprofit entity whose purpose is or includes the provision of pro bono legal representation to persons of limited means.

The following Model Pro Bono Policy can be modified to meet the needs of individual in-house legal departments. Adoption of such a policy is entirely voluntary. The model policy below is designed to serve as a starting point for in-house legal departments within Colorado that would like to put in place a structured program to encourage their lawyers to engage in pro bono service. The model policy should be adapted as needed to reflect the culture and values of the company or organization and legal department. No formal pro bono policy is needed to launch an in-house pro bono program (indeed, many of the most successful in-house pro bono programs have no policy at all); however, the model below reflects some of the issues that an in-house legal department may wish to consider before launching a program. In a few instances below alternative language is suggested. Additional resources and model policies are available from the Pro Bono Institute, Corporate Pro Bono Project: http://www.probonoinst.org/projects/corporate-pro-bono.html.

Recommended Model Pro Bono Policy for Colorado In-House Legal Departments

I. Introduction

Company recognizes the importance of good corporate citizenship, and supporting the communities in which it does business. Performing pro bono services benefits both the professionals who undertake the work as well as the individuals and organizations served. Pro bono work allows legal professionals to sharpen their existing skills, learn new areas of the law, connect more fully with their communities, and achieve a measure of personal fulfillment.

Rule 6.1 of the Colorado Rules of Professional Conduct sets forth an aspirational goal that each lawyer render at least 50 hours of pro bono public legal services per year, with a substantial majority of those hours without fee to (1) persons of limited means or (2) governmental or non-profit organization matters designed primarily to address the needs of persons of limited means.

[Insert statement about Company's existing or planned community service work]

Company encourages every member of the Legal Department to assist in providing pro bono legal services. Company aspires to attain the goal of each Company attorney devoting a minimum of 50 hours per year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules.

II. Mission Statement

Through its pro bono program, the Legal Department intends to serve Company's communities by providing pro bono legal services to individuals and organizations that otherwise might not have access to them. In addition, the Legal Department seeks to provide opportunities for rewarding and satisfying work, to spotlight Company's position as a good corporate citizen, for Legal Department professional skills and career development, and for collaboration and teamwork across Company's Legal Department and within the community in general for our attorneys and other professionals.

III. Pro Bono Service Defined

Pro bono service is the rendering of professional legal services to persons or organizations with limited means, without the expectation of compensation, regardless of whether such services are performed during regular work hours or at other times. It is this provision of volunteer legal services that is covered by this pro bono policy. Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, they are not pro bono services under this policy: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; non-legal service on the board of directors of a community or volunteer organization; services provided to a political campaign; and legal work for family members, friends, or Company employees who are not eligible to be pro bono clients under an approved pro bono project.

IV. Pro Bono Service Participation

Every member of Company Legal Department is encouraged to provide pro bono legal services. The pro bono legal services should not interfere with regular work assignments and must be approved by the Pro Bono Committee/Coordinator. No attorney will be adversely affected by a decision to participate in the program; conversely, no attorney will be penalized for not participating in the program.

Optional language: The Legal Department encourages each member to devote up to 50 hours of regular work time per year toward providing pro bono services. Legal Department members may need to use paid time off for any pro bono services provided in excess of 50 hours per year. *[Insert language for process of tracking those hours.]*

V. Pro Bono Committee/Coordinator

To support Company's efforts to provide pro bono services, Company Legal Department has established a Pro Bono Coordinator/Committee. The Committee/Coordinator oversees the pro bono program, supervises and approves all pro bono matters, ensures that conflicts are identified and processes are followed, and ensures that all pro bono matters are adequately supervised. The Pro Bono Coordinator/Committee encourages all employees within the Legal Department to bring to the Coordinator's/Committee's attention any pro bono projects of interest.

VI. Pro Bono Projects

All pro bono projects must be pre-approved by the Pro Bono Coordinator/Committee. Individuals may not begin their pro bono representations in a particular matter until Coordinator/Committee approval is received. Individuals must obtain the approval of their supervisors to perform pro bono services during scheduled work hours. The Pro Bono Coordinator/Committee plans to offer, from time to time, group projects that have already been approved. In addition, members of the Legal Department may seek approval for a new project by submitting to the Coordinator/Committee a project approval request that contains: the name of the proposed client, the name of the opposing parties and other entities (e.g. opposing attorney or law firm) involved, a description of the project including the scope of work to be done, the names of the Law Department members who would work on the project, an estimate of the time required from each person, an estimate of any anticipated costs associated with the project, anticipated schedule of the project and/or deadlines; supervision or training needs, whether malpractice coverage is provided by the project sponsor, and any other relevant information.

VII. Insurance Coverage

Company's insurance carrier provides insurance coverage for employees in the Legal Department for work performed on approved pro bono projects. Members of the Legal Department must advise the Pro Bono Coordinator/Committee immediately should they learn that a complaint or disciplinary complaint may be filed concerning a pro bono matter.

OR

Company does not have malpractice insurance to cover pro bono work of its Legal De-

partment members; however, many of the organizations that sponsor pre-approved pro bono projects carry malpractice insurance for their volunteer attorneys. The Pro Bono Coordinator/Committee will reject any project that does not provide malpractice coverage for the legal services provided. Members of the Legal Department must advise the Pro Bono Coordinator/Committee immediately should they learn that a complaint or disciplinary complaint may be filed concerning a pro bono matter.

[Note: The Pro Bono Institute has outlined additional options, such as self-insurance through the purchase of a policy from NLADA, in a paper available here: http://www.cpbo.org/wp-content/uploads/2012/09/Insurance-Paper.pdf]

VIII. Expenses and Resources

As with any other Company work assignment, individuals doing pro bono work may engage Legal Department legal assistants, paralegals and other support staff in a manner consistent with their job responsibilities. Legal Department members may use Company facilities, such as telephones, copiers, computers, printers, library materials, research materials, and mail, as appropriate to carry out pro bono work; however, in accordance with the section entitled ''Company Affiliation'' below, use of Company resources should not convey the impression that Company is providing the pro bono services. Ordinary expenses (e.g., parking, mileage, etc.) may be submitted for reimbursement. Expenses exceeding $250 should be submitted to the Pro Bono Coordinator/Committee for prior approval. Legal Department members should make every effort to control expenses related to pro bono work just as they would for any other legal matter.

IX. Expertise

Legal Department members providing pro bono services should exercise their best judgment regarding their qualifications to handle the issues necessary to provide pro bono services. Those providing pro bono services should obtain training on the legal issues they will handle. Training is available through various pro bono organizations, bar associations, law firms, and CLE offerings.

X. Company Affiliation

Although Company strongly endorses participation in the pro bono program, participants are not acting as Company representatives or employees with respect to the matters they undertake, and Company does not necessarily endorse positions taken on behalf of pro bono clients. Therefore, Company Legal Department members participating in such activities do so individually and not as representatives of Company. Individuals who take on pro bono matters must identify themselves to their clients as volunteers for the non-profit organization and not as attorneys for Company.

Individuals providing pro bono services should not use Company's stationery for pro bono activities or otherwise engage in any other acts that may convey the impression that Company is providing legal services. Individuals should use the stationery provided by the pro bono referral organization, or if no stationery is provided, blank stationery (i.e. no Company letterhead). Similarly Company business cards must not be distributed to pro bono clients.

Optional Language: Most client interviews or other meetings should take place at the offices of a partner organization. If this is not suitable, members of the Legal Department may host pro bono client meetings at a Company location with the prior approval of the Coordinator/Committee. The Company attorney hosting the meeting should take care to remind the pro bono client that, although the meeting is taking place at a Company location, the client is represented by the attorney and not Company.

XI. Conflict of Interest

Legal Department members may not engage in the provision of any pro bono service which would create a conflict of interest or give the appearance of a conflict of interest. This includes, but is not limited to, direct conflicts, business/public relations conflicts, and politically sensitive issues. Conflicts analysis must be ongoing throughout the course of any representation as an issue raising a conflict may present itself at any time during the course of representation. The Pro Bono Coordinator/Committee will review and resolve any potential conflict issues.

ANNOTATION

Law reviews. For article, ''Like It or Not, Colorado Already Has 'Mandatory' Pro Bono'', see 29 Colo. Law. 35 (Apr. 2000). For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012).

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial or otherwise oppressive burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

ANNOTATION

Law reviews. For article, ''Repugnant Objectives'', see 41 Colo. Law. 51 (Dec. 2012).

Rule 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is a director, officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of

a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure to the organization when the lawyer knows a private client might be materially benefited.

Rule 6.5. Nonprofit and Court-annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circum-

stances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve.

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this Rule if the lawyer complies with Rule 1.17(d).

Source: (f) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; comment amended, effective April 6, 2016.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

[2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

[3] It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

[4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. Rule 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

[5] Characterizations of a lawyer's fees such as ''cut-rate'', ''lowest'' and ''cheap'' are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

[6] Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

[7] Statements such as ''no recovery, no fee'' are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

[8] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[9] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

ANNOTATION

Annotator's note. Rule 7.1 is similar to Rule 7.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The relevant portions of the Colorado Consumer Protection Act (CCPA) are not inconsistent with the prohibition on misleading communications in C.R.P.C. 7.1. Attorney conduct that constitutes deceptive or unfair trade practices is not in compliance with the rules of professional conduct and is not exempted from CCPA liability. Crowe v. Tull, 126 P.3d 196 (Colo. 2006).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements in violation of the rule warrants public, rather than private, censure. Respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. Respondent's conduct involved dishonesty and misrepresentation and, in conjunction with prior discipline, foreclosed a private sanction. People v. Carpenter, 893 P.2d 777 (Colo. 1995).

Rules 7.1 to 7.6 govern information about legal services and concern advertisements, direct contact with prospective clients, and law firm names and letterheads. They do not relate to communications with an existing client. Therefore, firm was not obligated to reveal an attorney's prior arrest and medical history when attorney was added to the attorneys on

plaintiff's case. Moye White LLP v. Beren, 2013 COA 89, 320 P.3d 373.

Cases Decided Under Former DR 2-101.

Law reviews. For comment, ''A Consumers' Rights Interpretation of the First Amendment Ends Bans on Legal Advertising'', see 55 Den. L.J. 103 (1978). For article, ''Lawyer Advertising'', see 15 Colo. Law. 1819 (1986). For article, ''Marketing Your Practice'', see 16 Colo. Law. 259 (1987). For article, ''Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising'', see 58 U. Colo. L. Rev. 255 (1987). For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For comment, ''After Shapero v. Kentucky Bar Association: Much Remains Unresolved About the Allowable Limits of Restrictions on Attorney Advertising'', see 61 U. Colo. L. Rev. 115 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Cases Decided Under Former DR 2-102.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Listing Support Personnel Names on Letterhead and Business Cards, see 19 Colo. Law. 629 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 7.2. Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Source: (c)(1), (2), and (3) amended and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [8] amended and effective November 6, 2008; Comment amended, effective April 6, 2016.

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to

prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's profes-

sional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(d), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on the Applicability of Colo. RPC 7.2 to Internet-Based Lawyer Marketing Programs, see 39 Colo. Law. 65 (Aug. 2010). For article, ''Colorado Considers ABA's Ethics 20/20 Project and Amends Rules of Professional Conduct'', see 45 Colo. Law. 41 (Nov. 2016).

Public censure was appropriate where attorney continued to advertise with an unapproved, for-profit attorney referral service and where attorney had previously been disciplined with regard to use of client funds and was on suspension at the time of censure. People v. Mason, 938 P.2d 133 (Colo. 1997) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 7.3. Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded, or electronic communication, or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall:

(1) include the words ''Advertising Material'' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Source: Entire rule and comment amended and adopted and committee comment deleted by amendment June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; IP(b), (b)(1), (b)(2), IP(d), and Comment amended, effective April 6, 2016; (c)(1) amended and effective February 22, 2018.

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by e-mail or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a

former client or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(d)(1) that certain communications be marked ''Advertising Material'' does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Rule 7.4. Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation ''Patent Attorney'' or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation ''admiralty,'' ''proctor in admiralty'' or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: ''Colorado does not certify lawyers as specialists in any field.'' This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Source: (g) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted and committee comment deleted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a ''specialist,'' practices a ''specialty'' or ''specializes in'' particular fields, but such communications are subject to the ''false and misleading'' standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(e) unless the letterhead is used in an advertisement.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

Rule 7.5. Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Source: (b) amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the ''ABC Legal Clinic.'' A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as ''Springfield Legal Clinic,'' an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, ''Smith and Jones,'' for that title suggests that they are practicing law together in a firm.

ANNOTATION

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Reed, 955 P.2d 65 (Colo. 1998) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 7.6. Political Contributions to Obtain Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term ''political contribution'' denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term ''political contribution'' does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term ''government legal engagement'' denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term ''appointment by a judge'' denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term ''lawyer or law firm'' includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment

by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission, readmission, or reinstatement to the bar, or a lawyer in connection with an application for admission, readmission, or reinstatement to the bar or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. Rule 8.1(b) does not prohibit a good faith challenge to the demand for such information. A person relying on such a provision or challenge in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

ANNOTATION

Annotator's note. Rule 8.1 is similar to Rule 8.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Recklessly making a false statement of material fact in a disciplinary matter, in conjunction with violation of other disciplinary rules, sufficient to justify suspension. People v. Porter, 980 P.2d 536 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Demaray, 8 P.3d 427 (Colo. 1999); People v. Edwards, 201 P.3d 555 (Colo. 2008); People v. Duggan, 282 P.3d 534 (Colo. O.P.D.J. 2012); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Fagan, 423 P.3d 412 (Colo. O.P.D.J. 2018).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Kolhouse, 309 P.3d 963 (Colo. O.P.D.J. 2013); People v. Randolph, 310 P.3d 293 (Colo. O.P.D.J. 2013); People v. Goodman, 334 P.3d 241 (Colo. O.P.D.J. 2014); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015); People v. Weatherford, 357 P.3d 1251 (Colo. O.P.D.J. 2015); People v. Carrigan, 358 P.3d 650 (Colo. O.P.D.J. 2015).

Cases Decided Under Former DR 1-101.

Law reviews. For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part I'', see 19 Colo. Law. 465 (1990). For article, ''Update on Ethics and Malpractice Avoidance in Family Law — Part II'', see 19 Colo. Law. 647 (1990).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Bar reinstatement requires demonstration of possession of moral and professional qualifications. Where a state attorney had been convicted of failing to file his federal income tax return and making false representations to a special agent of the Internal Revenue Service regarding the filing of income tax returns, and where the attorney was later found to have made a false statement in his application to the Arizona State Bar by answering in the negative an inquiry as to whether he had ever been questioned regarding the violation of any law, he was suspended from the practice of law in Colorado for three years, and was required to demonstrate upon application for reinstatement that he possessed moral and professional qualifications for admission to the bar of this state. People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980).

Public censure appropriate where attorney acted recklessly in failing to disclose prior investigations for alleged criminal conduct on his application to the bar, but where attorney had practiced law in Colorado for five years without any other discipline and had cooperated in the disciplinary proceedings. People v. North, 964 P.2d 510 (Colo. 1998).

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer or of a candidate for election, or appointment to, or retention in, judicial or legal office.

(b) A lawyer who is a candidate for retention in judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

ANNOTATION

Respondent's motion to recuse was not supported by an affidavit as required by C.R.C.P. 97, thus the statements made therein were made with reckless disregard as to their truth or falsity. People v. Thomas, 925 P.2d 1081 (Colo. 1996) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Cases Decided Under Former DR 8-102.

Falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent violated other disciplinary rules and had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of the disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

Source: Entire rule amended and adopted June 19, 2003, effective July 1, 2003; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term ''substantial'' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct

is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ANNOTATION

Law reviews. For article, ''Policing the Legal System: The Duty to Report Misconduct'', see 30 Colo. Law. 85 (Sept. 2001). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007).

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (c) amended and adopted, effective September 28, 2017.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ''moral turpitude.'' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack

of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

ANNOTATION

Law reviews. For article, ''Settlement Ethics'', see 30 Colo. Law. 53 (Dec. 2001). For article, ''Improper Recording of an Attorney's Charging Lien'', see 32 Colo. Law. 61 (Feb. 2003). For article, ''Discipline Against Lawyers for Conduct Outside the Practice of Law'', see 32 Colo. Law. 75 (Apr. 2003). For article, ''Enforcing Civility: The Rules of Professional Conduct in Deposition Settings'', see 33 Colo. Law. 75 (Mar. 2004). For article, ''Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications'', see 33 Colo. Law. 53 (Oct. 2004). For comment, ''Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception'', see 75 U. Colo. L. Rev. 301 (2004). For article, ''The Duty of Loyalty and Preparations to Compete'', see 34 Colo. Law. 67 (Nov. 2005). For article, ''Investigative Tactics: They May Be Legal, But Are They Ethical?'', see 35 Colo. Law. 43 (Jan. 2006). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Ethics in Family Law and the New Rules of Professional Conduct'', see 37 Colo. Law. 47 (Oct. 2008). For article, ''Litigating Disputes Involving the Medical Marijuana Industry'', see 41 Colo. Law. 103 (Aug. 2012). For article, ''Client-Drafted Engagement Letters and Outside Counsel Policies'', see 43 Colo. Law. 33 (Feb. 2014). For article, ''Pretext Investigations: An Ethical Dilemma for IP Attorneys'', see 43 Colo. Law. 41 (June 2014). For article, ''Out of Bounds: Boundary Issues in the Practice of Law'', see 43 Colo. Law. 57 (Dec. 2014). For article, ''Disputed Funds in the Possession of a Lawyer'', see 44 Colo. Law. 47 (Feb. 2015). For article, ''Top 10 Things In-House Lawyers Need to Know about Ethics'', see 45 Colo. Law. 59 (July 2016). For article, ''Ethical Duties of an Insurance Defense Lawyer'', see 46 Colo. Law. 40 (Oct. 2017). For article, ''Handling Electronic Documents Purloined by a Client'', see 48 Colo. Law. 22 (Jan. 2019).

Annotator's note. Rule 8.4 is similar to Rule 8.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

A hearing board always has discretion in determining the appropriate sanction for attorney misconduct and may impose any of the forms of discipline listed in C.R.C.P. 251.6, which range from private admonition to disbarment. In re Attorney F, 2012 CO 57, 285 P.3d 322.

Hearing board erred, therefore, in concluding that it was compelled by case law to impose a public censure instead of private admonition. In re Attorney F, 2012 CO 57, 285 P.3d 322.

Attorney's refusal to return documents belonging to client's parents and assertion of a retaining lien constitute conduct which is prejudicial to the administration of justice. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Attorney's persistence in pursuing voluntary dismissal of client's claim, even after client had retained other counsel and asserted an intention not to dismiss the claim, constituted conduct prejudicial to the administration of justice. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Lawyer violated section (c) when he represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Attorneys are responsible for ethical violation when their investigator surreptitiously recorded his telephone interview with employee of defendant. Even if lawyers had no prior knowledge of the investigator's recording, once they learned that the interview was done without the employee's consent, they should not have listened to or used the recording without the employee's consent. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

Attorney violated sections (a) and (c) by failing to notify a client that he never paid two medical bills that he had promised to pay, recording a false deed of trust memorializing a purported loan from two married clients to another client even though the clients had unequivocally refused to make the loan, and attempting to enter into a business transaction with clients without making disclosures required by rule 1.8. People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011).

Taking for his or her own use funds that a client has paid the lawyer to cover the cost of specific services provided by a third party for the client's benefit constitutes knowing conversion and violates section (c). Matter of Kleinsmith, 2017 CO 101, 409 P.3d 305.

Lawyer violated section (c) when he failed to disclose the fact of his client's death during settlement negotiations. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Lawyer who misrepresented to clients his status to practice law in the state engaged in dishonest conduct in violation of section (c) of this rule. People v. Auer, 331 P.3d 136 (Colo. O.P.D.J. 2014).

Failure of former district attorney to make ordered child support payments constitutes conduct prejudicial to the administration of justice and conduct that adversely reflects upon a lawyer's fitness to practice law. People v. Primavera, 904 P.2d 883 (Colo. 1995).

Attorney's nonpayment of spousal support was a violation of section (d) warranting suspension, but the attorney's answer of ''no'' on his 2014 attorney registration statement regarding whether he was under the obligation of any current child support order did not violate section (c) because the attorney reasonably believed the unallocated temporary support order in place at that time was not a child support order. People v. McQuitty, 371 P.3d 279 (Colo. O.P.D.J. 2016).

Attorney who conditioned settlement agreement on plaintiffs not pursuing a grievance against him violated section (d) and constituted conduct prejudicial to the administration of justice. In re Lopez, 980 P.2d 983 (Colo. 1999).

When a public defender gave his client the impression that he would provide better representation if the client hired him as private counsel, his conduct prejudiced the administration of justice under section (d), for which public censure was warranted. People v. Casias, 279 P.3d 667 (Colo. O.P.D.J. 2012).

Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Suspension appropriate where prosecutor engaged in intentional deception in order to secure a suspect's arrest. The prosecutor's conduct violated the public and professional trust, was intentional, created potential harm, and involved aggravating factors, thus, justifying suspension. In re Pautler, 47 P.3d 1175 (Colo. 2002).

When considering discipline of attorneys who criticize judges, the New York Times standard should be applied because of the interests in protecting attorney speech critical of judges. Under the New York Times standard (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), a two-part inquiry applies in determining whether an attorney may be disciplined for statements criticizing a judge: (1) Whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice—that is, with knowledge that it was false or with reckless disregard as to its truth. In re Green, 11 P.3d 1078 (Colo. 2000).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that hindered a client's right to choose his or her own lawyer by interfering with the client's right to discharge his or her lawyer at any time, with or without cause. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure was appropriate where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Knowingly deceiving a client by altering a settlement check generally would warrant a 30-day suspension, however, because the client was uninjured by the deception and the respondent had no previous discipline in 13 years of practice, public censure was adequate. People v. Waitkus, 962 P.2d 977 (Colo. 1998).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Six-month penalty justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imposition of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse; and (6) relative inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993).

Six-month suspension appropriate for respondent convicted of drunken driving offense and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 460 (Colo. 1997).

Multiple criminal and traffic convictions demonstrate a pattern of misconduct, and the presence of multiple offenses warrants suspension for six months with the requirement of reinstatement proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998).

Demonstration of four conditions required for attorney publicly censured after conviction of driving while ability impaired: Continue psychotherapy, remain on antabuse, submit monthly reports regarding progress on antabuse, and execute written authorization to therapist to release medical information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Forty-five-day suspension warranted for attorney's professional misconduct involving the improper collection of attorney's fees in six instances. People v. Peters, 849 P.2d 51 (Colo. 1993).

Suspension of three months is appropriate when attorney engaged in sexual intercourse with dissolution of marriage client on one occasion, had a history of disciplinary sanctions, but cooperated with the disciplinary investigation. People v. Barr, 929 P.2d 1325 (Colo. 1996).

Nine-month suspension stayed upon the requirement to pay restitution to clients is justified when violating this rule in conjunction with other disciplinary rules, particularly given the substantial and continuous incompetence, advancement of meritless claims, and significant financial harm conduct caused clients in this case. People v. Bontrager, 407 P.3d 1235 (Colo. O.P.D.J. 2017).

Suspension for one year and one day, with conditional stay of all but 60 days, warranted for attorney's backdating of brief and certificate of service, after which attorney voluntarily reported misconduct, attempted to rectify the violation, cooperated in disciplinary proceedings, and showed genuine remorse. People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008).

Suspension for one year and one day appropriate where attorney, among other disciplinary rule violations, violated section (d) by

failing to pay attorney fees until two years after a malpractice action against the attorney and section (h) by engaging in two non-sufficient funds transactions involving his ''special'' account, and twenty-two non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for one year and one day appropriate where attorney had a selfish or dishonest motive in retaining fees he received from clients that rightfully belonged to his law firm, but had no prior disciplinary record and made a timely good faith effort to provide restitution. People v. Bronstein, 964 P.2d 514 (Colo. 1998) (overruled in In the Matter of Thompson, 991 P.2d 820 (Colo. 1999)).

Suspension for one year and one day warranted where attorney violated section (c) by knowingly submitting a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998).

Suspension of one year and one day appropriate where attorney committed offense of third-degree sexual assault on a client and recklessly accused a lawyer and judge of having an improper ex parte communication. In re Egbune, 971 P.2d 1065 (Colo. 1999).

It is appropriate to condition reinstatement, after suspension for a year and a day, upon the attorney's submission to an independent medical examination by a qualified psychiatrist, where the attorney's belief in a conspiracy to remove her from the practice of law was both ingrained and illogical. The suspension is warranted because the attorney violated section (d) by threatening to sue witnesses if they testified at a hearing over an award of attorney fees and section (c) by secretly negotiating with opposing litigants for additional attorney fees when the attorney's contingency fee contract with her former clients gave them a potentially valid claim to a portion of the fees. People v. Maynard, 275 P.3d 780 (Colo. O.P.D.J. 2010).

Two-year suspension warranted when attorney entered Alford plea to defer judgment on a charge of soliciting for child prostitution. People v. Gritchen, 908 P.2d 70 (Colo. 1995).

Driving while under the influence of alcohol with an expired driver's license and no proof of insurance, and accepting one ounce of cocaine as payment for legal services from a person believed to be a client facing drug charges, warranted a three-year suspension. People v. Madrid, 967 P.2d 627 (Colo. 1998).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998).

Suspension for three years appropriate when attorney circumvented proper channels for the adoption of a child by falsely listing her own husband as the birth father on the baby's birth certificate, counseled her husband to engage in fraudulent conduct, and provided false information on a petition for stepparent adoption. People v. Ritland, 327 P.3d 914 (Colo. O.P.D.J. 2014).

Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998).

A long period of suspension, rather than disbarment, is warranted when acts complained of occurred before an earlier disciplinary action against the attorney and mitigating factors exist. Attorney's actions were more properly viewed as a pattern of misconduct. In re Van Buskirk, 981 P.2d 607 (Colo. 1999).

Thirty-day suspension appropriate where attorney overdrew his Colorado Lawyer Trust Account Foundation (COLTAF) account but shortly thereafter deposited sufficient funds to cure the deficiency, negligently failed to keep adequate trust account records, knowingly and repeatedly failed to respond to several requests for information from the office of attorney regulation counsel, eventually provided bank records that revealed no further misconduct on his part, and faced a number of challenges in his personal life at the time he knowingly failed to cooperate with the office of attorney regulation counsel. People v. Edwards, 201 P.3d 555 (Colo. 2008).

Behavior toward client that precipitated conflict on day of client's criminal trial, forcing client's newly appointed public defender to seek a continuance to have adequate time to prepare violates this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Pushing another attorney in the courtroom, resulting in a conviction for third-degree assault, warranted a 30-day suspension. People v. Nelson, 941 P.2d 922 (Colo. 1997).

Lawyer who imposed unauthorized charging lien and subsequently failed to release such lien, and who testified at grievance proceedings that he kept documents belonging to third parties in order to protect his client's financial interests, which was the first instance at which such a theory was raised, violated this rule. Although the attorney's motives were dishonest and selfish, the grievance against the attorney involved in multiple offenses, the attorney violated a disciplinary rule at the grievance

proceedings, and the attorney failed to acknowledge wrongful nature of his conduct, the mitigating factors included the fact that the attorney had not been subject to prior grievances and the attorney was relatively inexperienced. Thus, the appropriate sanction is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

In determining appropriate sanction, it is not important whether injured party was attorney's client, when attorney-respondent was appointed conservator. People v. Vigil, 929 P.2d 1311 (Colo. 1996).

Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997).

Disbarment warranted for respondent who continued to practice law while under suspension. Respondent was suspended based upon conviction for possession of cocaine, a class 3 felony, and upon release from prison represented to several persons that he was a licensed attorney and provided legal services to those persons. Board's finding that respondent had a history of prior discipline, a dishonest or selfish motive, displayed a pattern of misconduct, had committed multiple offenses, had engaged in a bad faith obstruction of the disciplinary process, had refused to acknowledge any wrongful conduct on his part, had substantial experience in law, and could offer no mitigating factors warranted disbarment. People v. Stauffer, 858 P.2d 694 (Colo. 1993).

Disbarment warranted for respondent convicted of repeated theft from her immigration clients. People v. Cohen, 369 P.3d 289 (Colo. O.P.D.J. 2016).

Disbarment appropriate remedy where attorney neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998).

Disbarment is the presumed sanction for knowing misappropriation of funds from clients or one's law firm, barring significant mitigating circumstances. People v. Guyerson, 898 P.2d 1062 (Colo. 1995); People v. Varallo, 913 P.2d 1 (Colo. 1996); In the Matter of Thompson, 991 P.2d 820 (Colo. 1999) (overruling People v. Bronstein, 964 P.2d 514 (Colo. 1998)); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Fiore, 301 P.3d 1250 (Colo. O.P.D.J. 2013).

Disbarment appropriate when attorney accepted legal fees, performed limited services, abandoned the client, and then misappropriated the unearned fees. People v. Kuntz, 942 P.2d 1206 (Colo. 1997); People v. Ross, 350 P.3d 327 (Colo. O.P.D.J. 2015).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Structuring financial transaction to enable client to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995).

One-year and one-day suspension plus payment of restitution and costs proper for attorney who induced a loan through misrepresentations, assigned a promissory note obtained with proceeds of such loan without lender's knowledge or consent, and misrepresented that sufficient funds were in trust account to cover check. People v. Kearns, 843 P.2d 1 (Colo. 1992).

False statements by attorney in connection with an accident in which the attorney was at fault adversely reflects on attorney's fitness to practice law. People v. Dieters, 935 P.2d 1 (Colo. 1997).

Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Pleading guilty to felony theft evidences serious criminal conduct warranting disbarment. People v. Larson, 318 P.3d 89 (Colo. O.P.D.J. 2013).

Pleading guilty to felony theft from at-risk victims is a crime of dishonesty that warrants disbarment. People v. Zarlengo, 367 P.3d 1197 (Colo. O.P.D.J. 2016).

Attorney's repeated assurances to client that he would file a motion for reconsideration, his failure to do so, and his neglect of a legal matter entrusted to him constitute disciplinary violations warranting suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel, constituted disciplinary violations warranting a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion and then failed to appear at a deposition. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996).

Suspension stayed, in view of respondent's cooperation and remorse, conditioned upon successful completion of six-month probationary period and ethics refresher course. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements violates this rule and warrants public censure where respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. People v. Carpenter, 893 P.2d 777 (Colo. 1995).

Public censure appropriate where attorney misrepresented the status of a dismissed case to his client, the resultant actual harm to the client was only the cost of hiring a new lawyer to pursue an appeal of the dismissal, the attorney's law firm reimbursed the client for all fees it had collected, the attorney reimbursed the firm for such fees, the only aggravating factor was a 1994 letter of admonition given to the attorney for improperly communicating with a represented person, and mitigating factors included the absence of a dishonest or selfish motive, remorse, and full and free disclosure in the disciplinary proceedings. People v. Johnston, 955 P.2d 1051 (Colo. 1998).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996).

Public censure appropriate where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Public censure appropriate for attorney who had been reprimanded in Connecticut for failure to file federal income tax return and attorney had not been disciplined before in Colorado. People v. Perkell, 969 P.2d 703 (Colo. 1998).

Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997).

Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)).

Public censure is appropriate for driving under the influence with mitigating factor of candidness and cooperativeness. This was attorney's first conviction, and he was truthful, candid, and cooperative. He also underwent alcohol evaluation by a doctor. People v. Miller, 409 P.3d 667 (Colo. O.P.D.J. 2017).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone call with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Public censure was warranted where attorney made inappropriate, harmful, offensive, harassing, and sexually abusive comments to potential client. The mitigating factors found by the hearing board do not compel a different result. People v. Meier, 954 P.2d 1068 (Colo. 1998).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting

public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Two-year suspension was an adequate sanction where attorney neglected client matters by representing that he would file a lawsuit and neglected to do so, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by agreeing to represent client and thereafter failing to advise the client of attorney's suspension, and where attorney further engaged in misrepresentation by collecting legal fees and costs from client while attorney was under suspension. People v. de Baca, 948 P.2d 1 (Colo. 1997).

Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo. 1997).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998).

Depositing personal funds into a COLTAF account to hide personal assets from creditors supports a 90-day suspension with conditions of reinstatement. People v. Alster, 221 P.3d 1088 (Colo. O.P.D.J. 2009).

Suspension of one year and one day was appropriate based on evidence of three separate incidents in which the attorney physically assaulted his girlfriend. It was immaterial that no charges had been filed in any of the incidents, because the acts alone reflected adversely on the attorney's fitness to practice law. The fact that the attorney's behavior was not directly related to his practice of law was a factor to be considered, but was not conclusive. The attorney had failed to take any steps toward rehabilitation following the incidents, and the three separate assaults showed a pattern of misconduct. Therefore, it was appropriate to suspend the attorney and require him to demonstrate rehabilitation and completion of a certified domestic violence treatment program as a condition of reinstatement. People v. Musick, 960 P.2d 89 (Colo. 1998).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension, stayed upon completion of one-year period of probation with conditions. People v. Bendinelli, 329 P.3d 300 (Colo. O.P.D.J. 2014).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension for nine months plus additional conditions. People v. Muhr, 370 P.3d 677 (Colo. O.P.D.J. 2015).

Pleading guilty to one count of bribery evidences conduct warranting disbarment. People v. Viar, 848 P.2d 934 (Colo. 1993).

Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Disbarment is the only condign sanction for attempted second degree murder. Respondent nearly killed his wife by brutally attacking her with a hatchet and a kitchen knife. People v. Kintzele, 409 P.3d 680 (Colo. O.P.D.J. 2017).

Disbarment is warranted where attorney was convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment appropriate sanction for attorney who intentionally killed another person. Despite a lack of prior discipline in this state, giving full faith and credit to another state's law and its jury finding that attorney intentionally took her husband's life by shooting him 10 times with a firearm, disbarment is an appropriate sanction. People v. Sims, 190 P.3d 188 (Colo. O.P.D.J. 2008).

Disbarment is warranted for attorney convicted of one count of sexual assault on a

child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998).

Disbarment was appropriate, despite existence of mitigating factors, where attorney violated section (c) of this rule by misappropriating bar association funds for his personal use and where such misappropriation was knowing. People v. Motsenbocker, 926 P.2d 576 (Colo. 1996).

Disbarment was appropriate for knowing misappropriation of funds despite fact respondent had not been previously disciplined. People v. Dice, 947 P.2d 339 (Colo. 1997).

Disbarment is appropriate when a lawyer knowingly misappropriates client funds in the absence of extraordinary mitigating factors. Mitigating factors such as stress due to prolonged divorce, personal financial losses, a serious motor vehicle accident, filing for bankruptcy, a deteriorating law practice, and alcohol abuse were insufficient to deviate from the rule that a clear and convincing showing of a knowing misappropriation of client funds warrants disbarment. People v. Torpy, 966 P.2d 1040 (Colo. 1998).

Disbarment is warranted where attorney knowingly converted funds belonging to law firm and where attorney knowingly acted dishonestly toward the firm and the disciplinary board investigator. People v. Bardulis, 203 P.3d 632 (Colo. O.P.D.J. 2009).

Disbarment is only appropriate remedy for knowingly misappropriating client funds, unless significant extenuating circumstances are present. In re Cleland, 2 P.3d 700 (Colo. 2000).

Disbarment is warranted where attorney converted client's funds in multiple collections cases and committed other rule violations, thus causing severe injury to the client. People v. Solomon, 301 P.3d 1244 (Colo. O.P.D.J. 2013).

Disbarment warranted for knowingly abandoning clients, converting their funds, and causing actual financial and emotional harm to them. Attorney violated duty to preserve clients' property, to diligently perform services on their behalf, to be candid with them during the course of the professional relationship, and to abide by the legal rules of substance and procedure that affect the administration of justice. People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009).

Disbarment warranted for attorney convicted of conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of a false income tax return. People v. Evanson, 223 P.3d 735 (Colo. O.P.D.J. 2009).

Disbarment warranted for knowingly participating in a long-running tax evasion scheme, actively assisting more than 150 clients to disobey their legal obligations by collectively defrauding the federal government of millions of dollars. People v. Sugar, 360 P.3d 1041 (Colo. O.P.D.J. 2015).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney knowingly commingled and misappropriated clients' funds for his personal use, neglected filing a complaint in a case until it was barred by the statute of limitations, failed to comply with court orders applicable to his child support payments, and neglected two other cases causing default judgments to be entered against his client, despite fact that one of the judgments was subsequently set aside. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Attorney who was the trustee of client's trust violated section (h) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Prior discipline for conduct violating this rule is an important factor in determining the proper level of discipline, therefore disbarment is merited where attorney continues to engage in misconduct. In re C de Baca, 11 P.3d 426 (Colo. 2000).

Court erred when it ordered special advocate to refund fees without determining whether conduct violated section (c). In re Redmond, 131 P.3d 1167 (Colo. App. 2005).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct found to violate disciplinary rules. People v. Brenner, 852 P.2d 452 (Colo. 1993).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Newman, 925 P.2d 783 (Colo. 1996); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Rolfe, 962 P.2d

981 (Colo. 1998); Matter of Olsen, 2014 CO 42, 326 P.3d 1004.

Conduct violating this rule sufficient to justify public censure. People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Meier, 954 P.2d 1068 (Colo. 1998); In re Wilson, 982 P.2d 840 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. McCaffrey, 925 P.2d 269 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. McGuire, 935 P.2d 22 (Colo. 1997); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Barnthouse, 948 P.2d 534 (Colo. 1997); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Easley, 956 P.2d 1257 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Hickox, 57 P.3d 403 (Colo. 2002); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007); People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. Brennan, 240 P.3d 887 (Colo. O.P.D.J. 2009); People v. Albani, 276 P.3d 64 (Colo. O.P.D.J. 2011); People v. Culter, 277 P.3d 954 (Colo. O.P.D.J. 2011); People v. Duggan, 282 P.3d 534 (Colo. O.P.D.J. 2012); People v. Staab, 287 P.3d 122 (Colo. O.P.D.J. 2012); People v. Verce, 286 P.3d 1107 (Colo. O.P.D.J. 2012); People v. Cochrane, 296 P.3d 1051 (Colo. O.P.D.J. 2013); People v. Head, 332 P.3d 117 (Colo. O.P.D.J. 2013). People v. Beecher, 350 P.3d 310 (Colo. O.P.D.J. 2015); People v. Miller, 354 P.3d 1136 (Colo. O.P.D.J. 2015). People v. Quigley, 359 P.3d 1045 (Colo. O.P.D.J. 2015).

Conduct violating this rule sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Rudman, 948 P.2d 1022 (Colo. 1997); In re Van Buskirk, 981 P.2d 607 (Colo. 1999); In re Sather, 3 P.3d 403 (Colo. 2000); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Ebbert, 925 P.2d 274 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Jackson, 943 P.2d 450 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Lopez, 980 P.2d 983 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Gallegos, 229 P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010); People v. Zodrow, 276 P.3d 113 (Colo. O.P.D.J. 2011); People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011); People v. Calvert, 280 P.3d 1269 (Colo. O.P.D.J. 2011); People v. Alexander, 281 P.3d 496 (Colo. O.P.D.J. 2012); People v. Tolentino, 285 P.3d 340 (Colo. O.P.D.J. 2012); People v. Ringler, 309 P.3d 959 (Colo. O.P.D.J. 2013); People v. McNamara, 311 P.3d 622 (Colo. O.P.D.J. 2013); People v. Goodman, 334 P.3d 241 (Colo. O.P.D.J. 2014); People v. Lindley, 349 P.3d 304 (Colo. O.P.D.J. 2015); People v. Palmer, 349 P.3d 312 (Colo. O.P.D.J. 2015); People v. Doherty, 354 P.3d 1150 (Colo. O.P.D.J. 2015); People v. Kanwal, 357 P.3d 1236-1246 (Colo. O.P.D.J. 2015); People v. Weatherford, 357 P.3d 1251 (Colo. O.P.D.J. 2015); People v. Carrigan, 358 P.3d 650 (Colo. O.P.D.J. 2015); People v. Kleinsmith, 407 P.3d 1229 (Colo. O.P.D.J. 2016).

Conduct violating this rule sufficient to justify disbarment. People v. Kelly, 840 P.2d 1068 (Colo. 1992); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Sichta, 948 P.2d 1018 (Colo. 1997); People v. Nearen, 952 P.2d 371 (Colo. 1998); People v. Nitschke, 350 P.3d 334 (Colo. O.P.D.J. 2015).

Rule 8.5. Disciplinary Authority; Choice of Law

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [1A] amended, effective April 6, 2016.

COMMENT

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] The second sentence of Rule 8.5(a) does not preclude prosecution for the unauthorized practice of law of a lawyer who is not admitted in this jurisdiction, and who does not comply with C.R.C.P. 204 or C.R.C.P. 205, but who provides or offers to provide any legal services in this jurisdiction.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceed-

ing that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

ANNOTATION

Law reviews. For article, ''Negotiations and the Unauthorized Practice of Law'', see 23 Colo. Law. 361 (1994). For article, ''The New Rules of Professional Conduct: Significant Changes for In-House Counsel'', see 36 Colo. Law. 71 (Nov. 2007). For article, ''Temporal and Substantive Choice of Law Under the Colorado Rules of Professional Conduct'', see 39 Colo. Law. 35 (Apr. 2010). For article, ''Representing Clients in the Marijuana Industry: Navigating State and Federal Rules'', see 44 Colo. Law. 61 (Aug. 2015).

Applied in People v. Rozan, 277 P.3d 942 (Colo. O.P.D.J. 2011).

Rule 9. Title — How Known and Cited

These rules shall be known and cited as the Colorado Rules of Professional Conduct or Colo. RPC.

Source: Entire rule amended and adopted April 10, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

INDEX TO APPENDIX
TO CHAPTERS 18 TO 20
COLORADO RULES OF PROFESSIONAL CONDUCT

CHAPTER 21

Library

ANALYSIS BY RULE

CHAPTER 21

LIBRARY

Cross references: For the supreme court librarian and the supreme court library fund, see §§ 13-2-117, 13-2-118, and 13-2-120, C.R.S.

Rule 261. Abstracts and Briefs

The Clerk shall file with the Librarian of the Supreme Court Library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this Court, which shall become a part of the Court Library. The Clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this Court.

Rule 262. Withdrawal of Books

No books may be withdrawn or removed from the Library by any person, except members of the Court for use in their chambers.

Rule 263. Silence in Library

Silence is required in the Library. Employees shall observe and enforce this Rule.

Rule 264. Proof of Parts of Book

Whenever proof of the laws of any other state, territory or foreign government is required, and the official print thereof is on file in the Supreme Court Library, a verbatim copy thereof, either typewritten or by other duplicating methods, certified by the Librarian or Clerk of this Court to be the same as that contained in the official volume cited, shall have the same force and effect as such printed volume.

CHAPTER 22

Professional Service Companies

Adopted by the

SUPREME COURT OF COLORADO

November 22, 1995,

Effective December 1, 1995

Editor's note: Effective December 1, 1995, these Rules replaced the Rules on Professional Service Corporations and Joint-Stock and Limited Liability Companies.

ANALYSIS BY RULE

CHAPTER 22

PROFESSIONAL SERVICE COMPANIES

Rule 265. Professional Service Companies

(a) Rendering Legal Service Through a Professional Company. One or more attorneys who are licensed to practice law in Colorado may render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional company is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

(1) Professional Company Name. The name of the professional company shall comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

(2) Owners' Liability for Professional Acts, Errors, or Omissions. Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally to the extent provided by this Rule the liability of the professional company for such act, error, or omission. Notwithstanding the preceding sentence, any owner who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company does not assume such liability, except as provided in subsection (a)(3)(D), if, at the time the act, error, or omission occurs the professional company has professional liability insurance that meets the minimum requirements stated in subsection (a)(3).

(3) Professional Liability Insurance Policy Requirements. The professional liability insurance contemplated in subsection (a)(2) shall meet the following minimum requirements:

(A) Professional Acts Coverage. The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the rendering of legal services by any attorney through the professional company and against the liability imposed upon it arising out of the acts, errors, and omissions of all nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

(B) Policy Language. The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(C) Limits of Coverage. The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys who render legal services through the professional company or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser $300,000 multiplied by the number of attorneys who render legal services through the professional company or $2,000,000.

(D) Deductibles and Defense Costs. The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. The liability assumed by each owner of the professional company who has not directly participated in the act, error or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of

the professional company in excess of insurance available to pay such damages or the sum of the following:

(I) such deductible or retained self-insurance; and

(II) the amounts, if any, by which the payment of defense costs has reduced the insurance remaining available for the payment of damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by subsection (a)(3)(C).

(E) Determination of Coverage. An act, error, or omission in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this Rule if the policy or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

(F) Limitation of Vicarious Liability. The liability assumed by the owners of a professional company under this Rule is limited to the liability of the professional company for acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable and shall not extend to any other liability incurred by the professional company. Liability, if any, for any and all acts, errors, and omissions, other than acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

(b) Compliance with Rules of Professional Conduct. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through a professional company to comply with the Colorado Rules of Professional Conduct promulgated by this Court.

(c) Violation of Rule: Termination of Authority. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

(d) Professional Company Constituencies. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "Professional Company" Defined. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

Source: Entire chapter repealed and adopted November 22, 1995, effective December 1, 1995; entire rule amended and effective February 26, 2009.

Cross references: For corporations and associations, see title 7, C.R.S.

ANNOTATION

Law reviews. For article, ''Law Firm Incorporation in Colorado'', see 34 Rocky Mt. L. Rev. 427 (1962). For comment on Empey v. United States appearing below, see 46 Den. L.J. 306 (1969). For article, ''Changes in the Rule Authorizing Professional Corporations'', see 25 Colo. Law. 67 (Mar. 1996). For article, ''The Function of CRCP 265: Rendering Legal Services through a Professional Company'', see 47 Colo. Law. 25 (May 2018).

This rule authorizes lawyers to organize professional service corporations under the Colorado corporation code and thereafter operate them for the practice of law, provided they

organize and operate such corporations in accordance with the provisions of this rule. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

Such lawyers are entitled to be treated as a corporation for income tax purposes. A corporation organized to practice a learned profession under the general corporation laws of a state which has to meet requirements laid down in this rule is entitled to be treated as a corporation for federal income tax purposes. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

The definition of a partnership plainly refers to unincorporated organizations; so, to treat as a partnership for federal income tax purposes, a corporation, organized and chartered under state laws as a corporation and operated as such in good faith, does violence to the statutory definitions of the terms ''partnership'' and ''corporation'' of the internal revenue statutes. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

Activities of law firm incorporated as professional corporation in conducting a business of selling television advertising materials go beyond the purpose of conducting a law practice and violate this rule, and, therefore, contracts made by such professional corporation are unenforceable. Network Affiliates, Inc. v. Robert E. Schack, P.A., 682 P.2d 1244 (Colo. App. 1984).

Failure of attorney to register as a professional corporation for the practice of law violated DR 1-102 and subjected attorney to disciplinary proceedings. People v. Dickinson, 903 P.2d 1132 (Colo. 1995).

Requirements contained in this rule are applicable only for the acts, errors, and omissions of the employees of the corporation. Gutrich v. LaPlante, 942 P.2d 1266 (Colo. App. 1996), aff'd on other grounds sub nom. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

CHAPTER 23

Group Legal Services

Repealed by the

SUPREME COURT OF COLORADO

Repealed September 3, 1987;

Effective October 1, 1987.

CHAPTER 23.3

Rules Governing Contingent Fees

ANALYSIS BY RULE

CHAPTER 23.3

RULES GOVERNING CONTINGENT FEES

Rule 1. Definitions

In this rule, the term ''contingent fee agreement'' means a written agreement for legal services of an attorney or attorneys (including any associated counsel), under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement.

ANNOTATION

Court may scrutinize contingent fee contracts. Under its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof. Anderson v. Kenelly, 37 Colo. App. 217, 547 P.2d 260 (1975).

Oral agreement does not substantially comply with this rule. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

Lack of a written agreement does not preclude an attorney from recovering fees based on the theory of quantum meruit. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

Withdrawn co-counsel may pursue quantum meruit claim against former co-counsel. But no action is permitted against the client who entered into the contingency-fee agreement with the attorneys. Claim accrues when the withdrawn attorney knows or should know of the settlement or judgment that results in the payment of the attorney fees. Melat, Pressman & Higbie v. Hannon Law Firm, 2012 CO 61, 287 P.3d 842.

Reasonableness of an attorney's fee depends on various factors, no one of which is determinative. The existence of a contingent fee contract is determinative only to the extent that it sets the maximum amount permitted. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

The rules governing contingent fees do not apply to attorney fees recovered pursuant to the common fund doctrine. In a common fund case, the court takes on the role of fiduciary for the beneficiaries of the fund when awarding attorney fees; thus, the court's oversight provides protection to the beneficiaries comparable to the rules governing contingent fee agreements. Brody v. Hellman, 167 P.3d 192 (Colo. App. 2007).

Rule 2. Construction

Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule. The Colorado Rules of Professional Conduct may be considered in reviewing disputed contingent fee agreements.

Source: Amended November 5, 1992, effective January 1, 1993.

Rule 3. Prohibitions

No contingent fee agreement shall be made (a) in respect to the procuring of an acquittal upon any favorable disposition of a criminal charge, (b) in respect of the procuring of a dissolution of marriage, determination of invalidity of marriage or legal separation, (c) in connection with any case or proceeding where a contingency method of a determination of attorneys' fees is otherwise prohibited by law, the Colorado Rules of Professional Conduct, or governmental agency rule, or (d) if it is unconscionable, unreasonable, and unfair.

Source: Amended November 5, 1992, effective January 1, 1993.

Rule 4. Procedure

(a) Before a contingent fee agreement is entered into the attorney shall disclose to the prospective client in writing:

(1) The nature of other types of fee arrangements;

(2) The nature of specially awarded attorney fees;

(3) The nature of expenses and the estimated amount of expenses to handle the matter to conclusion;

(4) The potential for an award of costs and attorneys' fees to the opposing party;

(5) What is meant by "associated counsel"; and

(6) What is meant by "subrogation" and effect of any subrogation interest or lien.

(b) Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within ten days after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of six years after the completion or settlement of the case or the termination of the services, whichever event first occurs.

(c) A written disbursement statement shall issue to the client at the time of final disbursement.

Source: Entire rule amended and effective January 31, 1992.

ANNOTATION

Rules imposed upon an attorney the absolute burden to ensure that a proper contingent fee agreement is in place. This rule allows for no exception for instances in which an attorney does not comply with the requirement of the rules but simply relies on the client's representation. Fasing v. LaFond, 944 P.2d 608 (Colo. App. 1997); Hansel-Henderson v. Mullens, 39 P.3d 1200 (Colo. App. 2001), rev'd on other grounds, 65 P.3d 992 (Colo. 2002).

Rule 5. Contents

Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy and other matters with reference to which the services are to be performed; (d) a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney; (e) a statement of the precise percentage to be charged subject to the limitations of Rule 3(d); and (f) a stipulation that the client, except as permitted by the Rules of Professional Conduct, including Rule 1.8(e), is to be liable for expenses, such stipulation including an estimate of such expenses, authority of the attorney to incur the expenses and make disbursements, a maximum limitation not to be exceeded without the client's further written authority. The final disbursement statement shall reflect the amount received, expenses incurred in handling of the case and computation of the contingency fee.

Source: Entire rule amended and adopted, effective November 16, 1995.

ANNOTATION

Contract unenforceable where it is silent as to liability when either the attorney unilaterally terminates the agreement or the attorney and the client mutually terminate the agreement, thus failing to expressly include a contingency as required by the rule. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Under section (d) of this rule and rule 6, chapter 23.3 limits recovery to situations in which the contingent fee agreement specifically sets forth circumstances under which the client will be liable. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Attorney may proceed on a quantum meruit claim if outlined in the contingency fee agreement, even if the agreement contains other deficiencies and is unenforceable for purposes of the contingency. As long as the client has some notice of the possibility of equitable recovery should the contingency fail, the agree-

ment cannot prohibit the attorney from seeking such recovery. Language in a contingent fee agreement notifying the client that, upon termination, the attorney may seek recovery based on a predetermined hourly rate provides insufficient notice of the possibility of equitable relief. Dudding v. Norton Frickey & Assocs., 11 P.3d 441 (Colo. 2000).

Attorney earned reasonable attorney fees, despite unenforceable contingency agreement, under quantum meruit. An attorney is entitled to fees under quantum meruit when the agreed upon services are successfully completed but the contingent fee agreement is not in writing. Mullens v. Hansel-Henderson, 65 P.3d 992 (Colo. 2002).

Section (d) applies only to claims in quantum meruit brought against a client. Rule does not bar a claim in quantum meruit against former co-counsel. Hannon Law Firm v. Melat, Pressman & Higbie, 293 P.3d 55 (Colo. App. 2011).

Rule 6. Sanction for Non-Compliance

No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3.

Source: Entire rule amended and adopted May 24, 2001, effective July 1, 2001.

ANNOTATION

Contract unenforceable where it is silent as to liability when either the attorney unilaterally terminates the agreement or the attorney and the client mutually terminate the agreement, thus failing to expressly include a contingency as required by the rule. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Under rule 5(d) and this rule, chapter 23.3 limits recovery to situations in which the contingent fee agreement specifically sets forth circumstances under which the client will be liable. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Rule 7. Forms

The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent use of other forms consistent with this Chapter 23.3.

Source: Entire rule amended and effective January 31, 1992; Form 2 amended and effective November 16, 1995; entire rule, Form 1, and Form 2 amended and adopted and committee comment added and adopted May 24, 2001, effective July 1, 2001.

Form 1
Disclosure Statement

Type of Attorney Fee Agreements:

I have been informed and understand that there are several types of attorney fee arrangements: (1) time based, (2) fixed, (3) contingent, or (4) combinations of these types of fee arrangements. ''Time based'' means a fee that is determined by the amount of time involved such as so much per hour, day or week. ''Fixed'' means a fee that is based on an agreed amount regardless of the time or effort involved or the result obtained. ''Contingent'' means a certain agreed percentage or amount that is payable only upon attaining a recovery regardless of the time or effort involved. I understand that not all attorneys offer all of these different types of fee arrangements, and I acknowledge that I have the right to contact other attorneys to determine if they may provide such other fee arrangements for my case or matter. After such consideration or consultation, I have elected the fee arrangement set forth in the accompanying contingent fee agreement.

Specially Awarded Attorney Fees:

I have been informed and understand that the court or an arbitrator may sometimes award attorney fees in addition to amount of recovery being claimed. I understand that the fee agreement I enter into with my attorney should contain a provision as to how any specially awarded attorney fees will be accounted for and handled.

Expenses:

I have been informed and understand that there may be expenses (aside from any attorney fee) in pursuing my claim. Examples of such expenses are: fees payable to the court, the cost of serving process, fees charged by expert witnesses, fees of investigators, fees of court reporters to take and prepare transcripts of depositions, and expenses involved in preparing exhibits. I understand that an attorney is required to provide me with an estimate of such expenses before I enter into an attorney fee agreement and that my attorney fee agreement should include a provision as to how and when such expenses will be paid. I understand that the fee agreement should tell me whether a fee payable from the proceeds of the amount collected on my behalf will be based on the ''net'' or ''gross'' recovery. ''Net recovery'' means the amount remaining after expenses and deductions. ''Gross recovery'' means the total amount of the recovery before any deductions. The estimated amount of the expenses to handle my case will be set forth in the contingent fee agreement.

The Potential of Costs and Attorney's Fees Being Awarded to The Opposing Party:

I have been informed and understand that a court or arbitrator sometimes awards costs and attorney fees to the opposing party. I have been informed and understand that should that happen in my case, I will be responsible to pay such award. I understand that the fee agreement I enter into with my attorney should provide whether an award against me will be paid out of the proceeds of any amount collected on my behalf. I also understand that the agreement should provide whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the awarded costs and attorney fees to an opposing party.

Associated Counsel:

I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. That other attorney is called an ''associated counsel.'' I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled.

Subrogation:

I have been informed and understand that other persons or entities may have a subrogation right in what I recover in pursuing my claim. ''Subrogation'' means the right to be paid back. I understand that the subrogation right may arise in various ways such as when an insurer or a federal or state agency pays money to or on behalf of a claiming party like me in situations such as medicare, medicaid, worker's compensation, medical/health insurance, no-fault insurance, uninsured/underinsured motorist insurance, and property insurance situations. I understand that sometimes a hospital, physician or an attorney will assert a ''lien'' (a priority right) on a claim such as the one I am pursuing. Subrogation rights and liens need to be considered and provided for in the fee agreement I reach with my attorney. The fee agreement should tell me whether the subrogation right or lien is being paid by my attorney out of the proceeds of the recovery made on my behalf and whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the subrogation right or lien.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this _____ of _____, 20_____.

_____
(Signature)

Alternative Attorney Compensation:

I have been informed and understand that if, after entering into a fee agreement with my attorney, I terminate the employment of my attorney or my attorney justifiably withdraws, I may nevertheless be obligated to pay my attorney for the work done by my attorney on my behalf. The fee agreement should contain a provision stating how such alternative compensation, if any, will be handled.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this _____ day of _____, 20_____.

_____
(Signature)

Form 2
CONTINGENT FEE AGREEMENT
(To be Executed in Duplicate)

Dated _____, 20_____

The Client _____ retains the
(Name) (Street & No.) (City or Town)

Attorney_____
(Name) (Street & No.) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The attorney agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) The client is not to be liable to pay compensation otherwise than from amounts collected for the client by the attorney, except as follows:

In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.

(4) The client will pay the attorney (including any associated counsel) _____*_____ percent of the (gross amount collected) (net amount collected) [indicate which]. (''Gross amount collected'' means the amount collected before any subtraction of expenses and disbursements) (''Net amount collected'' means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] court-awarded costs or attorneys' fees.) [indicate which]. ''The amount collected'' (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client.

(5) Costs and attorneys' fees awarded to an opposing party against the client before completion of the case will be paid (by the client) (by the attorney) [indicate which] when ordered. Any award of costs or attorneys' fees, regardless of when awarded, (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

(6) The client is to be liable to the attorney for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. Authority is given to the attorney to incur expenses and make disbursements up to a maximum of $_____ which limitation will not be exceeded without the client's further written authority. The client will reimburse the attorney for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to Signatures:

_____
(Signature of Client)

_____ _____
Witness to Client's Signature (Signature of Attorney)

_____
Witness to Attorney's Signature

* [Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]

(7) The client (authorizes) (does not authorize) [indicate which] the attorney to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). Where the applicable law specifically requires the attorney to pay the claims of third parties out of any amount collected for the client, the attorney shall have the authority to do so notwithstanding any lack of authorization by the client, but if the amount or validity of the third party claim is disputed by the client, the attorney shall deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to Signatures:

_____
(Signature of Client)

_____ _____
Witness to Client's Signature (Signature of Attorney)

_____
Witness to Attorney's Signature

* [Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]

FINAL DISBURSEMENT STATEMENT

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____$_____

_____$_____

_____$_____

_____$_____

Total Expenses $_____

Amount of Expenses
Advanced by Attorney $_____

Amount of Expenses
paid by Client $_____

NET RECOVERY $_____

Computation of Contingent Fee:
_____ % of (Net) (Gross)
Recovery = $_____

Total Fee
(and expenses advanced
by attorney)* $_____

DISBURSEMENT TO CLIENT_____ $_____

_____
(Signature of Attorney)

_____
(Signature of Client)

By signature of client acknowledges receipt of a copy of this disbursement statement.

*(If fee is on ''Net Recovery'' and attorney has advanced expenses which are being reimbursed from the ''gross recovery.'')

COMMITTEE COMMENT

The Rules contained in this Chapter 23.3 set forth the minimum requirements of all enforceable contingency fee agreements in Colorado. The Rules do not prohibit additional terms, provided that such terms are not inconsistent with these Rules or the Colorado Rules of Professional Conduct.

One type of provision that is sometimes included in contingent fee agreements is a ''conversion clause.'' A conversion clause is a provision that converts the fee due from the contingent amount set forth in the contract to some other type of fee, often an hourly based fee, when the contract is terminated before the contingency occurs.

There are a number of factors that must be considered to determine the ethical propriety and legal enforceability of a conversion clause. These factors are set forth and analyzed in detail in Formal Opinion 100, issued by the Colorado Bar Association Ethics Committee. Opinions of the CBA Ethics Committee are available on the Internet at www.cobar.org. This Committee notes that any conversion clause that purports to remove the contingency by making the attorney's fees payable without regard to the occurrence of the contingency, is presumptively invalid, unless the client is relatively sophisticated, has the demonstrated means to pay the attorney's fee even before the occurrence of the contingency, and has specifically negotiated the conversion clause.

The Colorado Supreme Court has held that an attorney cannot recover a fee based upon quantum meruit or unjust enrichment, unless the contingent fee agreement provides notice to the client of the possibility of such a fee. *Dudding v. Norton Frickey & Associates*, 11 P.3d 441 (Colo. 2000). Section (3) of the form Contingent Fee Agreement, which is a part of Chapter 23.3, provides notice to the client of the possibility of a quantum meruit or unjust enrichment fee recovery.

CHAPTER 23.5

Rules of Procedure for Judicial Bypass of Parental Notification Requirements

ANALYSIS BY RULE

CHAPTER 23.5

RULES OF PROCEDURE FOR JUDICIAL BYPASS OF PARENTAL NOTIFICATION REQUIREMENTS

Rule 1. Applicability

This rule applies to proceedings instituted pursuant to Section 12-37.5-107 (2) (g), C.R.S. which allows for judicial bypass of the parental notification requirements set forth in the Colorado Parental Notification Act, Sections 12-37.5-101, et seq. concerning abortions to be performed on unemancipated minors.

Source: Entire chapter added and effective September 18, 2003.

Rule 2. Petition for Waiver of Parental Notification Requirements

(a) Procedure. An unemancipated minor who seeks waiver of the parental notification requirements for an abortion shall file on her own, or have filed on her behalf, a ''petition'' with any district court or Denver Juvenile Court (both hereinafter referred to as ''district court''), as provided in Rule 6 (Form 1) of these rules. These rules of procedure and forms, as well as instructions for using the judicial bypass procedure, shall be available free of charge at the offices of all clerks of the state district courts and on the Judicial Department's official website (www.courts.state.co.us). The clerk of court's office shall provide assistance to minors seeking to file a judicial bypass petition in a manner that protects the minor's right to anonymity and confidentiality in the proceedings.

(b) Expedited Proceedings. Court proceedings under this rule shall be given preference over other pending matters and shall be heard and decided as soon as practicable but in no event later than four calendar days after the petition was filed. If the court fails to act within four calendar days, the court in which the proceeding is pending shall immediately issue an order setting forth that the parental notification requirements have been dispensed with by operation of law, pursuant to Section 12-37.5-107 (2) (f), C.R.S.

(c) Setting. At the time the petition is filed, the clerk shall immediately transfer the court file to the assigned judge for setting and inform the person filing the petition of the date, time and location of the hearing. The hearing shall be set as soon as practicable but in no event later than four calendar days after the date of filing. The hearing time shall accommodate the minor's schedule as practicable and shall be set before a district court or Denver juvenile court judge, and not a magistrate.

(d) Transfer of Court File. At the time the petition is filed, the clerk shall place the petition in a sealed envelope marked ''SEALED MATERIALS - CONFIDENTIAL'' identifying the file by case number only. The envelope shall be date stamped and forwarded immediately to the assigned judge for setting of the hearing. The clerk shall inform the judge of the four-day time limitation for the case and of any request for counsel and/or a guardian ad litem at that time.

(e) Contents of Petition. The petition shall include the following:

(1) the name and age of the minor;

(2) the length of the pregnancy;

(3) information to establish that the minor is unemancipated;

(4) a statement concerning whether the minor has been informed of the risks and consequences of the abortion;

(5) a statement that the minor seeks to have an abortion without notifying her parent(s), guardian or foster parent;

(6) the name, address and telephone number of the attending physician should the minor request to have the court inform the physician directly of its decision;

(7) a statement that the minor is sufficiently mature to decide whether to have an abortion without the notification of her parent(s), guardian or foster parent, and/or that parental notification would not be in her best interest;

(8) any request for court appointed counsel and/or a guardian ad litem; and

(9) contact information for confidential notification by the court of any court proceedings and/or rulings.

(f) Grounds for Waiver. In review of the petition, the court shall enter an order dispensing with the notice requirements of Section 12-37.5-104, C.R.S. if:

(1) the court determines, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to have an abortion; or

(2) the court determines, by a preponderance of the evidence, that the giving of parental notice would not be in the best interest of the minor.

(g) Orders. Any order allowing for or denying a waiver of the parental notification requirements, either on the record or in writing, shall include specific factual and legal conclusions in support of the decision. The order shall issue within four calendar days of the filing of the petition. If the court fails to act within four days, an order shall immediately be issued by the court setting forth that the parental notification requirements have been dispensed with by operation of law. A certified copy of any order issued shall be provided to the minor by the method requested in the petition, the minor's attorney, if represented, and the guardian ad litem, if one has been appointed. A certified copy of the order also shall be provided to the attending physician of the minor, as set forth in the petition. If the court denies the petition, the minor and/or her attorney, if she is represented, shall be notified of the right to appeal and provided with a copy of the notice of appeal form (Form 3) contained in Rule 6 of these rules.

(h) Appointment of Counsel and/or Guardian Ad Litem. The court may appoint counsel for the minor, if she is not represented. In addition, the court may appoint a guardian ad litem for the minor. Any appointed attorney or guardian ad litem shall be retained at no cost to the minor, shall act within the time frames provided in these rules and shall maintain the confidentiality of the court record and proceedings.

Source: Entire chapter added and effective September 18, 2003.

Rule 3. Appeal to the Court of Appeals

(a) Procedure. An appeal of an order denying a petition filed under these rules may be made to the Colorado Court of Appeals by the minor, or someone acting on her behalf, by promptly filing a ''notice of appeal,'' as provided in Rule 6 (Form 3) of these rules. A copy of the district court order shall be attached to the notice of appeal. An advisory copy of the notice of appeal shall be filed with the district court. The appeal shall be decided on the record. A petitioner brief may be filed but is not required. Oral argument may be held at the discretion of the court.

(b) Setting. Upon receipt of the notice of appeal, the clerk of the Court of Appeals shall immediately request a transcript or any analog or digital recording of the district court proceedings. The clerk of the district court shall arrange for preparation of the transcript directly with the reporter if the proceeding was stenographically recorded. The clerk of the district court shall certify the contents and forward the entire district court file, including any prepared transcript or recording, in its sealed envelope to the clerk of the Court of Appeals via overnight or hand delivery forthwith, to be received in no event later than 48 hours after the notice of appeal was filed.

(c) Decision. A decision shall issue no later than five calendar days after the notice of appeal was filed. If no decision is rendered within five days, the court shall immediately issue an order setting forth that the parental notification requirements have been dispensed with by operation of law, pursuant to Section 12-37.5-107 (2) (f), C.R.S. A certified copy of any order issued shall be provided to the minor by the method requested in the petition,

the minor's attorney, if represented, and the guardian ad litem, if one has been appointed. A certified copy of the order also shall be provided to the attending physician of the minor, as set forth in the petition.

Source: Entire chapter added and effective September 18, 2003.

Rule 4. No Fees or Costs

No court fees or costs of any kind, including transcript fees, shall be assessed against the minor in connection with the filing of the petition or an appeal pursuant to these rules.

Source: Entire chapter added and effective September 18, 2003.

Rule 5. Confidentiality of Court Record and Proceedings

(a) Court proceedings. All district court and appellate court proceedings shall be closed to the public. All hearings shall be held in a location where there is privacy and limited access.

(b) Court record. The entire district court and appellate court record relating to the petition, excluding any published decisions but including, without limitation, the petition, pleadings, submissions, transcripts, court reporter notes and tapes, tape recordings, exhibits, orders, evidence, findings, conclusions, and any other material to be maintained, shall be stored in a closed file contained in a sealed envelope and conspicuously marked ''SEALED MATERIALS - CONFIDENTIAL.'' The envelope shall be identified within the clerk's office only through reference to the case number. Access to the court file shall be limited to essential court personnel, the minor, the minor's attorney, any appointed guardian ad litem, and/or the court for use only in connection with court proceedings conducted under these rules. The court record shall not be open to public inspection or public disclosure, unless otherwise ordered by the court.

Source: Entire chapter added and effective September 18, 2003.

Rule 6. Forms

The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent the use of other forms which substantively comply with the requirements of these rules of procedure.

Source: Entire chapter and Forms 1, 2, and 3 added and effective September 18, 2003.

❑ District Court ❑ Denver Juvenile Court _____County, Colorado Court Address: IN THE MATTER OF THE PETITION OF: _____ [Name of Minor] **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ COURT USE ONLY ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR WAIVER OF PARENTAL NOTIFICATION REQUIREMENTS OF §12-37.5-104, C.R.S.	

The Petitioner, a minor, states:

1. I am ___ years old.
2. I am approximately ____ weeks pregnant and desire to terminate the pregnancy by abortion.
3. I want to have the abortion without telling my parent(s), guardian or foster parent.
4. I am ❑ am not ❑ married.
5. I do ❑ do not ❑ financially support myself.
6. I live with my:
   - ❑ parent(s)
   - ❑ guardian
   - ❑ foster parent(s)
   - ❑ relative: _____ (state relationship)
   - ❑ other: _____(state relationship)
7. I have ❑ have not ❑ been informed about the risks and consequences of having the abortion.
8. (Check one or both):
   - ❑ I believe I am mature enough to decide on my own to have an abortion without telling my parent(s), guardian or foster parent.
   - ❑ It would not be in my best interest to tell my parent(s), guardian or foster parent of the abortion.
9. The name, business address and telephone number of the clinic or doctor who would perform the abortion are (this information is optional if you want to have the court's decision sent directly to the clinic or doctor):

   _____

   _____.
10. ❑ I ask the Court to appoint a lawyer to represent me at no cost to me.

- ☐ I have a lawyer and ask the Court to appoint that person to continue to represent me. My lawyer's name, business address, telephone and fax numbers are: _____

  _____

- ☐ I do not want to be represented by a lawyer.

11. I understand that the court proceedings and my court file are confidential and cannot be disclosed to anyone, including my parent(s), guardian or foster parent.

12. The Court can let me know of any Court proceedings or decisions in the following way:

- ☐ Via Fax: #_____; Attn:_____
- ☐ Via Telephone: #_____; Attn:_____
- ☐ Via E-mail: _____
- ☐ Via Beeper or Pager #_____
- ☐ Via First Class Mail: _____

  _____

- ☐ Via My Attorney

13. I ask that the Court provide me with a certified copy of the court's order in the following way (check one):

- ☐ Via First Class Mail: _____

  _____

- ☐ Via My Attorney
- ☐ Via the Court File for pickup by me or _____ who has my permission to pick up the certified copy on my behalf from the court file at the courthouse

14. The best days and times for me to come to court are:

_____

_____

WHEREFORE, I request to the Court enter an order allowing me to have the abortion without telling my parent(s), guardian or foster parent.

Respectfully submitted this ____ day of _____, 20___.

_____
Signature of Minor

_____
Signature of Attorney, if Petitioner is represented

❑ District Court ❑ Denver Juvenile Court _____ County, Colorado Court Address: **IN THE MATTER OF THE PETITION OF:** _____ [Name of Minor] **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ **COURT USE ONLY** ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
SETTING NOTICE	

The hearing in the above-captioned matter has been set as follows:

Judge _____ of Division ____ will hold a hearing on the Petition at _____ a.m./p.m. on _____. The hearing will be held at: _____ _____.

If you need to change the date or time of your hearing, you or your lawyer must contact the court at _____ to reschedule the hearing.

A copy of this Setting Notice shall be placed by the clerk in the court file.

LAWYER ASSIGNMENT
(To be filled out by the Judge)

The name, address, and telephone of the court-appointed lawyer assigned to represent the minor is:

_____
_____.

The judge will notify the lawyer of his/her appointment and the date of the hearing.

Colorado Court of Appeals 2 East Fourteenth Avenue, Suite 300 Denver, Colorado 80203-2115 _____ District Court, Judge _____, Case # _____ **IN THE MATTER OF THE PETITION OF:** _____ **[Name of Minor]** **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ **COURT USE ONLY** ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF APPEAL	

The Petitioner, a minor, states:

1. The district court has denied my petition to have an abortion without telling my parent(s), guardian or foster parent.
2. I ask that I be given permission by this court to have the abortion without telling my parent(s), guardian or foster parent on the grounds stated in the Petition filed with the district court on _____, 20__.
3. I believe the district court was wrong in its decision because:_____
   _____
   _____
   _____
   _____.
4. A copy of the district court's decision is attached to this Notice of Appeal.
5. ❑ I ask the court to appoint a lawyer to represent me at no cost to me.
   ❑ I have a lawyer and ask the court to appoint that person to continue to represent me. My lawyer's name, business address, telephone and fax numbers are: _____
   _____
   ❑ I do not want to be represented by a lawyer.
6. I understand that the court proceedings and my court file are confidential and cannot be disclosed to anyone, including my parent(s), guardian or foster parent.
7. I request that the court contact me about its decision in the following way (check one):
   ❑ Via Fax: #_____; Attn:_____
   ❑ Via Telephone: #_____; Attn:_____
   ❑ Via E-mail: _____
   ❑ Via Beeper or Pager #_____
   ❑ Via First Class Mail: _____
   _____

❑ Via My Attorney

8. I request that the Court provide me with a certified copy of the court's order in the following way (check one):

❑ Via First Class Mail: _____

_____

❑ Via My Attorney

❑ Via the Court File for pickup by me or _____ who has my permission to pick up the certified copy from the court file at the courthouse

9. The name, business address, and telephone number of the clinic or doctor who would perform the abortion are (this information is not necessary but optional if you want to have the court's decision sent directly to the clinic or doctor): _____

_____.

WHEREFORE, I request that this court reverse the district court and allow me to have the abortion without telling my parents.

Respectfully submitted this ____ day of _____, 20__.

_____

Signature of the Minor

_____

Signature of Attorney, if minor is represented

CHAPTER 24

The Colorado Rules of Judicial Discipline

Repealed and Reenacted by the

SUPREME COURT OF COLORADO

March 22, 2012,

Effective Immediately

ANALYSIS BY RULE

PART D. DISPOSITIONS AND SANCTIONS

PART E. SUPREME COURT ACTION

CHAPTER 24

COLORADO RULES OF JUDICIAL DISCIPLINE

PART A. GENERAL PROVISIONS

Rule 1. Scope, Objectives and Title

(a) **Scope.** The Colorado Rules of Judicial Discipline (the ''Rules'') apply to all of the responsibilities and proceedings of the Colorado Commission on Judicial Discipline (the ''Commission''), pursuant to Article VI, Section 23(3) of the Colorado Constitution (the ''Constitution''), involving the removal, retirement, suspension, censure, reprimand, or other discipline of judges, and disabilities affecting the performance of their judicial duties.

(b) **Constitutional Mandate.** The Constitutional mandate of the Commission is to protect the public from improper conduct of judges; preserve the integrity of the judicial process; maintain public confidence in the judiciary; create a greater awareness of proper judicial behavior on the part of the judiciary and the public; and provide for the fair and expeditious disposition of complaints of judicial misconduct or judicial disabilities.

(c) **Title.** These Rules shall be known and cited as the Colorado Rules of Judicial Discipline or Colo. RJD.

ANNOTATION

Law reviews. For article, ''The New Commission on Judicial Discipline'', see 38 Colo. Law. 85 (Nov. 2009).

Rule 2. Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) The term **''Judge''** means any justice or judge of any court of record of this state serving on a full time, part-time, senior, or retired basis against whom a complaint has been filed or initiated or who has been convicted of a felony or an offense involving moral turpitude. This definition does not include judges of the county court of the City and County of Denver, whose conduct is monitored and disciplined by the Denver County Court Judicial Discipline Commission; municipal judges; magistrates; or administrative law judges. The conduct of an attorney serving as a municipal judge, magistrate, or administrative law judge is subject to the disciplinary and disability jurisdiction of Attorney Regulation under Colo. RPC 251.1(b).

(b) **''Attorney Regulation''** means the Office of Attorney Regulation Counsel.

(c) **''Chair''** means a member elected by the Commission to administer the business of the Commission and preside at all meetings of the Commission, any member appointed to preside at a hearing, or any person designated as ''acting chair.''

(d) **''Code,'' ''Canons,'' or ''Canon Rules''** mean the provisions of the Colorado Code of Judicial Conduct as amended.

(e) **''Colo. RPC''** means the Colorado Rules of Professional Conduct.

(f) **''Complaint''** means allegations that provide grounds for the Commission to conduct disability or disciplinary proceedings.

(g) **''Complainant''** means a person who initiates a complaint by requesting an evaluation of judicial conduct.

(h) **''C.R.C.P.''** means the Colorado Rules of Civil Procedure.

(i) **''Disability''** means a Judge's physical or mental condition that adversely affects the Judge's ability to serve as a judicial officer or to assist with his or her defense in disciplinary proceedings.

(j) **"Executive director"** means the person appointed by the Commission whose duties and responsibilities are described in Rule 3(d).

(k) **"Formal proceedings"** means disciplinary proceedings that could result in a recommendation for a public sanction.

(l) **"Grounds"** means the basis for disciplinary proceedings in Rule 5 or for disability proceedings in Rule 33.5.

(m) **"Hearing"** means a meeting of the Commission or special masters convened for the purpose of taking evidence or considering legal arguments.

(n) **"Informal proceedings"** means proceedings that could result in informal remedial action or the appointment of special counsel to advise the Commission regarding other options, including advice on whether there is probable cause to commence formal proceedings.

(o) **"Mail"** or **"mailed"** means first-class mail, personal delivery, or delivery by commercial mail service.

(p) **"Meeting"** means an assembly of the Commission or special masters in person or by conference call or any combination thereof.

(q) **"Member"** means a member or special member of the Commission.

(r) **"Misconduct"** means conduct by a Judge that does not comply with the Code or Colo. RJD.

(s) **"Notice"** means a letter or other writing sent by mail, unless otherwise specified in the Rules, to a Judge at the Judge's chambers or last known residence, to an address designated by the Judge, or to the Judge's counsel of record.

(t) **"Participant"** means a member, special member, the executive director, Commission staff, complainant, Judge, the Judge's counsel, special counsel, special master, witness, investigator, or any other person who obtains knowledge of a proceeding in the course of an investigation or prosecution by the Commission.

(u) **"Party"** means the Commission, special counsel, the Judge, or the Judge's counsel.

(v) **"Presenter"** means one or more members who are designated by the Commission or by the executive director to evaluate and report on a complaint to the Commission.

(w) **"Proceedings"** means informal or formal proceedings, including, but not limited to, consideration of a request for evaluation of judicial conduct; the investigation of a complaint; a meeting or hearing of or with the Commission, its staff, special counsel, or special masters; a disciplinary disposition; a disciplinary sanction; a disability disposition; or a communication with respect thereto.

(x) **"SCAO"** means the Office of the State Court Administrator.

(y) **"Request for evaluation of judicial conduct"** or **"request"** means a request by a complainant for the Commission to consider whether there is a reasonable basis for the commencement of disciplinary or disability proceedings.

(z) **"Rules"** as cited herein means Colo. RJD.

(aa) **"Special counsel"** means an attorney or attorneys appointed by the Commission to serve as counsel to the Commission on such matters as the Commission may request including, but not limited to, the investigation or disposition of a complaint, a motion for temporary suspension of a Judge under Rule 34, and the prosecution of a complaint in formal proceedings.

(bb) **"Special master"** means a person appointed by the Supreme Court to preside over hearings.

(cc) **"Special members"** are persons appointed by the Commission to serve as alternates to members.

(dd) **"Supreme Court" or "Court"** means the Colorado Supreme Court.

Source: Entire rule amended except (b) and (e) to (m) and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 3. Organization and Administration

(a) **Composition.** The Commission shall be made up of ten members as provided in the Constitution.

(b) **Officers.** The Commission shall elect from its membership a chair, a vice-chair, and a secretary, each of whom shall serve renewable one-year terms from January 1 to December 31 each year. The vice-chair shall act as chair in the absence of the chair, and in the absence of both, the members present may select an acting chair. An officer's position and authority shall continue beyond his or her term of office until a successor is duly elected.

(c) **Special Members.** The Commission may appoint a special member to serve in the place of a member who recuses or is disqualified with respect to a complaint, or who may be temporarily unable to perform his or her duties as a member.

(d) **Executive Director.** The Commission shall appoint an executive director whose duties and responsibilities, subject to general oversight by the Commission, shall be to:

(1) Establish and maintain a permanent office;

(2) Respond to inquiries about the Commission or the Canons;

(3) Process requests for evaluation of judicial conduct;

(4) Conduct investigations;

(5) Recommend dispositions;

(6) Maintain Commission records;

(7) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(8) Prepare the Commission's budget and administer its funds;

(9) Employ the Commission's staff;

(10) Prepare an annual report of the Commission's activities for presentation to the Commission, to the Supreme Court, and to the public;

(11) Employ special counsel, investigators, or other experts as necessary to investigate and process matters before the Commission and before the Supreme Court; and

(12) Perform such other duties as these Rules, the Commission, or the Supreme Court may require.

(e) **Meetings.** Meetings shall be held at the call of the chair, the vice-chair, or the executive director, or at the request of three members of the Commission. The Commission may conduct meetings in person or by conference call.

(f) **Quorum.** Six members must be present in person or by conference call for the transaction of business by the Commission.

Source: (b) and (d) amended and effective December 10, 2014; (d)IP, (d)(2), and (d)(3) amended April 20, 2017, effective July 1, 2017.

Rule 4. Jurisdiction and Powers

(a) **Jurisdiction.**

(1) **Filing Date.** The Commission has jurisdiction over a Judge regarding allegations of misconduct or a disability and the application of dispositions and sanctions thereto, based on events that occurred while the Judge was an active or senior judge, if a request for evaluation of judicial conduct is received by the Commission (or a complaint is commenced on the Commission's motion) (A) during the Judge's term of office or within one year following the end of the judge's term of office or the effective date of the Judge's retirement or resignation, with respect to alleged misconduct or disability occurring during the Judge's term of office; or (B) during the Judge's service in the senior judge program or within one year following the end of the Judge's service in the senior judge program, with respect to alleged misconduct or disability occurring during the Judge's service in the senior judge program.

(2) **Continuing Jurisdiction.** The jurisdiction of the Commission to fulfill its Constitutional mandate under of Rule 1(b) regarding a pending disciplinary or disability proceeding shall not terminate upon the expiration of the Judge's term of office, the Judge's retirement or resignation, or the appointment or reappointment of the Judge to the senior judge program. Such jurisdiction shall continue until a disposition or sanction is determined.

(b) **Attorney Regulation.** Conduct by a Judge or former Judge that involves grounds for disciplinary action under Rule 5 and/or may involve grounds for a violation of Colo.

RPC may be referred by the Commission to Attorney Regulation. Such referral shall not preclude the Commission from proceedings concerning conduct under its jurisdiction coincident with Attorney Regulation's jurisdiction over violations of Colo. RPC. Nothing in these Rules shall be construed to limit the jurisdiction of Attorney Regulation over an attorney with respect to conduct subject to Colo. RPC, which occurred before, during, or after the attorney's service as a judge.

(c) **General Powers.** The Commission shall have the authority and duty to investigate and resolve complaints in accordance with the Constitution and these Rules.

(d) **Evidentiary Powers.** Any member or special master may administer oaths and affirmations, compel by subpoena the attendance and testimony of witnesses, including the Judge as a witness, and provide for the inspection of documents, books, accounts, and other records.

(e) **Contempt Powers.** A Judge's refusal to comply with a disposition ordered under Colo. RJD 35 or the willful misconduct of a Judge or any other person during any stage of the Commission's investigation or consideration of a complaint in informal, formal, or disability proceedings, including, but not limited to, misrepresentation of a material fact, resistance to or obstruction of any lawful process, disruptive behavior, breach of confidentiality, or failure to comply with any of these Rules, may be grounds for direct or indirect contempt, as provided in C.R.C.P. 107. In formal proceedings or disability proceedings, direct contempt may be addressed summarily by the special masters. To address allegations of indirect contempt, the Commission shall request the Supreme Court to appoint a special master. The Commission shall be represented in contempt proceedings by special counsel who shall file a motion with the special master, verified by the executive director or a member of the Commission, alleging the grounds for contempt. The special master may ex parte order a citation to issue to the person charged to appear and show cause at a designated date, time, and place why the person should not be held in contempt. The motion and citation shall be served on the person charged at least seven days before the time required for the person to appear before the special master. The special master shall conduct a hearing and file recommended findings of fact and conclusions of law regarding the alleged contempt with the Supreme Court. The Supreme Court shall consider the special master's recommendations and dismiss the citation or order remedial or punitive sanctions as it deems appropriate under C.R.C.P. 107.

(f) **Administrative Powers.** The Commission may adopt administrative policies, procedural rules, or forms for its internal operation or proceedings that do not conflict with the provisions of these Rules.

(g) **Communications.** The Commission may distribute information to the judiciary and the public concerning its authority and procedures.

Source: (a) amended and effective December 10, 2014; (a)(1) and (e) amended April 20, 2017, effective July 1, 2017.

Rule 5. Grounds for Discipline

(a) **In General.** Grounds for judicial discipline shall include:

(1) Willful misconduct in office, including misconduct which, although not related to judicial duties, brings the judicial office into disrepute or is prejudicial to the administration of justice;

(2) Willful or persistent failure to perform judicial duties, including incompetent performance of judicial duties;

(3) Intemperance, including extreme or immoderate personal conduct; recurring loss of temper or control; abuse of alcohol, prescription drugs, or other legal substances; or the use of illegal or non-prescribed narcotic or mind-altering drugs; or

(4) Any conduct that constitutes a violation of the Code.

(b) **Failure to Cooperate During Proceedings.** A Judge's failure to cooperate with the Commission during the investigation or consideration of a complaint may be grounds for discipline.

(c) **Failure to Comply with a Commission Order.** A Judge's failure or refusal to comply with an order issued under these Rules during disciplinary proceedings or with a

disciplinary order resulting from such proceedings may be (i) grounds for initial or supplemental disciplinary measures or (ii) probable cause to proceed with formal proceedings.

(d) **Contempt Proceedings not Precluded.** Determinations by the Commission under sections (b) and (c) of this Rule are in addition to and do not preclude contempt proceedings under Rule 4(e).

(e) **Misconduct Distinguished from Disputed Rulings.** A dispute regarding a Judge's rulings on motions, evidence, procedure, or sentencing; a Judge's findings of fact and conclusions of law; or other matters that are within the jurisdiction of the trial or appellate courts to resolve shall not provide a basis for disciplinary proceedings, unless the Judge's conduct in presiding over the case involves one or more of the grounds provided in this Rule.

Source: (c), (d), and (e) amended April 20, 2017, effective July 1, 2017.

ANNOTATION

Delay by district court judge in issuing a decision constituted a willful or persistent failure to perform judicial duty in violation of paragraph (a)(2). In re Jones, 728 P.2d 311 (Colo. 1986).

Rule 6. [Reserved]

[Confidentiality and Privilege revised and restated in 2012 as Rule 6.5.]

Rule 6.5. Confidentiality and Privilege

(a) **Confidentiality.** The proceedings of the Commission and special masters, including all papers, investigative notes and reports, pleadings, and other written or electronic records, shall be confidential unless and until the Commission files a recommendation with the Supreme Court under Rule 37. The recommendation and the record of proceedings shall thereupon become public, subject to the limitations provided in Rule 37. The Supreme Court may enter a protective order requiring that certain portions of the record remain confidential upon a showing of good cause by the Commission, special counsel, special masters, or the Judge.

(b) **Privilege.** Papers or pleadings filed with the Commission, the work product of investigations, testimony given in proceedings, minutes and decisions of the Commission, records of special counsel, hearings conducted by the special masters, and the report of the special masters are privileged and, therefore, cannot be the subject of any legal action against a participant, including a claim for defamation.

(c) **Disability Proceedings.** In disability proceedings, all orders transferring a Judge to or from disability inactive status shall be matters of public record; otherwise, disability proceedings shall remain confidential and shall not be made public, except by order of the Supreme Court.

(d) **Disclosures.** Subject to certification, when required by subsection (e)(2) of this Rule, confidentiality does not apply to (i) the disclosure of the records and proceedings reasonably necessary for the Commission or the executive director to fulfill the Commission's Constitutional mandate under Rule 1(b) or (ii) disclosures in the interest of justice or public safety, including the following:

(1) Disclosure of the allegations in a complaint and related materials reasonably necessary to conduct the investigation of the complaint;

(2) When the Commission has determined that there is a demonstrated need to notify another person in order to protect that person; or to notify an appropriate government agency, including law enforcement or Attorney Regulation, in order to protect the public or the judiciary or to further the administration of justice;

(3) In response to an inquiry by the Supreme Court or SCAO concerning the qualifications of a Judge for appointment or reappointment to other judicial responsibilities (including the senior judge program), by an agency or official authorized to evaluate the

qualifications of a Judge who has applied for or has been nominated for another judicial position, or by the Governor with respect to the qualifications of a Judge recommended by a nominating commission for appointment to another judicial position, the Commission shall disclose disciplinary dispositions under Rule 35 (other than complaints resulting in dismissals) and sanctions under Rule 36, together with the status of any pending complaints directed at the Judge which the Commission, as of the date of such request, is investigating under Rule 14;

(4) In response to an inquiry by the Office of Judicial Performance Evaluation (''Judicial Performance'') if the Commission determines, in its discretion, that disclosure to Judicial Performance is consistent with its Constitutional mandate under Rule 1(b) and on the condition that Judicial Performance will not publicly disclose such information or its source without independent verification by Judicial Performance;

(5) When a Judge has been convicted of a crime or has become subject to disciplinary measures taken by Attorney Regulation or a similar agency in another jurisdiction;

(6) Upon request of an agency authorized to investigate the qualifications of persons for admission to practice law;

(7) Upon request of any attorney discipline enforcement agency;

(8) Upon request of any law enforcement agency;

(9) Upon a Judge's written waiver of confidentiality and consent to disclosure; or

(10) When the Commission or the executive director has knowledge of potential grounds for misconduct under state or federal law, a chief justice directive, or other rule applicable to the conduct of an employee of the state judicial branch (other than a Judge) and provides such information to SCAO.

(e) **When Certification Required.**

(1) The Commission is permitted to disclose nonpublic information pursuant to subsections (d)(1) through (d)(5) of this Rule without prior notice to, or waiver and consent by, the Judge.

(2) The Commission is permitted to provide nonpublic information requested pursuant to subsections (d)(6) through (d)(8) of this Rule without prior notice to, or waiver and consent by, the Judge, only if a senior official of the requesting agency provides a verified certificate to the Commission on the agency's letterhead in support of its request, which addresses:

(i) Whether there is an ongoing investigation of (A) alleged misconduct by the Judge, (B) an alleged violation of federal or state law, or (C) the Judge's qualifications to practice law;

(ii) The reasons the information is essential to that investigation;

(iii) Whether the agency has attempted to obtain the Judge's waiver of confidentiality and consent to disclosure or why a request for waiver and consent would be inappropriate or impractical;

(iv) Why disclosure of the existence of the investigation to the Judge would significantly prejudice the investigation; and

(v) Other factors relevant to the request.

(3) If an agency authorized to request disclosure by subsections (d)(6) through (d)(8) of this Rule has not obtained a waiver and consent from the Judge or provided the certification required in subsection (e)(2), then the Commission may decline the request or may notify the Judge in writing of the request which identifies the requesting agency and describes the information proposed to be released. The notice shall advise the Judge that the Commission will release the information, unless the Judge objects to the disclosure within fourteen days after mailing of the notice. If the Judge objects to the disclosure, then the information shall remain confidential unless, upon motion by the requesting agency or the Commission with notice to the Judge, the Supreme Court enters an order requiring release.

(f) **Prior Discipline.** In investigating a complaint, determining a disposition under Rule 35, or in recommending a sanction under Rule 36, the Commission and special masters may consider the record of any discipline previously imposed on the Judge by the Commission or the Supreme Court.

(g) **Public Knowledge.** The Commission or the Judge, by motion filed with the Supreme Court, may assert that allegations of misconduct, the commencement of informal or formal proceedings, and/or the disposition of such proceedings have become generally known to the public and, in the interest of justice, should be publicly disclosed. The Judge or the Commission shall have 14 days to object to or request modifications to the proposed disclosure. The Supreme Court, in its discretion, may deny such motion or order the disclosure as proposed or with such modifications as it deems necessary. Notwithstanding the disclosure of the nature, status, and result of the proceedings, the Commission's records, including but not limited to investigative reports, correspondence, and pleadings, shall remain confidential unless and until the Commission files a recommendation for sanctions in formal proceedings to the Supreme Court under Rule 37(c) or the Commission and the Judge stipulate to the resolution of formal proceedings under Rule 37(e).

(h) **Summaries.** In the annual report required by Rule 3(d)(10), the Commission may publish summaries of proceedings which have resulted in disciplinary dispositions or sanctions. A summary may include a brief statement of facts, references to the applicable Canons or Canon Rules, and a description of the disciplinary action taken, but shall not disclose the date or location of the factual basis for the disciplinary measures or the identity of the Judge, the complainant, witnesses, or other parties to the proceedings.

(i) **Duty of Officials and Employees.** All officials and employees within the Commission, the executive director's office, special counsel's office, special masters' offices, and the Supreme Court shall conduct themselves in a manner that maintains the confidentiality mandated by these Rules.

Source: (a), (e)(2), (f), (g), and (i) amended and effective December 10, 2014; (a), (d)IP, (d)(3), (d)(4), (d)(5), (d)(10), (f), (g), (h), (i), and (j) amended April 20, 2017, effective July 1, 2017.

Editor's note: Section (f) was added and sections (g) and (h) were deleted, resulting in the relettering of sections (g) to (i).

Rule 7. Notice of Action

Upon termination of any proceedings hereunder, the Judge, the Judge's counsel, special counsel, and the complainant shall be notified of the action taken by the Commission or the Supreme Court and all participants shall be advised of the confidentiality of Commission proceedings.

Rule 8. Service

(a) **Service on Judge.** All papers and pleadings in proceedings may be served on a Judge in person or by mail, except that a notice of formal charges served by mail must be served by certified mail. Mail shall be sent to the chambers or last known residence of a Judge, or to an address designated by the Judge. If counsel has been designated for a Judge, all notices, papers, and pleadings may be served on the Judge's counsel in lieu of service upon the Judge.

(b) **Service on Commission.** Service of papers and pleadings on the Commission or any member shall be by delivering or mailing the papers to the Commission's office.

(c) **Service on Special Counsel.** Service of papers and pleadings on special counsel shall be by delivery or mail to special counsel's office.

(d) **When Service Accomplished.** When service is by mail, a pleading or other document is timely served if mailed within the time permitted for service.

Source: (c) amended April 20, 2017, effective July 1, 2017.

Rule 8.5. Procedural Rights of Judge

(a) **Counsel.** A Judge may confer with and be represented by counsel at any stage of disciplinary or disability proceedings. If counsel has entered an appearance, all communications and pleadings from the Commission, the executive director, and special counsel

shall be directed to the Judge's counsel. In formal proceedings and disability proceedings, a Judge may testify, introduce evidence, and examine and cross-examine witnesses, and the Judge's counsel may introduce evidence and examine and cross-examine witnesses.

(b) **Guardian ad litem.** If it appears to the Commission at any time that a Judge may not be competent to act, the Commission shall appoint a guardian ad litem for the Judge at the Commission's expense. The guardian ad litem may claim and exercise any right or privilege that could be claimed or exercised by the Judge, including the selection of counsel, a request for an independent medical examination, or the commencement of disability proceedings under Rule 33.5. Any notice to be served on the Judge shall also be served on the guardian ad litem.

Source: (a) amended April 20, 2017, effective July 1, 2017.

Rule 9. Disqualification of an Interested Party

A Judge who is a member shall be disqualified from participation in any proceedings involving the Judge's own discipline or disability. A justice of the Supreme Court shall be disqualified from participating in formal proceedings concerning the justice's own discipline or disability. A member or the executive director may recuse himself or herself in any proceeding involving a Judge who is a close personal acquaintance, their current or recent professional or business associate, or where there are other actual or potential conflicts of interest.

Rule 10. Immunity

Members, the executive director, Commission staff, its investigators, special counsel, and special masters shall be absolutely immune from suit for all conduct in the course of their official duties.

Rule 11. Amendment of Rules

The Commission may petition the Supreme Court to amend or alter these Rules as may be necessary to implement the Commission's Constitutional mandate. Any person may request the adoption, amendment, or repeal of a Rule by filing a petition with the Commission describing the proposed change.

PART B. INFORMAL PROCEEDINGS

Rule 12. Request for Evaluation of Judicial Conduct

To initiate a complaint, any person or organization may request that the Commission examine a Judge's conduct. The request should identify the Judge, the person or organization making the request, and describe conduct by the Judge that may involve grounds for disciplinary or disability proceedings. A request may be in any format; however, the Commission shall prepare and distribute printed forms to guide a complainant in making a request for evaluation of judicial conduct. Commission staff will make reasonable accommodations for a person with disabilities in preparing and filing a request.

Source: Entire rule amended and adopted April 20, 2017, effective July 1, 2017.

Rule 13. Preliminary Proceedings

(a) **Evaluation of the Request.** The executive director or one or more members of the Commission, upon receipt and without undue delay, shall evaluate each request to determine whether it alleges sufficient grounds for the Commission to consider disciplinary or disability proceedings. The evaluation may include a preliminary review of documentation, including court records.

(b) **Complaint.** If the members of the Commission, based on an evaluation of the request, conclude that there is a reasonable basis for disciplinary or disability proceedings, the Commission shall process the request as a complaint under these Rules.

(c) **Absence of a Reasonable Basis for a Complaint.** The executive director or members of the Commission shall close the matter without further consideration, if:

(1) The request does not allege sufficient grounds for disciplinary or disability proceedings;

(2) The request disputes a Judge's rulings on motions, evidence, procedure, or sentencing; a Judge's findings of fact and conclusions of law; or other matters that are within the jurisdiction of the trial or appellate courts to resolve, without providing grounds for disciplinary or disability proceedings;

(3) The allegations are frivolous; or

(4) The allegations involve subject matter that is not within the jurisdiction of the Commission.

(d) **Reply to the Request.** The executive director or a member of the Commission shall provide a written explanation to the complainant of the results of its evaluation.

(e) **Reports from Other Offices.** In its evaluation and any subsequent proceedings, the Commission may consider relevant information contained in (1) a report of an investigation by SCAO regarding the conduct of a Judge and/or other employees of the judicial branch or (2) a report by Attorney Regulation regarding (i) the misconduct of an attorney who has been appointed as a Judge or (ii) attorney misconduct that involves a Judge.

(f) **Complaints Initiated by the Commission.** The Commission on its own motion, based on information it deems reliable, may determine that there is a reasonable basis on which to initiate a complaint. The Commission shall process such a complaint in the same manner as other complaints.

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 14. Investigation and Notice to Judge

(a) **Notice to Judge.** As soon as practicable, after the members of the Commission have concluded that the allegations are sufficient to be processed as a complaint, the Commission shall provide written notice to the Judge of the allegations and commence an investigation. A copy of the Rules shall be included with the notice or incorporated by reference into the notice. The Commission is not required to notify a Judge of a request for evaluation that the Commission determined to be insufficient for consideration as a complaint.

(b) **Investigation.** The Commission's investigation may include interviews; an examination of pleadings, orders, transcripts, and other court records; and consideration of other evidence relevant to the allegations. The Commission or the executive director, in its, his, or her discretion, may determine when the complainant should be notified of the investigation.

(c) **Expedited Notice and Investigation.** If the request alleges an unreasonable delay in performing judicial duties or other circumstances which, in the good faith judgment of the executive director, require immediate commencement of disciplinary or disability proceedings, the executive director may process the request as a complaint, notify the Judge, and begin the investigation without the prior approval of the members of the Commission.

(d) **Judge's Response.** The Judge shall be afforded a reasonable opportunity to provide a written response to the allegations or to appear before the Commission.

(e) **Temporary Suspension.** The Commission may request the temporary suspension of a Judge under Rule 34 during an investigation.

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 15. Independent Medical Examination

If the preliminary evaluation or the investigation indicates that a Judge may have a physical or mental condition which significantly impairs his or her performance of judicial

duties, the Commission may order the Judge to submit to one or more independent examinations by physicians or other persons with appropriate professional qualifications, who shall report their findings and recommendations to the Commission.

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 16. Determination

(a) **Summary.** The executive director or the Commission shall appoint a member to serve as the presenter who shall provide a summary of an investigation, including the allegations, the Judge's response, and other relevant evidence, to the other members.

(b) **Decision.** The Commission shall consider the summary of the investigation and by majority vote of the members participating in person and by conference call, exclusive of the presenter, dismiss the complaint under Rule 35(a) or take one of, or a combination of any of, the following measures:

(1) Apply a private disciplinary disposition under subsections (c) through (i) of Rule 33.5;

(2) Initiate disability proceedings under Rule 33.5;

(3) Request a temporary suspension of the Judge under Rule 34; or

(4) Appoint special counsel to review the summary, conduct such further investigation as may be appropriate, and advise the Commission regarding its options to address the allegations; and, upon consideration of special counsel's advice, dismiss the complaint, adopt a private disciplinary disposition, initiate disability proceedings, request a temporary suspension of the Judge pending further proceedings, determine that probable cause exists for the commencement of formal proceedings, or continue the investigation.

(c) **Standard of Proof.** The standard of proof for a decision under section (b) of this Rule shall be the preponderance of the evidence.

Source: Entire rule amended and effective December 10, 2014.

Rule 17. Disqualification of a Judge

When a complaint is filed against a Judge, the Commission may order the Judge disqualified, on request of the complainant or on the Commission's own motion, in any litigation in which the complainant is involved. Disqualification will be ordered only when the circumstances warrant such relief. After completion of the disqualifying litigation, the order for disqualification shall terminate unless extended by the Commission.

Source: Entire rule amended April 20, 2017, effective July 1, 2017.

PART C. FORMAL PROCEEDINGS

Rule 18. Statement of Charges, Notice, and Pleadings in Formal Proceedings

(a) **Commencement of Formal Proceedings, Statement of Charges, and Notice.** Special counsel shall commence formal proceedings in the name of the People of the State of Colorado by serving a statement of charges together with a notice of formal charges on the Judge. The case shall be captioned ''In re the Matter of the People of the State of Colorado, Complainant, and Judge [name], Respondent.''

(1) The statement of charges shall state in ordinary and concise language the grounds for the charges with specific reference to the alleged misconduct and applicable Canons, Canon Rules, or Colo. RJD. The notice shall advise the Judge of his or her right to file an answer to the statement of charges, which shall include a response to each allegation together with applicable affirmative defenses or mitigation factors.

(2) Pleadings in formal proceedings shall follow the general format for civil pleadings. The statement of charges, notice of formal charges, the originals of all pleadings, and the

orders of the special masters shall be filed in the office of the executive director, who shall maintain the record of proceedings.

(b) **Role of Special Counsel in Formal Proceedings.** At all times during formal proceedings, special counsel shall represent the People and shall inform the Commission periodically concerning the status of the proceedings.

Source: Entire rule amended and effective December 10, 2014.

Rule 18.5. Special Masters

(a) **Appointment.** After special counsel has served the statement of charges and notice of formal charges on the Judge and filed copies thereof with the executive director, the Commission shall request the Supreme Court to appoint three special masters to preside over formal proceedings who shall hear and take evidence concerning the charges and provide a report to the Commission in accordance with the Constitution and these Rules. The appointees may be retired justices or active or retired judges of courts of record, who have no conflicts of interest and who are able to serve diligently and impartially as special masters. Unless otherwise designated, the judge or justice first named in the Supreme Court's order shall be the presiding special master. The presiding special master is authorized to act on behalf of the special masters in resolving pre-hearing issues, including but not limited to discovery disputes; conducting pre-hearing conferences; and ruling on evidentiary, procedural, and legal issues that arise during hearings.

(b) **One Special Master.** The Commission may request the Supreme Court to appoint one special master for designated purposes in any proceeding.

Source: (a) amended and effective December 10, 2014.

Rule 19. Response of Judge

The Judge shall file a response to the statement of charges with the executive director within 21 days after service of the statement of charges and notice of formal charges. The special masters may consider the failure or refusal to respond as an admission of the charges.

Source: Entire rule amended and effective December 10, 2014.

Rule 20. Setting for Hearing

After the filing of the Judge's response under Rule 19, or if the Judge does not file a response under Rule 19, the presiding special master shall order that the formal proceedings are at issue and shall schedule a hearing regarding the matters contained in the statement of charges and the response, if any. The special masters shall serve notice on all parties of the location and date of the hearing, which shall begin no later than 91 days after the at issue date, unless extended for good cause by order of the presiding special master.

Source: Entire rule amended and effective December 10, 2014.

Rule 21. [Reserved]

[Discovery revised and restated in 2012 as Rule 21.5.]

Rule 21.5. Discovery

(a) **Purpose and Scope.** Rule 21.5 shall govern discovery in judicial discipline and disability proceedings. C.R.C.P. 26 shall not apply to such proceedings, except as provided in this Rule or as ordered by the presiding special master.

(b) **Meeting.** A meeting of the parties shall be held no later than 14 days after the case is at issue to confer with each other about the nature and basis of the claims and defenses and discuss the matters to be disclosed.

(c) **Disclosures.** No later than 21 days after the case is at issue, the parties shall disclose:

(1) The name and, if known, the address, and telephone number of each person likely to have discoverable information relevant to disputed facts alleged in the pleadings, and the nature of the information;

(2) A listing, together with a copy or description of all documents, written or electronic records, and tangible things in the possession, custody, or control of the Commission or the Judge that are relevant to the disputed facts in the proceedings; and

(3) A statement of whether the parties anticipate the use of expert witnesses, identifying the subject areas of the proposed experts.

(d) **Limitations.** Except upon order by the presiding special master for good cause shown, discovery shall be limited as follows:

(1) Special counsel may take one deposition of the Judge and two other persons in addition to the depositions of experts. The Judge or the Judge's counsel may take one deposition of the complaining witness and two other persons in addition to the depositions of experts. The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

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

(3) When the mental or physical condition of the Judge has become an issue in the proceeding, the presiding special master, on motion of any party or any of the special masters, may order the Judge to submit to a physical or mental examination by a suitable licensed or certified examiner. The order may be made only upon a determination that reasonable cause exists and after notice to the Judge. The Judge will be provided the opportunity to respond to the motion; and the Judge may request a hearing before the special masters. The hearing shall be held within 14 days of the date of the Judge's request, and shall be limited to the issue of whether reasonable cause exists for such an order.

(4) A party may serve the adverse party requests for production of documents pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(5) A party may serve on the adverse party 20 requests for admission, each of which shall consist of a single request. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(e) **Good Cause.** In determining good cause pursuant to section (d) of this Rule, the presiding special master shall consider the following:

(1) Whether the scope of the proposed discovery is reasonable and likely to produce evidence that is material to the issues in the proceedings;

(2) Whether the discovery sought is unreasonably cumulative, unreasonably duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(3) Whether the burden or expense of the proposed discovery outweighs its likely benefit; and

(4) Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the proceedings to obtain the information sought.

(f) **Supplementation of Disclosures and Discovery Responses.** A party is under a duty to supplement its disclosures under section (c) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production, or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends to information contained in the expert's report or summary disclosed in

pre-hearing proceedings and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be provided in a timely manner.

(g) **Protective Orders.** Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute, and for good cause shown, the special masters may take any action which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including the issuance of one or more of the following orders:

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

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

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

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

(5) That discovery be conducted with no one present except persons designated by the special masters; and

(6) That a deposition, if sealed, be opened only by order of the special masters.

If the motion for a protective order is denied in whole or in part, the special masters, on such terms and conditions as are just, may order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to an award of expenses incurred with regard to the motion.

Source: (a) and IP(g) amended and effective December 10, 2014.

Rule 22. Subpoena and Inspection

Special counsel and the Judge shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the Judge as witness, and to provide for the production and inspection of documents, books, accounts, and other records. Subpoenas may be issued by the chair, the executive director, special counsel, the Judge's counsel, or a special master and shall be served in the manner provided by law for the service of subpoenas in a civil action. A party requesting or issuing a subpoena shall file a copy of each subpoena with the special masters; shall notify all parties of the issuance and service of each subpoena; and shall not cancel any subpoena without the approval of the presiding special master or the agreement of the parties.

Source: Entire rule amended and effective December 10, 2014.

Rule 23. Witness Fees and Expenses

All witnesses in formal proceedings shall receive fees and expenses in the amount allowed by law for civil litigation in the district courts, except as provided in this Rule. Fees and expenses of witnesses shall be borne by the party calling them. The Commission may, upon a showing of good cause, reimburse a Judge for reasonable expenses incurred for consultations with or testimony by a physician or mental health professional with respect to whether the Judge's conduct is adversely affected by a physical or mental condition. If the Judge is exonerated of allegations of misconduct in a matter that does not involve disability issues and the Commission determines that the Judge's payment of witness fees and expenses would work a financial hardship or injustice upon the Judge, then it may pay or reimburse such fees and expenses.

Source: Entire rule amended April 20, 2017, effective July 1, 2017.

Rule 24. [Reserved]

[Special Masters revised and restated in 2012 as Rule 18.5.]

Rule 25. Prehearing Procedures

The special masters may direct the parties to appear in person or by telephone for prehearing procedures which shall generally follow C.R.C.P. 16, but in a manner suitable for formal proceedings.

Source: Entire rule amended and effective December 10, 2014.

Rule 26. Hearing

(a) **In General.** At the time and place designated by notice, the special masters shall hear and take evidence, as required by Article VI, Section 23(3)(e) of the Constitution. Special counsel shall present the case in support of the formal charges. The presiding special master shall rule on all motions and objections made during the hearing, subject to the right of the Judge, the Judge's counsel, or special counsel to appeal a ruling to all of the special masters. The special masters shall provide a report to the Commission, as required by Article VI, Section 23(3)(e) of the Constitution and Rule 32, which shall be approved by majority vote of the special masters. In the event that a majority of the special masters cannot agree on the content of the report, each special master shall issue a report.

(b) **Failure to Appear.** The special masters may determine, in their discretion, whether the failure of the Judge to appear at the hearing may be considered an admission of the allegations in the statement of charges, unless such failure was due to circumstances beyond the Judge's control.

Source: (a) amended and effective December 10, 2014; (a) amended April 20, 2017, effective July 1, 2017.

Rule 27. Procedures and Rules

The hearing in formal proceedings shall be conducted in accordance with C.R.C.P., except where the special masters determine that certain provisions of C.R.C.P. would be impractical or unnecessary. The order of presentation in a hearing shall be the same as in civil cases. All witnesses shall give testimony under oath, and rules of evidence applicable in civil proceedings shall apply. Procedural errors or defects not affecting the substantive rights of a Judge shall not be grounds for invalidation of the proceedings.

Source: Entire rule amended and effective December 10, 2014.

Rule 28. [Reserved]

[Procedural Rights of Judge revised and restated in 2012 in Rules 8.5 and 33.]

Rule 29. Amendment to Pleadings

The special masters may in the interest of justice allow or require amendments to pleadings at any time in accordance with C.R.C.P.

Rule 30. Additional Evidence

The special masters may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of the hearing and shall indicate matters on which the evidence is to be taken. A copy of such order shall be served on the Judge and special counsel at least 14 days prior to the date of hearing.

Source: Entire rule amended and effective December 10, 2014.

Rule 31. Standard of Proof

The standard of proof in all formal proceedings and disability proceedings shall be clear and convincing evidence.

ANNOTATION

Applied in In re Jones, 728 P.2d 311 (Colo. 1986).

Rule 32. Report of the Special Masters

At the conclusion of the hearing in formal proceedings, the special masters shall issue and file with the executive director a report which shall include written findings of fact regarding the evidence in support of and in defense to the allegations in the complaint, a report of any prior disciplinary action by the Commission against the Judge, and its recommendations to the Commission for dismissal of the charges, a private disposition, or one or more sanctions. The executive director shall certify the special masters' report as part of the record of proceedings to be filed with the Supreme Court, in accordance with Rule 37.

Source: Entire rule amended and effective December 10, 2014.

Rule 33. Record of Proceedings

The record of proceedings shall consist of the report of the special masters together with pleadings, motions, verbatim electronic or written transcripts of proceedings, affidavits, exhibits, findings of fact and conclusions of law, legal briefs, and any other documentation designated by the Commission for the Supreme Court's consideration. The special masters shall determine whether the verbatim record will be made by court reporter or electronic recording. The Judge shall be provided, on request and without cost, copies of electronic recordings that are made of any portion of the proceedings. The Judge may, in addition, have all or any portion of the testimony in the proceedings transcribed at the Judge's own expense. Special counsel's work product, the investigation file, discovery, and deliberations of the Commission or the special masters shall not be included in the record of proceedings unless so ordered by the Court.

Source: Entire rule amended and effective December 10, 2014.

Rule 33.5. Disability Proceedings

(a) **Initiation of a Disability Proceeding.** A disability proceeding can be initiated by a request for evaluation of judicial conduct, by the Commission, by a Judge or the Judge's counsel, by a claim of inability to defend in a disciplinary proceeding, by an order of involuntary commitment or adjudication of incompetency, or as a result of information discovered during the course of disciplinary proceedings.

(b) **Proceedings to Determine Disability Generally.** The Commission shall conduct all disability proceedings in accordance with the procedures for disciplinary proceedings, except:

(1) The purpose of the disability proceedings shall be to determine whether the Judge suffers from a physical or mental condition that adversely affects the Judge's ability to perform judicial functions or to assist with his or her defense in disciplinary proceedings;

(2) All of the proceedings shall be confidential;

(3) The Commission may appoint a lawyer to represent the Judge if the Judge is without representation;

(4) In lieu of a Rule 18.5 appointment of three special masters, the Supreme Court may, in its discretion, appoint one special master, who is qualified to oversee disability proceedings (and who need not be a judge of a court of record), to conduct a hearing to take and consider evidence, promptly transmit a report concerning the alleged disability to the Supreme Court, and otherwise act as provided in this Rule for action by three special masters; and

(5) If the Supreme Court concludes that the Judge is incapacitated to hold judicial office, it may enter orders appropriate to the nature and probable length of the period of disability, including:

(i) Retirement of the Judge for a disability interfering with the performance of his or her duties which is, or is likely to become, of a permanent character;

(ii) Transfer of the Judge to temporary judicial disability inactive status. Such transfer shall be for a period of 182 days (the ''temporary transfer period''). The special master(s) shall take appropriate measures to review the Judge's disability status during the temporary transfer period, and issue a report to the Supreme Court on the degree of the Judge's disability no later than 70 days after the beginning of the temporary transfer period. If the special master(s) find that the Judge remains disabled, the special master(s) shall again review the Judge's condition within the 35 days preceding the end of the temporary transfer period and report to the Supreme Court on or before expiration of the 182 days. The Court may order more frequent reports during the temporary transfer period, in its discretion. For good cause, the Court may extend the temporary transfer period, but not to exceed an additional 182 days, and require periodic reports from the special master(s) during and at the end of the extension. In each report, the special master(s) shall determine whether the Judge is no longer disabled or that the disability is continuing, and shall recommend whether the Judge should be returned to active status or, retired due to a disability under subsection (b)(5)(i) of this Rule. The Court shall consider the recommendations and enter any order appropriate under the circumstances;

(iii) Transfer of the Judge to lawyer disability inactive status, if the Supreme Court concludes that the Judge is unable to practice law; or

(iv) Suspension of the disciplinary proceeding, pursuant to subsection (c)(2) of this Rule.

(c) **Inability to Properly Defend in a Disciplinary Proceeding.**

(1) If, in the course of a disciplinary proceeding, a Judge, the Judge's counsel or personal representative, or special counsel, if appointed, alleges that the Judge is unable to assist in his or her defense due to mental or physical disability, the Commission shall promptly notify the Supreme Court and suspend the disciplinary proceeding. The Supreme Court shall immediately transfer the Judge to lawyer and judicial disability inactive status and appoint a special master, or special masters, under subsection (b)(4) of this Rule, who shall consider all relevant factors and/or stipulations of the parties, conduct a hearing if necessary, and report to the Supreme Court concerning the Judge's alleged disability. The 182 day temporary transfer period, provided in subsection (b)(5)(ii) of this Rule, shall not commence until and unless the special master(s) determine that the Judge cannot assist with his or her defense under subsection (c)(2) of this Rule.

(2) The Supreme Court shall consider the report of the special master(s) to determine whether the Judge can assist in such defense. If it finds that the Judge can assist, the disciplinary proceeding shall be resumed but the Judge shall remain on lawyer and judicial inactive status, pending the results of the disciplinary proceeding. If it finds that the Judge cannot assist, the disciplinary proceeding shall remain in suspension and the Judge shall be placed on (i) temporary judicial disability inactive status, subject to the provisions of subsection (b)(5)(ii) of this Rule, and (ii) on lawyer disability inactive status. If the Supreme Court, under subsection (b)(5(ii), subsequently determines that the Judge is no longer disabled, the Judge shall be restored to lawyer and judicial active status and the Commission may resume the disciplinary proceeding.

(d) **Involuntary Commitment or Adjudication of Incompetency.** If a Judge has been declared incompetent by judicial order or has been involuntarily committed to an institution by judicial order on the grounds of incompetency or disability, the Supreme Court shall, after considering all relevant factors, enter an order appropriate in the circumstances, including but not limited to: (i) retiring the Judge under subsection (b)(5)(i) of this Rule; (ii) transferring the Judge to temporary judicial disability inactive status and evaluating the Judge's disability under provisions of subsection (b)(5)(ii); and/or (iii) transferring the Judge to lawyer disability inactive status under subsection (b)(5)(iii). A copy of the order shall be served on the Judge, his or her guardian, and the director of such institution. All such orders shall be public, in accordance with section (i) of this Rule.

(e) **Stipulated Disposition for Disability.**

(1) The special masters may designate one or more experts whom the special masters deem, in their discretion, to be appropriately qualified in medicine, psychiatry, or psychol-

ogy, and who shall examine the Judge prior to considering evidence of the alleged disability.

(2) After receipt of the examination report, the Commission or special counsel and the Judge may agree upon a stipulated disposition which includes proposed findings of fact, conclusions of law, and an order. The stipulated disposition shall be submitted to the special master(s) who shall forward it to the Supreme Court for approval or rejection.

(3) If the Supreme Court approves the stipulated disposition, it shall enter an order in accordance with its terms. If the stipulated disposition is rejected by the Supreme Court, the disability proceedings shall resume, but any statements by or on behalf of the Judge in the proposed disposition shall not be used as an admission of any material fact.

(f) **Interim Appointment.** The Supreme Court may designate another judge to assume the Judge's duties during the Judge's disability inactive status.

(g) **Reinstatement from Judicial Disability Inactive Status.**

(1) A Judge may petition the Court at any time, on good cause, for reinstatement to active judicial and lawyer status.

(2) Upon the filing of a petition for transfer to active judicial status, the Supreme Court may take or direct whatever action it deems necessary or proper to determine whether the disability has been removed, including but not limited to an examination of the Judge by a physician or mental health practitioner designated by the Supreme Court or consideration of the findings of the special master(s) under subsection (b)(5)(ii) of this Rule.

(3) With the filing of a petition for reinstatement to active judicial status, the Judge shall be required to disclose the name of each physician or mental health practitioner and hospital or other institution by whom or in which the Judge has been examined or treated since the transfer to judicial disability inactive status. The Judge shall furnish to the Supreme Court written consent to the release of information and records relating to the disability, if requested by the Supreme Court or by court-appointed experts. The Judge shall bear the burden of proof to establish grounds for reinstatement.

(4) A Judge who is returned to active judicial status will be eligible to apply for another judicial position or for the senior judge program.

(5) Reinstatement to active lawyer status shall be under the jurisdiction of Attorney Regulation, pursuant to C.R.C.P. 251.30.

(h) **Waiver of Medical Privilege.** Asserting a mental or physical condition as a defense to or in mitigation of judicial misconduct constitutes a waiver of medical privilege in any disciplinary proceeding.

(i) **Public Orders.** All recommendations of the special master(s) and orders of the Supreme Court under this Rule shall be public. However, the pleadings, briefs, and evidence considered by the special master(s), including but not limited to testimony, medical reports, and other documentation, shall remain confidential.

Source: (b)(5)(ii) and (d) amended and effective December 10, 2014; (a) and (i) amended April 20, 2017, effective July 1, 2017.

PART D. DISPOSITIONS AND SANCTIONS

Rule 34. Temporary Suspension

(a) **Request to Supreme Court.** The Commission, by its chair, the executive director, or special counsel, may request the Supreme Court to order temporary suspension of a Judge, with pay, pending the resolution of preliminary or formal proceedings. The request shall include a statement of the reasons in support of the suspension, which may include the Judge's failure to cooperate with the Commission. Upon receipt of such a request, the Court may require additional information from the Commission.

(b) **Order to Show Cause.** Upon a finding that the Supreme Court has been fully advised and that a temporary suspension is appropriate, the Court (1) shall issue an order for temporary suspension; (2) direct the Commission to issue an order to the Judge to show cause to the Commission in writing, within 21 days, why the Judge should not continue to be temporarily suspended from any or all judicial duties pending the outcome of prelimi-

nary or formal proceedings before the Commission; and (3) appoint an active, retired, or senior judge or a retired justice as special master to preside over a show cause hearing. The Court may issue an order for temporary suspension and an order to show cause to the Commission on its own motion.

(c) **Hearing.** The special master shall conduct a hearing on the order to show cause within 28 days of the Judge's response to such order or such later date ordered by the special master, at which the executive director, special counsel, the Judge, Judge's counsel, and witnesses may appear and participate. Within seven days following the conclusion of the hearing, the special master shall file its findings and conclusions with the Supreme Court. Within the seven days thereafter, special counsel and the Judge or the Judge's counsel may file exceptions with the Court regarding the findings and conclusions. Upon its consideration of the findings, conclusions, and exceptions, the Court may affirm, modify, or terminate the temporary suspension.

(d) **Further Order.** The Supreme Court may issue further orders concerning the suspension, as it may deem appropriate.

(e) **Voluntary Suspension.** The Commission may inquire whether a Judge will voluntarily submit to temporary suspension, and a written consent, if obtained, shall be filed with the Supreme Court.

(f) **Public Notice.** An order by the Supreme Court for temporary suspension shall become public upon its issuance. However, the Commission's investigation, pleadings, and other records with respect to the temporary suspension and its record of proceedings in preliminary or formal proceedings shall remain confidential unless and until a recommendation for sanctions or a recommendation for approval of a stipulated resolution is filed with the Court under Rule 37.

Source: (a) to (c) amended and (f) added and effective December 10, 2014; (a) amended April 20, 2017, effective July 1, 2017.

Rule 35. Dispositions

Upon consideration of all the evidence and the report of the presenter(s), the Commission may order any of the following dispositions:

(a) **Dismissal.** Dismiss an unjustified or unfounded complaint, which may include an appropriate expression of concern by the Commission regarding the circumstances;

(b) **Disability Proceedings.** Initiate disability proceedings under Rule 33.5 or stipulate to voluntary retirement by the Judge for a disability under Rule 33.5(e);

(c) **Diversion Plan.** Direct the Judge to follow a diversion plan, including but not limited to education, counseling, drug and alcohol testing, medical treatment, medical monitoring, or docket management, which may be accompanied by the deferral of final disciplinary proceedings;

(d) **Private Admonishment.** Admonish the Judge privately for an appearance of impropriety, even though the Judge's behavior otherwise meets the minimum standards of judicial conduct;

(e) **Private Reprimand.** Reprimand the Judge privately for conduct that does not meet the minimum standards of judicial conduct;

(f) **Private Censure.** Censure the Judge privately for conduct which involves a substantial breach of the standards of judicial conduct;

(g) **Costs and Fees.** Assess costs or fees of an investigation, examination or proceeding; or

(h) **Stipulated Disposition.** Agree with the Judge to a stipulated private disposition which may include the Judge's resignation, retirement, or agreement not to stand for retention; disciplinary measures under sections (c) through (g) of this Rule; and/or dismissal of the complaint with or without such disciplinary measures. A stipulated private disposition shall remain confidential, subject to Rule 6.5(g).

(i) **Other Action.** Take or direct such other action, including any combination of dispositions that the Commission believes will reasonably improve the conduct of the Judge. A Judge who disagrees with a disposition under this Rule has the right to request that the complaint be resolved through formal proceedings.

Source: (b), (c), (e), (f), and (h) amended and effective December 10, 2014; (h) amended April 20, 2017, effective July 1, 2017.

Rule 36. Sanctions

After considering the record of proceedings and the report of the special masters, in accordance with Article VI, Section 23(3)(e) of the Constitution, the Commission, by majority vote of the members meeting in person or by conference call, including the vote of any member who served as a presenter in prior proceedings, shall recommend that the Supreme Court dismiss the charges or order one or more of the following sanctions, except that a recommendation for removal shall require a majority vote of all members of the Commission:

(a) **Removal.** Remove the Judge from office;

(b) **Retirement.** Order the retirement of the Judge;

(c) **Suspension.** Suspend the Judge without pay for a specified period;

(d) **Disability Proceedings.** Remand the matter to the Commission for disability proceedings or stipulate to voluntary retirement by the Judge for a disability under Rule 33.5(e);

(e) **Public Reprimand or Censure.** Reprimand or censure the Judge publicly, either in person or by written order;

(f) **Diversion or Deferred Discipline.** Require compliance with a diversion plan or deferred discipline plan;

(g) **Costs and Fees.** Assess costs and fees incurred by the Commission, which may include a recommendation for reimbursement of its reasonable attorney fees, provided the recommendation includes grounds for such reimbursement that the Court determines to be appropriate and equitable in the circumstances; or

(h) **Other Discipline.** Impose any other sanction or combination of sanctions, including dispositions under Rule 35, that the Court determines will curtail or eliminate the Judge's misconduct.

Source: IP and (b) to (h) amended and effective December 10, 2014.

Rule 36.5. Conviction of a Crime

(a) **Suspension.** Whenever a Judge has been found guilty, by a verdict or a plea of guilty in any state or federal court of the United States, of a felony or an offense involving moral turpitude, the Supreme Court on its own motion or upon petition filed by any person and a finding that such a finding of guilty was had, shall enter an order suspending the Judge from office and suspending the payment of the Judge's salary until such time as the Judge is sentenced.

(b) **Removal.** Upon the sentencing of the Judge, the Supreme Court shall enter an order removing the Judge from office and declaring the Judge's office vacant; and also forfeiting the Judge's salary, retroactive to the date of the finding of guilty.

(c) **Reversal or Acquittal.** If the judgment of guilty is reversed and a judgment of acquittal or a dismissal is then entered, the Judge shall recover the salary that had been forfeited pursuant to section (b) of this Rule together with the salary that would have accrued through the date of acquittal or dismissal. While reversal of a conviction does not entitle the Judge to resume his or her previous judicial office or to be paid a salary beyond the date of acquittal or the date of dismissal, the Judge will be eligible for consideration by a judicial nominating commission for open positions and will be eligible to apply for the senior judge program.

(d) **Effect of Pleas.** A plea of guilty or *nolo contendere* shall be equivalent to a finding of guilty for the purpose of this Rule.

Source: Entire rule amended and effective December 10, 2014.

PART E. SUPREME COURT ACTION

Rule 37. Recommendations

(a) **Filing the Record of Proceedings and Recommendation.** Upon the Commission's consideration of the report of the special masters, the executive director shall file, with the clerk of the Supreme Court, the record of the proceedings and the Commission's recommendation to the Court for dismissal, sanctions, a private disposition, or a stipulated resolution.

(b) **Dismissal.** If the Commission recommends dismissal, the dismissal and the record of proceedings shall remain confidential, unless the Supreme Court orders public disclosure under Rule 6.5(g).

(c) **Sanctions.** The Commission may recommend one or more of the sanctions provided in Rule 36. The Commission's recommendation for sanctions and the record of proceedings shall become public upon filing the recommendation with the Supreme Court, and the clerk shall docket the recommendation for the Court's expedited consideration. The executive director shall promptly serve a copy of the recommendation and notice of the date of its filing on the Judge (or the Judge's counsel) and on special counsel. The executive director shall file proof of service of the recommendation and the notice with the clerk. Exceptions to the recommendation may be filed under Rule 38.

(d) **Private Disposition.** As an alternative to sanctions, the Commission may recommend a private disposition under Rule 35. The executive director shall notify the Judge (or the Judge's counsel), special counsel, and the Supreme Court of the Commission's recommendation. Exceptions to the recommendation may be filed under Rule 38. The recommendation, exceptions, and any disposition resulting therefore shall remain confidential subject to the provisions of Rule 6.5(g). If the Court does not approve the disposition, the case shall be remanded to the Commission and the record shall remain sealed pending the Commission's further action.

(e) **Stipulated Resolution of Formal Proceedings.** Special counsel and the Judge may propose that the Commission adopt a stipulated resolution of formal proceedings, which shall include summaries of the principal allegations, the Judge's response, and material facts that are agreed or remain disputed; relevant Canons, Canon Rules, or provisions of Colo. RJD; recommendations for dismissal or sanctions; and an acknowledgement that the stipulated resolution and the record of proceedings will become public. If the Commission finds that the terms of the stipulated resolution comply with these requirements, it shall file the stipulated resolution with the Supreme Court as its recommendation under this Rule. The recommendation, the stipulated resolution, the record of proceedings, and any sanctions proposed in the stipulated resolution shall become public upon the Commission's filing of the recommendation with the Court. However, if it provides for dismissal, the stipulated resolution and the record of proceedings shall be confidential pending the Court's consideration, and if approved by the Court, the stipulated resolution and the record of proceedings shall remain confidential, subject to the provisions of Rule 6.5(g).

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 38. Exceptions

Exceptions to a recommendation under Rule 37(c) or 37(d) may be filed by the Judge, the Judge's counsel, or special counsel with the clerk of the Supreme Court and served on each other party to the proceedings within 21 days after service of the notice required by Rule 37(c) or 37(d). Exceptions shall be supported by an opening brief based on the record of the proceedings. A party opposing the exceptions shall have 14 days after the filing of the opening brief within which to file an answer brief, a copy of which shall be served on all parties. A party shall have 7 days after the filing of the answer brief within which to file a reply brief, a copy of which shall be served on all parties. If no exceptions are filed, the matter will stand submitted upon the Commission's recommendation and the record. In

other respects, the filing and consideration of exceptions to the special masters' recommendation shall be governed by the Colorado Appellate Rules, unless the Court determines that the application of a particular rule would be impracticable, inappropriate, or inconsistent in disciplinary proceedings.

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

Rule 39. Additional Findings

If the Supreme Court desires an expansion of the record or additional findings as to certain issues or the entire matter, it may remand the proceedings to the Commission with appropriate directions and continue the proceedings pending receipt of the additional information. The Commission shall refer the remand to the special masters for additional findings and forward the additional findings to the Court. The Court may order oral argument, in its discretion.

Source: Entire rule amended and effective December 10, 2014.

Rule 40. Decision

The Supreme Court shall consider the evidence and the law, including the record of the proceedings and additions thereto; the special masters' report; the Commission's recommendation; and any exceptions filed under Rule 38. The Court shall issue a decision, in which it may dismiss the complaint; adopt or reject the recommendation of the Commission; adopt the recommendation of the Commission with modifications; or remand the proceedings to the Commission for further action. Provided, however, that if the Commission has recommended a stipulated resolution, the Court shall order it to become effective and issue any sanction provided in the stipulated resolution, unless the Court determines that its terms do not comply with Rule 37(e) or are not supported by the record of proceedings. The decision of the Court, including such sanctions as may be ordered, shall be final. Unless confidentiality is required under Rule 37, the decision shall be published.

Source: Entire rule amended and effective December 10, 2014; entire rule amended April 20, 2017, effective July 1, 2017.

ANNOTATION

Standard of review. Factual findings of the commission on judicial discipline must be upheld unless, after considering record as a whole, court concludes that they are clearly erroneous or unsupported by substantial evidence. In re Jones, 728 P.2d 311 (Colo. 1986).

However, the court is not bound by the commission's conclusions of law. In re Jones, 728 P.2d 311 (Colo. 1986).

APPENDIX TO CHAPTER 24

Colorado Code of Judicial Conduct

Repealed and Readopted by the

SUPREME COURT OF COLORADO

May 27, 2010,

Effective July 1, 2010

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APPENDIX TO CHAPTER 24

COLORADO CODE OF JUDICIAL CONDUCT

Editor's note: All ethics opinions and some annotations within the Colorado Code of Judicial Conduct were written by the Colorado Supreme Court.

Preamble

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Colorado Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

Scope

[1] The Colorado Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as ''may'' or ''should,'' the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term ''must,'' it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical

standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Colorado Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other.

ANNOTATION

By expressing approval of the canons of ethics, the supreme court did not enact them into law. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Nevertheless, they are recognized as principles of exemplary conduct. Although the canons employing language of wide coverage cannot be given the effect of law, they nevertheless are recognized generally as a system of principles of exemplary conduct and good character. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Neither the supreme court nor the grievance committee has the power or authority to institute or conduct disciplinary proceedings of any kind involving the conduct of a duly elected judge, he being responsible solely to the people, the constitution fixing the remedy at impeachment. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Terminology

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

"Appropriate authority" means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. In Colorado, the Commission on Judicial Discipline is the authority responsible for investigating judicial misconduct and disciplining judges, except with respect to Denver County court and municipal judges, over whom it has no jurisdiction pursuant to Colo. Const. Article VI § 26; § 13-10-105, C.R.S.; C.J.R.D. 4(a). See Rules 1.1, 2.14 and 2.15.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance which, if obtained by the recipient otherwise, would require a financial expenditure. See Rule 3.7.

"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

"Domestic partner" means a person with whom another person maintains household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 3.13, and 3.14.

"Economic interest" means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $5,000, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(1) Ownership in a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an ''economic interest'' in such securities unless the judge participates in the management of the fund;

(2) securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant is not an ''economic interest'' in securities held by the organization;

(3) the proprietary interest of a policy holder in a mutual insurance company, of a depositer in a financial institution, or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or a similar proprietary interest is an ''economic interest'' in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(4) ownership of government securities is an ''economic interest'' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

See Rules 1.3 and 2.11.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"Impartial," "impartiality," and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Impending matter" is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

"Independence" means a judge's freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

"Judicial candidate" means a sitting judge who is seeking selection for judicial office by appointment or retention. See Rules 2.11, 4.1, 4.2, and 4.3.

"Knowingly," "knowledge," "known," and **"knows"** mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.15, 2.16, 3.6, and 4.1.

"Law" encompasses court rules and orders as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1, 4.2, and 4.4.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

"Personally solicit" means a direct request made by a judge or judicial candidate for financial support or in kind services, whether made by letter, telephone, or any other means of communication. See Rule 4.1.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's retention committee created as authorized by Rule 4.3. See Rule 4.1.

"Public election" includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rule 4.2.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Application

The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. Applicability of This Code

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to three distinct categories of part-time judges. The three categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or member of the administrative law judiciary.

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] This code does not apply to a person appointed by the court to serve as a master in a particular case. This code does not apply to municipal judges except to the extent it is made applicable by statute, municipal charter or ordinance. However, reference to the code by all judicial officers, including municipal judges, is recommended to provide guidance concerning the proper conduct for judges.

II. Senior and Retired Judges

Senior judges, while under contract pursuant to the senior judge program, and retired judges, while recalled and acting temporarily as a judge, are not required to comply:

(A) with Rule 3.9 (Service as Arbitrator or Mediator); or

(B) with Rule 3.8 (Appointments to Fiduciary Positions).

III. Part-Time Judges

A judge who serves on a part-time basis

(A) is not required to comply:

(1) with Rules 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (A) and (B) (Financial, Business, or Remunerative Activities); and

(B) shall not practice law in the court on which the judge serves or in any comparable level court in the same judicial district on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(C) shall not practice law with respect to any controversies which will or appear likely to come before the court on which the judge serves or any court of the same or comparable jurisdiction within the same judicial district on which the judge serves.

COMMENT

[1] This Canon limits a part-time judge from practicing law in any comparable level court in the same judicial district as the judge serves. However, this prohibition shall not apply to any temporary assignment of a part-time judge to a comparable level court outside the judicial district the judge serves. In addition, this prohibition shall not apply to a one-time assignment of a part-time judge to a court of higher jurisdiction (such as a one-time assignment under order in a district court case) either within, or outside of, the judicial district in which the judge serves. A part-time judge serving on temporary assignment is not thereby precluded from practicing law in the court to which that judge may be temporarily assigned. During such period of temporary assignment, however, the judge shall not actively participate as counsel in any case pending before the court to which the judge is temporarily assigned.

[2] A part-time judge who practices law must avoid undertaking or continuing any relationship which precludes the judge from maintaining the integrity of the bench which he or she serves and at the same time providing the undivided loyalty to clients which the exercise of professional judgment on behalf of a client demands. Being ''of counsel'' is deemed to be the practice of law, whereas acting as a mediator or arbitrator is not deemed to be the practice of law. Necessarily, the professional responsibilities of a part-time judge who practices law limit the practice of law by the judge's partners and associates.

ETHICS OPINIONS

A part-time county court judge with authority by chief judge order to preside over cases in the district court may not appear as a lawyer in the district court in the judicial district. In this case, the part-time judge had continuing authority to hear district court criminal cases, but never exercised his authority. The opinion precludes the judge from appearing in district court civil cases in the same judicial district. CJEAB Op. 07-06.

IV. Appointed Judges

An Appointed Judge who serves pursuant to C.R.C.P. 122 and section 13-3-111, C.R.S., for the period of the appointment, and in his or her capacity as Appointed Judge,

(A) is not required to comply with the following canons:

(1) 2.10 (A) (Judicial Statements on Pending and Impending Cases), except as to the case where he or she is appointed, and should require similar abstention from comment on the part of those personnel who are subject to the Appointed Judge's direction and control;

(2) 3.2 (Appearances Before Governmental Bodies and Consultation with Governmental Officials); 3.3 (Testifying as a Character Witness); 3.4 (Appointments to Governmental Positions); 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities); 3.8 (Appointments to Fiduciary Positions); 3.9 (Service as Arbitrator of Mediator); 3.10 (Practice of Law); 3.11 (Financial, Business, or Remunerative Activities); 3.12 (Compensation for Extrajudicial Activities); 3.13 (C) (Reporting of Certain Gifts, Loans, Bequests, Benefits, or Other things of Value); 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges); and 3.15 (Reporting Requirements);

(3) 4.1 (A) (5, 12, 13) (Political and Campaign Activities of Judges in General); 4.2 (Political and Campaign Activities of a Judge Standing for Retention); and 4.4 (Campaign Committees).

(B) should refrain as follows:

(1) from financial and business dealings that relate directly to any issues in the case to which the Appointed Judge is appointed;

(2) from accepting any gift, bequest, favor or loan from any party to or the lawyer appearing in the case to which the appointed judge is appointed, and should require a spouse, domestic partner or family member residing in the judge's household to refrain from accepting gifts, bequests, favors, or loans in the same manner as the judge.

V. Time for Compliance

A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary

Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

COMMENT

[1] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Rule 1.1: Compliance with the Law

(A) A judge shall comply with the law,* including the Code of Judicial Conduct.

(B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.

(C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority* in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the appropriate authority within ten days after the date of the conviction a certificate thereof. This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.

ANNOTATION

Violations by a judge of federal or state criminal law may constitute a violation of the requirement that a judge must comply with the law, unless the violation is trivial. Matter of Vandelinde, 366 S.E.2d 631, 633 (W. Va. 1988) (involving a magistrate judge's misconduct in the form of excess election contributions).

Violation of law, however trivial, harmless or isolated, is not necessarily a violation of the judicial canons. However, conduct that is grave, intentional and threatening, such as criminal mischief in third degree, falls on censurable side of line. In re Conduct of Roth, 645 P.2d 1064 (Or. 1982) (disciplining a judge for third degree criminal mischief).

Some violations of law (such as minor traffic infractions) may be of such a nature as to not come within the intended meaning of [this Rule]. In re Sawyer, 594 P.2d 805, 811 (Or. 1979) (concluding that a judge who is regularly-employed as a part-time teacher for pay by a state-funded college violates a state constitutional prohibition against officials of one state department exercising functions of another).

Rule 1.2: Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Impropriety occurs when the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence. Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

ANNOTATION

Law reviews. For article, ''From the Cloister to the Street: Judicial Ethics and Public Expression'', see 64 Den. U. L. Rev. 549 (1988).

One meaning of impartiality in the judicial context is lack of bias for or against any party to a proceeding. Impartiality may also involve open-mindedness, not in the sense that judges should have no preconceptions on legal issues, but rather that judges should be willing to consider views that oppose those preconceptions and remain open to persuasion when those issues arise in a pending case. Republican Party of Minn. v. White, 536 U.S. 765, 775, 779 (2002).

Role of judiciary is one of impartiality. The role of the judiciary, if its integrity is to be maintained, is one of impartiality. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

The duty to be impartial cannot be fulfilled where, by his active role in the presentation of the prosecution's case, a trial judge calls witnesses, presents evidence, and cross-examines defense witnesses, because these are the acts of an advocate and not a judge. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Such conduct constitutes reversible error. The assumption by the court of the role of advocate for the prosecution is inconsistent with the proper function of the judiciary and constitutes reversible error. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Judge's advice to prosecution not error unless defendant denied fair trial. While it may be ill-advised for a trial judge to point out a possible deficiency in the prosecution's case, such conduct is not reversible error where it does not so depart from the required standard of impartiality as to deny the defendant a fair trial. People v. Adler, 629 P.2d 569 (Colo. 1981).

Judge is ill-advised to be expert witness and judge on same issue in two proceedings. The actions of a retired judge in becoming an expert witness in a case concerning the same issue — size of attorney fees in an estate proceeding — as in another dispute raises the specter of an appearance of impropriety. The judge is ill-advised to place himself in this position and then preside at the trial of the latter case. However, when the judge does not actually testify in the former case, and the record contains no indication that the judge acted with prejudice, the judge does not have such an interest as to require disqualification. Colo. State Bd. of Agriculture v. First Nat'l Bank, 671 P.2d 1331 (Colo. Ct. App. 1983).

Actual bias arises where a prejudice in all probability prevents a judge from dealing fairly with a party. People v. Julien, 47 P.3d 1194 (Colo. 2002).

Disqualification requires more than mere relationship. Determining factors are closeness of the relationship and its bearing on the underlying case. Schupper v. People, 157 P.3d 516 (Colo. 2007).

Existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification even though no other facts call into question the judge's impartiality. Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984).

Having the presiding judge's wife on the jury did not affect the independence, integrity, or impartiality of the judge. Although it would have been prudent for the judge to excuse his wife, or to recuse himself as presiding judge, the judge's misjudgment was not so egregious that it requires reversal under the plain error standard. People v. Richardson, 2018 COA 120, __ P.3d __.

While a dissent may be written in a succeeding case or two, the code of judicial conduct should bury the idea of a judge dissenting on the same issue ad infinitum. People v. Steed, 189 Colo. 212, 540 P.2d 323 (1975).

Public reprimand ordered based upon appearance of impropriety arising from judge's conduct hiring the judicial district's coroner. Appointee did not apply during application period, selection was made on basis of criteria not stated in official announcement, including known friendship with the Chief Justice, and on terms significantly different from those advertised to general public. In re Johnstone, 2 P.3d 1226 (Alaska 2000).

ETHICS OPINIONS

A judge whose spouse is running for city council, which exercises supervisory responsibility over the chief of police and city manager, would not be required to disqualify himself in all cases charged by the police department. The existence of this relationship would not, in the usual case, cause the judge's impartiality to be questioned. Colo. J.E.A.B. Op. 07-09.

A part-time county judge who maintains a part-time civil practice may not exercise discretionary authority to sit as a district judge in criminal matters and also continue to appear in the same district court as a lawyer on civil matters. To allow a judge to preside over cases while practicing in the same court would erode confidence in the impartiality of the judiciary. Colo. J.E.A.B. Op. 07-06.

A judge may not advertise her ability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05.

A judge is not required to automatically disqualify himself when the parent of his estranged godchild or the parent's colleagues appear before the judge. Colo. J.E.A.B. Op. 07-04.

A judge need not automatically disqualify herself where an attorney who represented the judge's adult child, the costs of which were paid by the judge but reimbursed by the adult child, appears before the judge. Colo. J.E.A.B. Op. 07-01.

An active judge planning to retire in the near future should refrain from setting or hearing private mediations until the judge actually retires. Colo. J.E.A.B. Op. 06-09.

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and the judge may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06.

A judge should disqualify himself sua sponte if an attorney or firm currently representing the judge, or the judge's adversary in a current matter, appears before the judge. A judge should also disqualify himself sua sponte for a reasonable period, typically for one year, after the representation has ended, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge in order to avoid an appearance of impropriety. After the expiration of a reasonable period of time, disqualification is not required but may be appropriate under the circumstances. Disclosure should continue until the passage of time or circumstances make the prior representation irrelevant. Colo. J.E.A.B. Op. 06-05.

To avoid an appearance of impropriety, when a judge's spouse contributes to a political candidate, the contribution should be made in the spouse's name alone and from the spouse's separate bank account, with no reference to the judge or the judge's position. Colo. J.E.A.B. Op. 06-04.

A judge may recommend a lawyer only in circumstances where the judge has a sufficiently close relationship with the requesting party that he would automatically recuse himself from the case due to the closeness of the relationship regardless of whether the judge had been asked to make the recommendation. Colo. J.E.A.B. Op. 06-01.

Service on the judge's homeowners' association board of directors would be inappropriate where the association is large and substantial, maintains sizable cash reserves and operates under a large budget, and engages in outside transactions likely to result in litigation. Colo. J.E.A.B. Op. 05-3.

A judge should disqualify himself from cases in which a partner or associate in his brother-in-law's firm acts as counsel. Colo. J.E.A.B. Op. 05-02.

A judge need not recuse in every case involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

A mentee judge may discuss pending or impending matters with his or her mentor judge but the mentee judge alone is responsible for making decisions in the matter. Colo. J.E.A.B. Op. 04-02.

A judge's report of an attorney's misconduct in a case pending before the judge requires the judge to disqualify himself or herself. Colo. J.E.A.B. Op. 04-01.

A judge who, immediately following a hearing, had lunch with one of the attorneys in the proceeding, violated Canon 2A by creating an appearance of impropriety. The closeness in time between the hearing and the social lunch could suggest to a reasonable observer that the attorney had influence over the judge based upon their social relationship. Alaska Formal Op. 021.

A judge engages in improper political activity by moderating a partisan political debate. Despite all candidates being represented and no sponsorship by any political party, political debates by their nature engage the moderator in political discourse inappropriate to judicial office. Such a debate improperly lends the prestige of judicial office to the event in a state with a non-elected judiciary. Alaska Formal Op. 023.

While a judge may ''speak, write, lecture, and teach on both legal and non-legal subjects'' and may accept compensation so long as the compensation does not exceed a reasonable amount nor exceed that which would be received by a person who is not a judge, it is not permissible for a judge to write a regular column in a for-profit publication in which the placement of the article, not within the judge's control, could be construed as endorsing other articles or advertisements that might demean the office. Md. Ethics Op. 2001-01.

A judge should not participate on the advisory board of an arbitration association where it is likely that the judge's opinions on matters before the board could be construed as the giving of legal advice. Md. Ethics Op. 1995-06.

A judge's introduction of keynote speaker at event that is primarily commemorative but which also is used to raise funds would create appearance of impropriety. Neb. Ad. Op. 07-01.

No appearance of impropriety for judge who serves on board of directors of charitable organization to allow his name to appear on the organization's stationery provided judge's position is not identified and his name not selectively emphasized. U.S. Conf. Ad. Op. No. 35.

No appearance of impropriety for judge to participate in a seminar in another country designed to improve relations with that country where judge's expenses are paid by organization unlikely to come before Utah courts. Utah Ad. Op. 88-10.

No appearance of impropriety for judge to teach a course involving only one component of the bar. Utah Ad. Op. 99-6.

Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

COMMENT

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by providing information to such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

ETHICS OPINIONS

Judicial officer may not advertise his or her availability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05.

Judge may not testify as a character witness on a voluntary basis, but he or she is obligated to comply with a subpoena if one is issued. Judge should consider attempting to discourage, to the extent reasonable, a party or lawyer from subpoenaing the judge as a character witness, unless the interests of justice require the judge's testimony. Colo. J.E.A.B. Op. 06-03.

Judge's spouse is not subject to the Code of Judicial Conduct and thus may freely pursue elected office. However, the judge should refrain from attending all political events in support of the spouse's candidacy and must avoid activities that could be perceived as constituting an endorsement of the candidate or using the prestige of the judicial office to benefit the spouse. Colo. J.E.A.B. Op. 05-05.

A judge should take appropriate steps to ensure that neither the content of the foreword to a book a judge was asked to write nor the advertising exploit the judicial office or advance the private interests of others. Utah Ad. Op. 90-8.

Advising a judge to retain control over the advertising of his publications, including a veto right, to ensure that the judicial position is not exploited nor the private interests of others advanced by use of the prestige of the judge's office. U.S. Conf. Ad. Op. No. 55.

A judge should not receive compensation for publication on how to practice before judge's court; for-profit publication on scholarly and legal topics permissible. U.S. Conf. Ad. Op. No. 87.

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.1: Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

ETHICS OPINIONS

Whether a judge may sit on the board of directors of his or her homeowner's association is to be determined on a case-by-case basis. Where the association is large and substantial, maintains significant cash reserves, operates under a sizeable budget and engages in substantial business-type contacts with the outside enterprises of the kind that might involve the association in litigation, it would be inappropriate for a judge to serve on the association's board. Colo. J.E.A.B. Op. 05-03.

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the

law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Rule 2.3: Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Rule 2.4: External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

ETHICS OPINIONS

The judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on ''pending or impending matters,'' the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

Rule 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

[3] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on

the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[4] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

Rule 2.7: Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*

COMMENT

[1] Judges must be available to decide the matters that come before the courts. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

ANNOTATION

Unnecessary and unwarranted delay by district court judge in issuing a decision violates this Rule. In Re Jones, 728 P.2d 311 (Colo. 1986).

Rule 2.8: Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

COMMENT

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

ANNOTATION

Judge who met with jurors after the trial to thank them for their service erred in using jurors' post-verdict statements to impeach the verdict. In re Hall v. Levine, 104 P. 3d 222 (Colo. 2005).

Rule 2.9: Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* or by consent of the parties to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the

matter, and with judges who have appellate jurisdiction over the matter.

[6] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

[7] As it applies to paragraph 5(C), the definition of judicially noticed facts is set forth in Rule 201 of the Colorado Rules of Evidence.

ANNOTATION

Law reviews. For article, ''Ex Parte Communications with a Tribunal: From Both Sides'', see 29 Colo. Law. 55 (April 2000).

The initiation of an ex parte communication by a judge with a party in a dependency hearing regarding the adequacy of her attorney's representation was improper, but judge would not be disqualified where disqualification motion and affidavits failed to allege facts from which it might be inferred that the ex parte communication demonstrated a bias against the party or her attorney. S.S. v. Wakefield, 764 P.2d 70 (Colo. 1988).

Trial court's ex-parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after the court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. App. 1999).

Applied in People v. Wieghard, 727 P.2d 383 (Colo. App. 1986).

ETHICS OPINIONS

A judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on ''pending or impending matters,'' the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

Rule 2.10: Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity, subject to Canon 1.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

ETHICS OPINIONS

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.AB. Ad. Op. 2008-01.

Rule 2.11: Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, child, or other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and

court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) In limited circumstances, the rule of necessity applies and allows judges to hear a case in which all other judges also would have a disqualifying interest or the case could not otherwise be heard.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. The term ''recusal'' is sometimes used interchangeably with the term ''disqualification.''

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to disqualifications which might reasonably cause the judge's impartiality to be questioned. The rule of necessity has been invoked for trial court and court of appeals judges where disqualifications exist as to all members of the court and there is no other judge available. It has been invoked as to the supreme court when all or a majority of its members have a conflict of interest; the importance of having the court render a decision overrides the existence of the conflict, which might otherwise leave litigating parties in limbo. Under the rule of necessity, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable. Rather than deny a party access to court, judicial disqualification yields to the demands of necessity.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] ''Economic interest,'' as set forth in the Terminology section, means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $5,000, or a relationship as a director, advisor, or other active participant in the affairs of a party, except that:

(1) Ownership in a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an ''economic interest'' in such securities unless the judge participates in the management of the fund;

(2) securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant is not an ''economic interest'' in securities held by the organization;

(3) the proprietary interest of a policy holder in a mutual insurance company, of a depositer in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or a similar proprietary interest is an ''economic interest'' in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(4) ownership of government securities is an ''economic interest'' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

ANNOTATION

Law reviews. For article, ''Disqualification of Judges'', see 13 Colo. Law. 54 (1984).

Courts must meticulously avoid any appearance of partiality, not merely to secure the

confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

Upon reasonable inference of a "bent of mind" that will prevent judge from dealing fairly with party seeking recusal, it is incumbent on trial judge to recuse himself. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

At least an appearance of bias or prejudice existed due to a professional relationship between the trial judge and an expert witness for defendants and the trial court erred in denying a motion for recusal. Hammons v. Birket, 759 P.2d 783 (Colo. App. 1988).

Not all ex parte communications are per se grounds for disqualification under C.R.C.P. 97. The critical test is whether the affidavits in support of the motion to disqualify, along with any other matters of record, establish facts from which it may reasonably be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, in favor of or against a party to the litigation. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Not every connection between a judge and a participant in a case will require the judge to disqualify himself or herself. It is a judge's duty to sit on a case unless a reasonable person could infer that a judge would be prejudiced against a defendant. People v. Crumb, 203 P.3d 587 (Colo. App., Sept. 18, 2008).

Although judges hearing appeal from trial court's dismissal of antitrust action brought against software manufacturer used the operating system at issue in the lawsuit, raising the potential for a conflict of interest, the rule of necessity required those judges to proceed with the case. Pomerantz v. Microsoft Corp., 50 P.3d 929 (Colo. App. 2002).

Successor judge erred in determining that the same circumstances that led the trial judge to recuse himself or herself from defendant's other cases also existed before the commencement of trial in this case. People v. Schupper, 124 P.3d 856 (Colo. App. 2005), aff'd, 157 P.3d 516 (Colo. 2007).

Appearance of impropriety, not actual prejudice, is sufficient to warrant recusal. Where recusal is sought based upon the relationship of the judge to another person, it is the closeness of the relationship and its bearing on the underlying case that determines whether disqualification is necessary. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010) (decided under former canon 3(C)), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Trial court judge erred by determining the relationship between his court clerk and the witness did not warrant judge's recusal. Where court clerk's daughter, as caseworker, was material witness in the case, absent waiver, judge abused his discretion by not recusing from the case. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010) (decided under former canon 3(C)), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Applied in People v. Mills, 163 P.3d 1129 (Colo. 2007); Spring Creek Ranchers Ass'n, Inc. v. McNichols, 165 P.2d 244 (Colo. 2007); Schupper v. People, 157 P.3d 516 (Colo. 2007); People v. Julien, 47 P.3d 1194 (Colo. 2002); People v. Harlan, 8 P.3d 448 (Colo. 2000); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000); Office of State Court Adm'r v. Background Info. Services, Inc., 994 P.2d 420 (Colo. 1999); Comiskey v. District Court In and For County of Pueblo, 926 P.2d 539 (Colo. 1996); Wilkerson v. District Court In and For County of El Paso, 925 P.2d 1373 (Colo. 1996); People v. District Court, In and For Eagle County, State of Colo., 898 P.2d 1058 (Colo. 1995); Klinck v. District Court of Eighteenth Judicial District, 876 P.2d 1270 (Colo. 1994); Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993); Goebel v. Benton, 830 P.2d 995 (Colo. 1992); Brewster v. District Court of the Seventh Judicial Dist., 811 P.2d 812 (Colo. 1991); Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1987); People ex rel. A.E.L., 181 P.3d 186 (Colo. App. 2008); Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008); Parsons ex rel. Parsons v. Allstate Ins. Co., 165 P.3d 809 (Colo. App. 2006); In re McSoud, 131 P.3d 685 (Colo. App. 2006); Keith v. Kinney, 140 P.3d 141 (Colo. App. 2005); People v. Cambell, 94 P.3d 1186 (Colo. App. 2004); People ex rel S.G., 91 P.3d 443 (Colo. App. 2004); Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001); Prefer v. PharmNetRx, LLC, 18 P.3d 844 (Colo. App. 2000); People v. Anderson, 991 P.2d 319 (Colo. App. 1999); People v. Lanari, 926 P.2d 116 (Colo. App. 1996); People v. Bowring, 902 P.2d (Colo. App. 1995); People v. McCarty, 851 P.2d 181 (Colo. App. 1992); Giralt v. Vail Vill. Inn Assocs., 759 P.2d 801 (Colo. App. 1988); People in Interest of C.Y., 2018 COA 50, 417 P.3d 975.

ETHICS OPINIONS

A judge who sits on the county bench in a small, rural district and whose spouse wishes to run for election to the city council, which oversees the chief of police, is not required to disqualify himself in cases charged by the police department. He should, however, consider whether the facts and circumstances make disqualification appropriate in a particular case, and, if his spouse is elected, he should disclose her role on the city council in cases charged by

the police department. Colo. J.E.A.B. Op. 07-09.

A judge is not required to disqualify himself when the judge's estranged godchild's father appears before him, solely because of that relationship, but disqualification may nevertheless be appropriate depending on the judge's subjective and objective analysis of the circumstances. The judge should, however, disclose the godparent relationship to each party when his godchild's father appears in his court. Colo. J.E.A.B. Op. 07-04.

A judge need not disqualify herself sua sponte when the attorney who represented the judge's adult daughter appears before the judge. The judge should consult her own conscience to determine whether disqualification is warranted if the judge maintains a disabling prejudice for or against the attorney. If the judge concludes that disqualification is unnecessary, disclosure of the daughter's representation may still be appropriate until the passage of time, the limited consequences of the prior matter and the nature of the judge's relationship with the attorney have made the prior representation irrelevant. Colo. J.E.A.B. Op. 07-01.

Withdrawing Opinion 2004-01, the Board determines that a judge's report of attorney misconduct, without more, does not require the judge automatically to recuse from the reported attorney's cases. If the judge has a personal bias or prejudice against the attorney, or if the judge's impartiality might reasonably be questioned if the judge did not recuse, the judge must recuse from the reported attorney's cases. If the judge determines that the judge must recuse, the judge's disqualification from the reported attorney's cases does not require the judge to recuse in pending or new cases filed generally by the attorney's law firm but that do not include an entry of appearance by the reported attorney. Colo. J.E.A.B. Ad. Op. 2011-01.

A judge who reports an attorney to Attorney Regulation Counsel but concludes that disqualification from the attorney's cases is not required has a duty to sit on the reported attorney's cases and must disclose the report to the parties and their counsel until the disciplinary proceeding stemming from the report has been closed. Colo. J.E.A.B. Ad. Op. 2012-06.

A judge should disqualify himself or herself sua sponte if an attorney or firm currently representing the judge, or representing the judge's adversary in a current matter, appears before the judge. A judge should also continue to disqualify himself or herself sua sponte for a reasonable period of time after the representation has ended, typically one year, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge. After the expiration of a reasonable period of time, continued disqualification is not required, but may be appropriate under the facts and circumstances of the case in which the judge was represented. Colo. J.E.A.B. Op. 06-05.

A judge who presides over a county court in a small rural jurisdiction should disqualify himself when any member of his brother-in-law's firm appears in the court on which he serves. Colo. J.E.A.B. Op. 05-02.

A judge must disqualify in any case in which the judge's spouse, who is an officer employed by a fire protection district which assists the sheriff's department with arson investigations, or those he or she supervises, participated in the investigation of the case. The judge is not, however, required to disqualify from all cases involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

Rule 2.12: Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

COMMENT

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

Rule 2.13: Administrative Appointments

(A) In making administrative appointments, a judge:
(1) shall exercise the power of appointment impartially* and on the basis of merit; and
(2) shall avoid nepotism, favoritism, and unnecessary appointments.
(B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

Rule 2.14: Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] ''Appropriate action'' means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

Rule 2.15: Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.*
(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.
(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.
(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

COMMENT

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

ETHICS OPINIONS

Withdrawing Opinion 2004-01, the Board determines that a judge's report of attorney misconduct, without more, does not require the judge automatically to recuse from the reported attorney's cases. If the judge has a personal bias or prejudice against the attorney, or if the judge's impartiality might reasonably be questioned if the judge did not recuse, the judge must recuse from the reported attorney's cases. If the judge determines that the judge must recuse, the judge's disqualification from the reported attorney's cases does not require the judge to recuse in pending or new cases filed generally by the attorney's law firm but that do not include an entry of appearance by the reported attorney. Colo. J.E.A.B. Op. Ad. 2011-01.

A judge who reports an attorney to Attorney Regulation Counsel but concludes that disqualification from the attorney's cases is not required has a duty to sit on the reported attorney's cases and must disclose the report to the parties and their counsel until the disciplinary proceeding stemming from the report has been closed. Colo. J.E.A.B. Op. Ad. 2012-06.

Rule 2.16: Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

COMMENT

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

ANNOTATION

Judge's use of judicial chambers stationery for letters to opposing counsel in personal matter creates appearance of impropriety; objectively reasonable person would not know the difference between judicial chambers stationery and official court stationery. Judge privately reprimanded for this and other misconduct. Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).

Public reprimand appropriate where judge was arrested for and plead guilty to drunk driving. In re Weaver, 691 N.W.2d 725 (Iowa 2004).

District court judge's two-month secret intimate relationship with assistant county attorney, who appeared before him on behalf of State on daily basis, was conduct that brought disrepute to judicial office, and warranted 60 day suspension without pay, despite lack of evidence that judge's relationship with county attorney prejudiced any defendant who appeared before him, where affair occurred with subordinate public servant, judge allowed affair to remain hidden from those who appeared before him against assistant county attorney, judge and county attorney engaged in intimate encounters in courthouse, and both parties were married to other people. In re Gerard, 631 N.W.2 271 (Iowa 2001).

Juvenile court judge's retaliation and intemperate statements directed at the attorneys required by law to appear on child welfare cases was at least negligent and ran afoul of duties to give precedence to his or her judicial duties over all other activities of the judge, to be patient and courteous to all persons dealt with in a judicial capacity, and to disqualify himself if impartiality could reasonably be questioned; the judge allowed his non-judicial activities, namely his federal action against the Director of the Office of the Guardian ad Litem, to take priority over his judicial duty to hear child welfare cases, and he did so by treating the Director, the attorneys in her office, and the attorneys of the Attorney General's office with considerable disrespect, creating a continuing situation where his impartiality could reasonably be, and was, repeatedly questioned. In re Anderson, 82 P.3d 1134 (Utah 2004).

ETHICS OPINIONS

The judge may speak at a CLE which is, in effect, limited to only one component of the bar, provided that the judge satisfies certain conditions. In addition, the judge should consider with care the topic on which he presents, and should avoid presenting on a topic such as trial strategy, which could raise questions regarding the judge's impartiality. Colo. J.E.A.B. Op. 08-03.

Judges are not permitted to be members of special bar association, as it would convey the appearance of a special relationship to one side in the adversarial process. Judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position. Alaska Ad. Op. 99-4.

A judge may not participate in an infomercial for a local surgeon, which would demean the judicial office and lend the prestige of the judge's office to advance the physician's private interests. Md. Ad. Op. 2006-11.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. Md. Ad. Op. 2005-11.

Judge may make presentations before groups representing single components of the judicial system as long as the judge is careful about the contents of the discussions and does not give legal advice, comment on pending cases, or offer opinions that would indicate biases or prejudgment of certain types of cases. The judge must also be willing to accept invitations from other components in the system. Utah Ad. Op. 2006-06.

Judge may maintain membership in a cycling club that is sponsored, in part, by a law firm. Utah Ad. Op. 03-01.

Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary* capacity.

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, Rule 2.11, outlining the circumstances under which a judge must disqualify himself or herself, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

ETHICS OPINIONS

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 2007-07.

The judge should not accept appointment to a blue ribbon panel of public and private leaders charged with "reducing the state's contribution

and vulnerability to a changed climate'' by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. The judge's work on the panel would involve consulting with or providing recommendations to the legislative and executive branches on climate control issues, which are unconnected with the law, the legal system, the administration of justice, or the role of the judiciary. Colo. J.E.A.B. Op. 06-08.

Rule 3.3: Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

ETHICS OPINIONS

A judge may not testify as a character witness on a voluntary basis, but he is obligated to comply with a subpoena if one is issued. Where a judge has been asked to provide such testimony, the judge should consider whether the interests of justice require his or her testimony, and if not should then consider attempting to discourage the subpoenaing party or lawyer from requiring the testimony, because of the possibility that the testimony is being sought to trade on the judge's position. Colo. J.E.A.B. Op. 06-03.

A judge may not write a letter to the pardon board at the request of convicted felon sentenced by the judge, nor should the judge write such a letter of the judge's own initiative. Alaska Ad. Op. 2003-01.

A judge should not testify as a character witness for a criminal defendant in a trial unless the judge has been subpoenaed. The giving of such character testimony by judges should be discouraged, and is appropriate only where a subpoena makes it unavoidable. Utah Ad. Op. 88-09.

Rule 3.4: Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

COMMENT

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

[3] Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Every governmental board, committee and commission is different and must be evaluated independently to determine whether judicial participation is appropriate. In considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board or commission relates to the law, the legal system, or the administration of justice. To effectuate the Code's goal of encouraging judges to participate in their communities, the relationship between the board's mission and the law, legal system, or the administration of justice should

be construed broadly. Any judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid. A judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality. The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper to continue the affiliation.

ETHICS OPINIONS

Judge's service on a state Children's Justice Act task force created by federal statute and requiring state judge membership should be limited to roles permitted by ethical limitations. ''Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge.'' Ak. Ad. Op. 2001-01.

Rule 3.5: Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign

immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

COMMENT

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph 4(A). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or

abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

ETHICS OPINIONS

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 07-07.

A judge may serve on a grant-making committee of a community foundation. Colo. J.E.A.B. Op. 07-03.

A judge may serve on the board of directors of a public charter school in a neighboring judicial district. Colo. J.E.A.B. Op. 07-02.

The judge should not accept appointment to a blue-ribbon panel of public and private leaders charged with ''reducing the state's contribution and vulnerability to a changed climate'' by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. Colo. J.E.A.B. Op. 06-08.

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and he may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06.

A judge may make monetary contributions to further pro bono activities, but it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Acknowledging the *pro bono* activity of particular attorneys would be permissible if it were done in a manner that is public, but letters of congratulation sent directly to the attorney could be interpreted as evidence that the attorneys are in a special position of influence or that the judge's ability to act impartially has been compromised. Alaska Ad. Op. 2004-01.

Judge may as college trustee co-host outreach event for alumni who are lawyers. Md. Ad. Op. 2008-06.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. Md. Ad. Op. 2005-11.

A judge shall not be a director or officer of an organization if it is likely that the organization will be engaged regularly in adversary proceedings in any court. Md. Ad. Op. 2008-05.

A judge may not serve on the board of a mental health organization whose representatives frequently appear in the judge's court. Utah Ad. Op. 07-04.

Judge may participate in a nationally renowned non-profit musical education and performance organization. Utah. Ad. Op. 97-3.

Part-time traffic referee may not practice criminal law. The referee also may not practice law at the court or courts which the referee serves. The judges of the district must enter disqualification in all cases in which the referee appears as counsel. Utah Ad. Op. 07-02.

Rule 3.8: Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fidu-

ciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Rule 3.9: Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

COMMENT

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

ETHICS OPINIONS

Active judge soon to retire and participate in the Senior Judge Program should refrain from setting or hearing private mediations until after he retires. Colo. J.E.A.B. Op. 06-09.

A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Trial judges conducting settlement conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle. Alaska Ad. Op. 2006-01.

Rule 3.10: Practice of Law

A judge shall not practice law except as permitted by law or this Code. A judge may act pro se but should not defend himself or herself when sued in an official capacity. The judge may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is prohibited from serving as the family member's lawyer in any forum.

COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

[2] A judge who drafts or reviews documents as permitted by this rule must comply with C.R.C.P. 11(b).

ETHICS OPINIONS

Judge may not participate in a local legal service's call-a-lawyer program by providing advice to callers, anonymous or otherwise, because doing so would constitute the practice of law. The judge may, however, engage in activities intended to encourage attorneys to perform pro bono services or act in an advisory capacity to the legal services pro bono program. Colo. J.E.A.B. Op. 06-02.

A judge may serve as a National Guard judge advocate if the judge's role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military. Judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system. Ak. Ad. Op. 2007-01.

Rule 3.11: Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

ANNOTATION

Judge's conduct in assuming command responsibility in furtherance of speculative real estate development project which depends for success upon official action of city and which results in substantial profit to judge violates canon requiring judge to avoid giving grounds for any reasonable suspicion that he is using power or prestige or his office to persuade others to contribute to the success of private business ventures and rule that judge shall not directly or indirectly lend the influence of his name or prestige of his office to aid or advance the welfare of a private business and such conduct warrants censure. In re Foster, 318 A.2d 523 (Md. 1974).

ETHICS OPINIONS

A judge may not serve as president of a corporation which markets products to correctional facilities. As a company officer, the judge would be engaged in financial dealings. A judge's service to an organization that markets product to correctional facilities may reasonably be perceived to exploit the judge's judicial position, and may cast reasonable doubt on the judge's capacity to act impartially as a judge. Utah Ad. Op. 05-01.

Rule 3.12: Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

COMMENT

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Note: Statutory disclosure and reporting requirements are contained in §§ 24-6-202 and -203, C.R.S.

ETHICS OPINIONS

Judge may not charge a fee for performing ceremonies at the court conducted during normal business hours. Utah Ad. Op. 98-8.

Rule 3.13: Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

(1) gifts incident to a public testimonial;

(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and

(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, and does not require public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

Note: Statutory disclosure and reporting requirements are contained in §§ 24-6-202 and -203, C.R.S.

ETHICS OPINIONS

Judge may not receive free travel to conference sponsored by The Roscoe Pound Foundation of Trial Lawyers of America because it could convey a special relationship to one side in the adversarial process. Alaska. Ad. Op. 99-5.

Judge may not allow law firm to pay for function following investiture. Md. Ad. Op. 2005-16.

Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental

expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

COMMENT

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

Note: Statutory disclosure and reporting requirements are contained in §§ 24-6-202 and -203, C.R.S.

Rule 3.15: Reporting Requirements

(A) A judge shall publicly report the source and amount or value of:

(1) compensation received for extrajudicial activities as permitted by Rule 3.12;

(2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items does not exceed the statutory amount specified in Title 24, Article 6 of the Colorado Revised Statutes; and

(3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A).

(B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.

(C) The public report required by paragraph (A)(1) shall be made at least annually. Public reports required by paragraph (A)(2) and (3) shall be made quarterly.

(D) Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves or other office designated by law*.

(E) Full time magistrates shall file reports required by paragraph A in the office of the clerk of the court on which the magistrate serves annually on or before January 15.

COMMENT

[1] In Colorado, judges' public reporting requirements are governed both by this Code and by statute. See § 24-6-202 and -203, C.R.S.

[2] Pursuant to section 24-6-202, all judges are required to file an annual disclosure with the secretary of state.

[3] Pursuant to section 24-6-203, judges are required to file quarterly disclosures reporting gifts, loans, tickets to events, and reimbursement for travel and lodging expenses.

[a] Money, including a loan, pledge, or advance of money or a guarantee of a loan of money with a value of $25 or more must be reported. § 24-6-203(3)(a), C.R.S.

[b] Any gift of any item of real or personal property, other than money, with a value of $50 or more must be reported. § 24-6-203(3)(b).

[c] Any loan of any item of real or personal property, other than money, if the value of the loan is $50 or more. § 24-6-203(3)(c).

[d] Waiver or partial waiver of the cost of attending CLEs or other educational conferences or seminars is included within the statutory requirement that judges report tickets to sporting, recreational, educational or cultural events with a value of $50 or more, or a series of tickets with a value of $100 or more. § 24-6-203(3)(e), C.R.S.

[e] Payment of or reimbursement for actual and necessary expenditures for travel and lodging at a convention or meeting at which the judge is scheduled to participate must be reported unless the payment or reimbursement is made from public funds, a joint governmental agency, an association of judges, or the judicial branch. § 24-6-203(3)(f), C.R.S.

[4] The disclosure reports filed with the secretary of state's office may be posted electronically on its website when technically feasible.

CANON 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,* or by this Canon, a judge or a judicial candidate* shall not:

(1) act as a leader in, or hold an office in, a political organization;*

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;

(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(6) publicly identify himself or herself as a candidate of a political organization;

(7) seek, accept, or use endorsements from a political organization;

(8) personally solicit* or accept campaign contributions;

(9) use or permit the use of campaign contributions for the private benefit of the judge or others;

(10) use court staff, facilities, or other court resources as a judicial candidate;

(11) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A), except as permitted by Rule 4.3.

COMMENT

General Considerations

[1] A judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

Participation in Political Activities

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3.

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no ''family exception'' to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited by paragraphs (A)(2) or (A)(3).

Statements and Comments Made during a Campaign for Judicial Office

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their retention committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In making any such response, the judge should maintain the dignity appropriate to judicial office.

[9] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

Pledges, Promises, or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office

[10] The role of a judge is different from that of a legislator or executive branch official Campaigns for retention to judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 are intended to help preserve the integrity and independence of the judiciary, and to honor Colorado's merit-based system of selecting and retaining judges.

[11] Paragraph (A)(13) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[12] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

ANNOTATION

Judge who allowed candidate for public office to place a sign in support of candidate outside judge's home publicly endorsed candidate for public office, thereby engaging in a prohibited political activity and improperly lending the prestige of his office to advance the private interests of another. In re Inquiry Concerning McCormick, 639 N.W.2d 12 (Iowa 2002).

ETHICS OPINIONS

The Colorado District Judges' Association (''Association'') may hire a public information officer (''PIO'') to convey general information to the public and discrete information, like issues impacting trial judges and trial courts, to news media. Subject to the limits set forth in the Code of Judicial Conduct (''Code''), the PIO may also appear before deliberative bodies to advocate positions designed to improve the welfare of trial courts and staff, the legal system, and the administration of justice. If a judge faces active opposition and is a candidate for retention, the PIO may also help that judge formulate a response to such opposition. Though the PIO may not be subject to the requirements of the Code, the Association's members in general, and especially its elected officers, are responsible for ensuring that the PIO's conduct and statements comply with the Code. Colo. J.E.A.B. Ad. Op. 19-01.

To make clear that any contribution by the judge's spouse to a political candidate is not from the judge, that contribution should be made in the spouse's name alone from the spouse's separate bank account with no reference to the judge or judicial position. Colo. J.E.A.B. Op. 06-04.

A judge may not contribute to another judge's retention campaign fund. Although a judge standing for retention is not necessarily a candidate for ''public'' office, judicial contributions to retention elections necessarily politicizes them, in contravention to the Code. Alaska Op. 98-3.

A judge may not attend a political party caucus. A judge may vote in a primary election, even when participation is conditioned on party affiliation. Utah. Ad. Op. 2002-1.

A judge may not act as a master of ceremonies at a ''Meet the Candidates Night'' sponsored by a local PTA, because the meeting is a political gathering. Utah Ad. Op. 98-15.

Rule 4.2: Political and Campaign Activities of a Judge Who is a Candidate for Retention

(A) A judicial candidate* in a retention public election* shall:

(1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;

(2) comply with all applicable federal and state election, election campaign, and election campaign fund-raising laws and regulations;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.3, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.3, that the candidate is prohibited from doing by Rule 4.1.

ETHICS OPINIONS

The Colorado District Judges' Association (''Association'') may hire a public information officer (''PIO'') to convey general information to the public and discrete information, like issues impacting trial judges and trial courts, to news media. Subject to the limits set forth in the Code of Judicial Conduct (''Code''), the PIO may also appear before deliberative bodies to advocate positions designed to improve the welfare of trial courts and staff, the legal system, and the administration of justice. If a judge faces active opposition and is a candidate for retention, the PIO may also help that judge formulate a response to such opposition. Though the PIO may not be subject to the requirements of the Code, the Association's members in general, and especially its elected officers, are responsible for ensuring that the PIO's conduct and statements comply with the Code. Colo. J.E.A.B. Ad. Op. 19-01.

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provide viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. Op. 08-04.

Rule 4.3: Retention Campaign Committees

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

(1) The judge may speak at public meetings;

(2) the judge may use advertising media, provided that the advertising is within the bounds of proper judicial decorum;

(3) a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;

(4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses;

(5) the judge should not be advised of the source of funds raised by the committee or committees;

(6) the judge should review and approve the content of all statements and materials produced by the committee or committees before their dissemination.

COMMENT

[1] Judicial candidates are prohibited from personally soliciting funds in support of their retention or personally accepting retention campaign contributions. See Rule 4.1(A)(8).

[2] Retention campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Judicial candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their retention campaign committees.

[3] At the start of a retention campaign, the candidate must instruct the retention campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a judge who is retained are permitted to make campaign contributions, the judge should not be informed of the source of any funds.

Note: The Fair Campaign Practice Act, §§1-45-101 et seq., C.R.S. applies to campaigns for and against retention in office.

ETHICS OPINIONS

A great deal of media attention to a judge's ruling, even if it is critical of the ruling, does not, in itself, constitute active opposition to the judge's retention. However, if there is an organized campaign in opposition to the judge's retention or if there are individual comments opposed to the judge's retention that have been broadcast to a public audience, the judge may safely conclude that there is active opposition to the judge's retention. Here, the Board concludes that the numerous comments posted on the local newspaper's website recommending non-retention of the judge amount to active opposition. Nevertheless, the Board cautions the judge that even though he may, ethically, campaign for retention, he should begin a campaign with great care, bearing in mind that our system strongly disfavors judicial campaigns. Colo. J.E.A.B. Op. 08-05.

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provide viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. 08-04.

A judge may operate a retention campaign if there is active opposition to the judge's retention. Active opposition does not include a below-average performance rating by the Judicial Conduct Commission or casual, water-cooler type discussions in opposition to the judge's retention, but can include scenarios where an anti-retention message is broadcast to a large audience of potential voters, such as through a letter to the editor, lawn signs, or paid advertisements in a publication. Active opposition may also be found in news stories, timed to a judge's retention election, that raise negative facts and qualification issues not immediately relevant to a news-making case. Utah Ad. Op. 2000-05.

Rule 4.4: Activities of Judges Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

COMMENT

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The ''resign to run'' rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the ''resign to run'' rule.

Index to Colorado Rules of Civil Procedure

Index entries for the rules governing contingent fees, the rules of procedure for judicial bypass of parental notification requirements, the rules of judicial discipline, and the code of judicial conduct have been incorporated into this index. The following citations for the incorporated rules have been used in this index:

Cont. Fees refers to the rules governing contingent fees

J.B.P.N. refers to the rules of procedure for judicial bypass of parental notification requirements

C.R.J.D. refers to rules of judicial discipline

C.J.C. refers to the code of judicial conduct, which includes canons and rules

Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.

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CHAPTER 25

The Colorado Rules of County Court Civil Procedure

ANALYSIS BY RULE

CHAPTER 25

COLORADO RULES OF COUNTY COURT CIVIL PROCEDURE

Rule 301. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in all county courts created and governed by Chapter 45 of the Colorado Session Laws of 1964. They shall be liberally construed to secure the just, speedy and inexpensive determination of every action.

(b) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Source: (b) amended and adopted December 5, 1996, effective January 1, 1997.

Editor's note: Chapter 45 of the session laws of 1964 is now numbered as article 6 of title 13, C.R.S.

ANNOTATION

Orders need not be signed to be valid. There is no provision in these rules requiring orders to be signed in order to be valid. Spar Consol. Mining & Dev. Co. v. Aasgaard, 33 Colo. App. 35, 516 P.2d 127, aff'd, 185 Colo. 157, 522 P.2d 726 (1974).

Rule 302. Form of Action

There shall be one form of action to be known as a ''Simplified Civil Action''.

Rule 303. Commencement of Action

(a) How Commenced. A simplified civil action is commenced: (1) by filing with the court a complaint consisting of a statement of claim setting forth briefly the facts and circumstances giving rise to the action in the manner and form provided in Rule 308; or (2) by service of a summons and complaint. The complaint must be filed within 14 days of the service of the summons and not less than 7 days in advance of the return date. If the complaint is not timely filed, the service of the summons shall be deemed ineffective and void without notice. In such case the court may, in its discretion, tax a reasonable sum in favor of the defendant to compensate the defendant for expense and inconvenience, including attorney's fees, to be paid by plaintiff or the plaintiff's attorney. The 14 day filing requirement may be expressly waived by a defendant and shall be deemed waived upon the filing of an answer or motion to the complaint without reserving the issue.

(b) Issuance of Summons. Upon the filing of a complaint as provided in section (a) of this rule and the payment of the docket fee, the clerk shall docket the case and assign it a number. Unless summons has prior thereto been issued and signed by an attorney, the clerk shall then sign and issue a summons under the seal of the court. Separate, additional, and amended summons may be issued by the clerk or an attorney of record against any defendant at any time, and when issued by an attorney, it must be filed with the court no later than 7 days in advance of the return date. All process shall be issued by the clerk except as otherwise provided by these rules.

(c) Time of Jurisdiction. The court shall have jurisdiction from (1) the filing of the complaint, or (2) the service of the summons and complaint; provided, however, if more than 14 days elapses after service upon any defendant before the filing of the complaint, jurisdiction as to that defendant shall not attach by virtue of the service.

Source: (a) amended July 22, 1993, effective January 1, 1994; (b) amended November 18, 1993, effective January 1, 1994; (a) and (b) amended and effective June 28, 2007; (c) amended and effective April 10, 2008; entire rule amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 304. Service of Process

(a) To What Applicable. This rule applies to all process except as otherwise provided by these rules.

(b) Initial Process. Except in cases of service by publication under Rule 304(f), the complaint and a blank copy of the answer form shall be served with the summons.

(c) By Whom Served. Process may be served within the United States or its Territories by any person whose age is eighteen years or older, not a party to the action. Process served in a foreign country shall be according to any internationally agreed means reasonably calculated to give notice, the law of the foreign country, or as directed by the foreign authority or the court if not otherwise prohibited by international agreement.

(d) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode, with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) Upon a natural person whose age is at least thirteen years and less than eighteen years, by delivering a copy thereof to the person and another copy thereof to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control the person may be, or with whom the person resides, or in whose service the person is employed, and upon a natural person under the age of thirteen years by delivering a copy to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to the person in whose care or control the person may be.

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator.

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers, or that officer's secretary or assistant;

(B) A general partner of any form of partnership, or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members, or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant;

(E) A trustee of a trust, or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import

duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) Repealed.

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor, the city manager, the clerk, or deputy clerk.

(7) Upon a county, by delivering a copy thereof to the county clerk, chief deputy, or county commissioner.

(8) Upon a school district, by delivering a copy thereof to the superintendent.

(9) Upon the state by delivering a copy thereof to the attorney general.

(10) (A) Upon an officer, agent, or employee of the state, acting in an official capacity, by delivering a copy thereof to the officer, agent, or employee, and by delivering a copy to the attorney general.

(B) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof, and by delivering a copy to the attorney general.

(C) For purposes of service of an initial summons and complaint, the copies shall be delivered to both the party and the attorney general within the times as set forth in rule 312(a). For all other purposes, the effective date of service shall be the latter date of delivery.

(11) Upon other political subdivisions of the State of Colorado, special districts, or quasi-municipal entities, by delivering a copy thereof to any officer or general manager, unless otherwise provided by law.

(12) Upon any of the entities or persons listed in subsections (4) through (11) of this section (d) by delivering a copy to any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person. The delivery shall be made in any manner permitted by such appointment or law.

(e) Substitute Service. In the event that a party attempting service of process by personal service under section (d) is unable to accomplish service, and service by publication or mail is not otherwise permitted under section (f), the party may file a motion, supported by an affidavit of the person attempting service, for an order for substituted service. The motion shall state (1) the efforts made to obtain personal service and the reason that personal service could not be obtained, (2) the identity of the person to whom the party wishes to deliver the process, and (3) the address, or last known address of the workplace and residence, if known, of the party upon whom service is to be effected. If the court is satisfied that due diligence has been used to attempt personal service under section (d), that further attempts to obtain service under section (d) would be to no avail, and that the person to whom delivery of the process is appropriate under the circumstances and reasonably calculated to give actual notice to the party upon whom service is to be effective, it shall:

(1) Authorize delivery to be made to the person deemed appropriate for service, and

(2) Order the process to be mailed to the address(es) of the party to be served by substituted service, as set forth in the motion, on or before the date of delivery.

Service shall be complete on the date of delivery to the person deemed appropriate for service.

(f) Other Service. Except as otherwise provided by law, service by mail or publication shall be allowed only in actions affecting specific property or status or other proceedings in rem. When service is by publication, the complaint need not be published with the summons. The party desiring service of process by mail or publication under this section (f) shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such

service, and shall show the efforts, if any, that have been made to obtain personal service and shall give the address, or last known address, of each person to be served or shall state that this address and last known address are unknown. The court, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the party to send by registered or certified mail a copy of the summons and a copy of the complaint, addressed to such person at such address, requesting a return receipt signed by addressee only. Such service shall be complete on the date of the filing of proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the summons in a newspaper published in the county in which the action is pending. Such publication shall be made once each week for five successive weeks. Within fifteen days after the order the party shall mail a copy of the summons and complaint to each person whose address or last known address has been stated in the motion and file proof thereof. Service shall be completed on the day of the last publication. If no newspaper is published in the county, the court shall designate one in some adjoining county.

(g) Manner of Proof. Proof of service shall be made as follows:

(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or statement duly acknowledged under oath by any other person completing the service as to date, place, and manner of service.

(2) Repealed.

(3) If served by mail, an affidavit showing the date of the mailing, with the return receipt attached, where applicable.

(4) If served by publication, by the affidavit of publication, together with an affidavit as to the mailing of a copy of the summons, complaint and answer form where required.

(5) If served by waiver, by the written admission or waiver of service by the person or persons to be served, duly acknowledged, or by their attorney.

(6) If served by substituted service, by a duly acknowledged statement as to the date, place, and manner of service, accompanied by an affidavit that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons issued.

(i) Waiver of Service of Summons. A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the defendant.

(j) Refusal of Copy. If a person to be served refuses to accept a copy of the summons and complaint, service shall be sufficient if the person serving the documents knows or has reason to identify the person who refuses to be served, identifies the documents being served as a summons and complaint, offers to deliver a copy of the documents to the person who refuses to be served, and thereafter leaves a copy in a conspicuous place.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; entire rule amended and effective March 23, 2006; (g)(1) amended and effective February 7, 2008; (d)(1) and (d)(4) amended and effective June 21, 2012.

Rule 305. Service and Filing of Pleadings and other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper related to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, filings on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that

pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 304.

(b) Making Service. (1) Service under C.R.C.P. 305(a) on a party represented by an attorney is made upon the attorney unless the court orders personal service upon the party. A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any out-of-state attorney practicing in any courts of this state.

(2) Service under C.R.C.P. 305(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone 18 years of age or older residing there;

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing;

(C) If the person served has no known address, leaving a copy with the clerk of the court; or

(D) Delivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number in the pleadings effects consent in writing for such delivery. Parties who have subscribed to E-Filing, pursuant to Chief Justice Directive 06-02 have agreed to receive E-Service. Service by other electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service by other electronic means or overnight courier under C.R.C.P. 305(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Service: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing; Certificate of Service. All papers after the initial pleading required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule C.R.C.P. 316 and discovery requests and responses shall not be filed until they are used in the proceeding or the court orders otherwise.

(e) Filing with Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A paper filed by E-Filing in compliance with Chief Justice Directive 06-02 constitutes a written paper for the purpose of this Rule. The clerk shall not refuse to accept any paper presented for filing solely because it is not presented in proper form as required by these rules or any local practice.

(f) Inmate Filing and Service. Except where personal service is required, a pleading filed or served by an inmate confined to an institution is timely filed or served if deposited in the institution's internal mailing system on or before the last day for filing or serving. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (a), (b), (d), and (e) amended July 22, 1993, effective January 1, 1994; entire rule repealed and readopted and effective June 28, 2007.

Rule 305.5. Electronic Filing and Serving

(a) Definitions:

(1) **Document:** A pleading, motion, writing or other paper filed or served under the E-System.

(2) **E-Filing/Service System:** The E-Filing/service system (''**E-System**'') approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(3) **Electronic Filing:** Electronic filing (''**E-Filing**'') is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) **Electronic Service:** Electronic service (''**E-Service**'') is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(5) **E-System Provider:** The E-Service/E-Filing system provider authorized by the Colorado Supreme Court.

(6) **Signatures:**

I. Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

II. Scanned Signature: A graphic image of a handwritten signature.

(b) Types of Cases Applicable: E-Filing and E-Service may be used for all cases filed in county court as the service becomes available. The availability of the E-System will be determined by the Colorado Supreme Court and announced through its website: http:www.courts.state.co.us and through published directives. E-Filing and E-Service may be mandated pursuant to Section (o) of this Rule 305.5.

(c) To Whom Applicable:

(1) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5 may register to use the E-System. The E-System provider will provide an attorney permitted to appear pursuant to C.R.C.P. 205.3 or 205.5 with a special user account for purposes of E-Filing and E-Serving only in the case identified by a court order approving pro hac vice admission. The E-System provider will provide an attorney certified as pro bono counsel pursuant to C.R.C.P. 204.6 with a special user account for purposes of E-Filing and E-Serving in pro bono cases as contemplated by that rule. An attorney may enter an appearance pursuant to C.R.C.P. 121, Section 1-1, through E-Filing. Where E-Filing is mandated pursuant to Section (o) of this Rule 305.5, attorneys must register and use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(d) Commencement of Action-Service of Summons: Cases may be commenced under C.R.C.P. 303 through an E-Filing. Cases commenced under C.R.C.P. 303 through an E-Filing must be E-Filed to the court no later than seven (7) days before the set return date, if any. Service of a summons shall be made in accordance with C.R.C.P. 304.

(e) E-Filing, Date and Time of Filing: Documents filed in cases on the E-System may be filed under C.R.C.P. 305 through an E-Filing. A document transmitted to the E-System provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(f) E-Service - When Required - Date and Time of Service: Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g) Filing Party To Maintain the Signed Copy, Paper Document Not To Be Filed, Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by

the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(h) Default Judgments and Original Documents:

(1) If the action is on a promissory note or where an original document is by law required to be filed, that original document shall be scanned and submitted electronically with the e-filed motion for default. The original document shall be presented to the court in order that the court may make a notation of the judgment on the face of the document.

(2) Following compliance with sub-paragraph (1) of this paragraph (h) the document may then be returned to the filing party; retained by the court for a specified period of time to be determined by the court; or destroyed by the court.

(3) When the return of service is required for entry of default, the return of service may be scanned and E-Filed. In accordance with paragraph (i) of this Rule, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(i) Documents Requiring E-Filed Signatures: E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(j) C.R.C.P. 311 Compliance: Use of the E-System by an attorney constitutes compliance with the signature requirement of C.R.C.P. 311. An attorney using the E-System shall be subject to all other requirements of Rule 311.

(k) Documents Under Seal: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the discretion of the court; however, the filing party may object to this procedure.

(l) Transmitting of Orders, Notices, and Other Court Entries: Courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(m) Form of E-Filed Documents: C.R.C.P. 310 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

(n) Repealed.

(o) E-Filing May Be Mandated: With the permission of the Chief Justice, a chief judge may mandate E-filing within a county or judicial district for specific case classes or types of cases. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(p) Relief in the Event of Technical Difficulties:

(1) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (1) an error in the transmission of the document to the E-System provider which was unknown to the sending party, (2) a failure of the E-System provider to process the E-Filing when received, or (3) other technical problems experienced by the filer or E-System provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(q) Form of Electronic Documents:

(1) Electronic Document Format, Size, and Density: Electronic document format, size, and density shall be as specified by Chief Justice Directive #11-01.

(2) **Multiple Documents:** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(3) **Proposed Orders:** Proposed orders shall be E-Filed in an editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk's office and must be resubmitted.

Source: Entire rule and committee comment added and effective September 10, 2009; (a)(6), (b), (d), (f), (g), (h)(3), (i), and (q)(1) amended and (n) repealed and effective June 21, 2012; (f) amended and effective May 9, 2013; (c) and committee comment amended and effective December 31, 2013; (c)(1) amended and effective September 9, 2015; comments amended and effective January 12, 2017.

COMMENTS

2009

[1] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces/).

[2] ''Editable Format'' is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

[3] C.R.C.P. 377 provides that courts are always open for business. This Rule 305.5 is intended to comport with that rule.

2017

[4] Effective November 1, 2016, the name of the court authorized service provider changed from the ''Integrated Colorado Courts E-Filing System'' to ''Colorado Courts E-Filing'' (www.jbits.courts.state.co.us/efiling/).

Rule 306. Time

(a) Computation. (1) In computing any period of time prescribed or allowed by these rules, by order of court, or by an applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted including holidays, Saturdays or Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(2) As used in this Rule, ''Legal holiday'' includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the eleventh day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 325 and 360(b), except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. Repealed.

(d) Notice, Motion, Affidavits. Repealed.

(e) Additional Time on Service Under C.R.C.P. 305(b)(2)(B), (C), or (D). Repealed.

Source: (e) amended July 22, 1993, effective January 1, 1994; (a) amended and effective August 4, 1994; (a) and (e) amended and effective and (e) committee comment added and effective June 28, 2007; (a) amended and (c), (d), and (e) and (e) committee comment repealed and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012.

Cross references: For statutes concerning holidays, see article 11 of title 24, C.R.S.

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P.33 (January 2012).

Time computation is sometimes "forward," meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting "backward" means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

Rule 307. Pleadings and Motions

(a) Pleadings. There shall be a complaint and an answer which may or may not include a counterclaim. No other pleadings shall be allowed except by order of court.

(b) Motions. Repealed.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(d) Agreed Case, Procedure. Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules.

Source: (b) repealed, effective April 5, 2010.

Rule 308. General Rules of Pleading

(a) Claims for Relief. Complaints shall be in the form and content of Appendix to Chapter 25, Form 2, C.R.C.P., and shall be signed by the plaintiff or the plaintiff's attorney.

(b) Defenses; Form of Denials. The answer shall be in the form and content of Appendix to Chapter 25, Form 3, C.R.C.P., and shall be signed by the defendant or the defendant's attorney.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 309. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of

an organized association of persons that is a party. The issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity shall be raised by a short, concise, negative statement with supporting particulars in the answer.

(b) Fraud, Mistake, Condition of the Mind. All claims of fraud or mistake and the facts constituting such shall be concisely stated.

(c) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(d) Judgment. In pleading a judgment or decision of a court, judicial or quasi-judicial tribunal, or of a board or officer within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(e) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(f) Special Damages. When items of special damage are claimed, they shall be specifically stated.

(g) Pleading Statute. In pleading a statute of Colorado or of the United States, the same need not be set forth at length, but it shall be sufficient to refer to such statute by the appropriate designation in the official or recognized compilation thereof, or otherwise identify the same, and the court shall thereupon take judicial notice thereof.

Rule 310. Form of Summons, Pleadings and Other Documents

(a) Caption; Names of Parties. The complaint and answer shall be in the form shown in Appendix to Chapter 25, C.R.C.P. with a caption that conforms with C.R.C.P. 10. The complaint in an action brought pursuant to section 13-40-110, C.R.S., shall also include a demand for possession setting forth all jurisdictional prerequisites necessary for the entry of judgment for possession. The complaint in an action brought pursuant to section 13-6-104 (5) or (6), C.R.S., shall also be verified and include a demand for injunctive relief. The complaint in an action brought pursuant to section 13-6-105(1)(f), C.R.S., shall also be verified and include a demand for injunctive relief, and a copy of the covenant shall be attached as an exhibit. Affidavits, written orders and all other documents authorized to be filed shall contain the form of caption as specified in C.R.C.P. 10. In all cases the case or docket number shall appear on the document if known.

(b) Exhibits. An exhibit is a part of the document to which it is attached for all purposes.

(c) Form of Summons. The summons shall be in the form and content prescribed by the Appendix to Chapter 25, Forms 1, 1A (for actions brought pursuant to section 13-40-110, C.R.S.), 1B (for actions brought pursuant to section 13-6-105(1)(f), C.R.S.), or 1C (for actions where service is permitted to be by publication), with a caption that conforms with C.R.C.P. 10. The summons shall contain the name, address, telephone number, and registration number of the plaintiff's attorney, if any, and if not, the full name, address and daytime telephone number of the plaintiff.

(d) General Rule Regarding Paper Size and Quality. Only documents which are clear and legible and are on permanent plain 8 1/2 by 11 inch paper shall be filed.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; (a) corrected and effective January 9, 1995; (a) and (c) amended June 1, 2000, effective July 1, 2000; (c) amended and effective July 10, 2000.

Rule 311. Signing of Pleadings

(a) Obligations of parties and attorneys. When a party is not represented by an attorney, the party shall sign the pleadings. The pleadings shall contain the party's address,

and if the party is not represented by an attorney, shall include the party's telephone number. If a party is represented by an attorney, the attorney shall sign the pleading and state on the initial pleading the attorney's registration number, and in addition thereto shall note the attorney's address and telephone number thereon. The signature of the attorney on a pleading shall have the same effect and subject the attorney to the same penalties as provided in C.R.C.P. 11. If the pleading is not signed, it may be stricken and the action may proceed as though the pleading had not been filed. If the current registration number of the attorney is not included with the signature, the clerk of the court shall request from the attorney the registration number. If the attorney is unable to furnish the clerk with a registration number, that fact shall be reported to the clerk of the Supreme Court, but the clerk shall, nevertheless, accept the filing.

(b) Limited Representation. An attorney may undertake to provide limited representation in accordance with Colo.RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement. In helping to draft the pleading or paper filed by the pro se party, the attorney certifies that to the best of the attorney's knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. Assistance by an attorney to a pro se party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 311(b).

Limited representation of a pro se party under this Rule 311(b) shall not constitute an entry of appearance by the attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 305, and does not authorize or require the service of papers upon the attorney. Representation of the pro se party by the attorney at any proceeding before a judge, magistrate, or other judicial officer on behalf of the pro se party constitutes an entry of an appearance pursuant to C.R.C.P. 121, section 1-1. The attorney's violation of this Rule 311(b) may subject the attorney to the sanctions provided in C.R.C.P. 311(a).

Source: Entire rule amended July 22, 1993, effective January 1, 1994; entire rule amended and adopted June 17, 1999, effective July 1, 1999.

ANNOTATION

Law reviews. For article, ''Discrete Task Representation a/k/a Unbundled Legal Services'', see 29 Colo. Law. 5 (Jan. 2000).

Rule 312. Defenses and Objections — When and How Presented — by Pleading or Motion — Motion for Judgment on Pleadings

(a) Responsive Pleadings; When Presented. The defendant shall file an answer including any counterclaim or cross-claim on or before the appearance date as fixed in the summons. Except as otherwise provided in this rule, the appearance date shall not be more than 63 days from the date of the issuance of the summons and the summons must have been served at least 14 days before the appearance date. When circumstances require that the plaintiff proceed under Rule 304(e), the above limitation shall not apply and the appearance date shall not be less than 14 days after the completion of service by publication or mail.

(b) Motions. Motions raising defenses shall be made in accordance with Rule 307. If made by the defendant on or before the appearance date the motions shall be ruled upon before an answer is required to be filed. If the court rules upon such motions on the appearance date, the defendant may be required to file the answer immediately. The answer shall otherwise be filed within 14 days of the order. The court may permit the plaintiff to amend the complaint or supply additional facts and may permit additional time within which the answer shall be filed.

(c) Waiver of Defenses. A party waives all defenses and objections which are not raised either by motion or in his answer except that the defense of lack of jurisdiction of the subject matter may be made at any time.

(d) Motion for Judgment on the Pleadings. At any time after the last pleading is filed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. A party shall not submit matters outside the pleadings in support of the motion.

Source: Entire section amended July 22, 1993, effective January 1, 1994; (a) amended and adopted effective April 23, 1998; (a) amended and effective June 28, 2007; (a) and (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Rule 313. Counterclaim and Cross Claim

(a) Compulsory Counterclaims. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is within the jurisdiction of the county court, exclusive of interest and costs, arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim, does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction, and is not the subject of another pending action, the defendant shall file such counterclaim in the answer or thereafter be barred from suit on the counterclaim. The defendant may also elect to file a counterclaim not arising out of the transaction or occurrence.

(b) Alternate. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is not within the jurisdiction of the county court, exclusive of interest and costs, the defendant may:

(1) File the counterclaim in the pending county court action, but, unless the defendant follows the procedure set forth in section (2) below, any judgment in the defendant's favor shall be limited to the jurisdictional limit of the county court, exclusive of interest and costs, and suit for the excess due the defendant over that sum will be barred thereafter; or

(2) File the counterclaim together with the answer in the pending county court action and request in the answer that the action be transferred to the district court. Upon filing the answer and counterclaim, the defendant shall tender the district court filing fee for a complaint. Upon compliance by the defendant with the requirements of this section, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court. In the event the counterclaim which caused the removal is subsequently dismissed, the case may be remanded to the county court for further proceedings.

(c) Counterclaim Maturing or Acquired after Pleading. A claim which either matured or was acquired by the defendant after the answer was filed may, with the permission of the court, be presented as a counterclaim by supplemental pleading. If the counterclaim exceeds the jurisdiction of the county court, upon request of the defendant to transfer the case to district court and the tendering of the district court filing fee for a complaint, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court. If

it is determined that the defendant's request for transfer was made for the purpose of delaying the trial of the plaintiff's claim, the district court shall award the plaintiff any costs, including reasonable attorney fees, occasioned by the delay.

(d) Omitted or Amended Counterclaim. When a defendant fails to file a counterclaim or request that the case be transferred to the district court through oversight, inadvertence, or excusable neglect, or when justice requires, the counterclaim may be pled by amendment, subject to Rule 315. If this omitted or amended counterclaim exceeds the jurisdiction of the county court, upon request of the defendant to transfer the case to district court and the tendering of the district court filing fee for a complaint, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court. If it is determined that the defendant's request for transfer was made for the purpose of delaying the trial of the plaintiff's claim, the district court shall award the plaintiff any costs, including reasonable attorney's fees, occasioned by the delay.

(e) Cross Claim against Co-party. An answer may state a cross claim against a codefendant arising out of the same transaction or occurrence that is the subject matter of the original action or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that a party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant. A claim which either matured or was acquired by the defendant after filing the answer may, with the permission of the court, be presented as a cross claim by supplemental pleading. Any cross claim shall be limited to the jurisdictional limit of the county court, but the cross claimant shall have the right to dismiss the cross claim without prejudice at any time prior to trial, except that a dismissal operates as an adjudication upon the merits when requested by the cross claimant who has once dismissed in any court an action based on or including the same claim.

(f) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of Rules 319 and 320.

(g) Claims against Assignor or Assignee. Except as otherwise provided by law as to negotiable instruments, any claim, counterclaim, or cross claim which could be asserted against an assignor at the time of or before notice of an assignment, may be asserted against an assignee of the assignor, to the extent that such claim, counterclaim, or cross claim does not exceed recovery upon the claim of the assignee.

Source: (a), the introductory portion to (b), and (b)(2) amended and effective July 1, 1993; entire rule amended July 22, 1993, effective January 1, 1994; (b)(2) amended and effective February 8, 2013.

ANNOTATION

Court not to predetermine damages for jurisdictional question. Since damages are a matter of proof at the trial, a trial court may not determine in advance of filing whether the jurisdictional amount can be established. Medina v. District Court, 177 Colo. 185, 493 P.2d 367 (1972).

The three provisions of paragraph (b) are mutually exclusive alternatives for pursuing counterclaims in county court. As a result, when defendant filed its counterclaim in county court its potential recovery was limited to $5,000. Intern. Satellite Com. v. Kelly Servs., 749 P.2d 468 (Colo. App. 1987).

Even though defendant's counterclaim did not mature until after the action was begun, it is still subject to the other provisions of this rule. Intern. Satellite Com. v. Kelly Servs., 749 P.2d 468 (Colo. App. 1987).

Tenant's unlawful eviction action in district court was properly dismissed where tenant failed to mention landlord's unlawful detainer action in county court, failed to comply with the procedural requirements for asserting an unlawful eviction claim, and was unable to refile the same answer and counterclaim in district court that he had filed in county court. Platte River Drive J. Venture v. Vasquez, 560 P.2d 599 (Colo. App. 1993).

Applied in Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838 (1975); Hurricane v. Kanover, Ltd., 651 P.2d 1218 (Colo. 1982).

Rule 314. No Colorado Rule

Rule 315. Amended Pleadings

Amendments. Amendment to pleadings shall not be permitted except by order of court.

Rule 316. Pretrial Procedure — Disclosure and Conference

(a) Disclosure Statement.

(1) At any time after the answer is filed but no later than 21 days before trial, a party may request from an opposing party a list of witnesses who may be called at trial, and copies of documents and pictures, and a description of physical evidence which may be used at trial. Such request shall be made by serving pursuant to C.R.C.P. 305 a blank disclosure statement, which shall be in the form and content of Appendix to Chapter 25, Form 9, on the opposing party and shall be accompanied by the requesting party's properly completed Form 9 and its attachments. The opposing party shall serve pursuant to C.R.C.P. 305 a completed Form 9 with attachments on the requesting party within 21 days after service but not less than 7 days before trial. The court may shorten or extend that time. A party may not supplement the disclosure statement except for good cause.

(2) The court may order the parties to exchange and file Form 9 disclosure statements at any time before trial.

(3) Any party failing to respond in good faith to a Form 9 request or court order under this subsection (a) shall be subject to imposition of appropriate sanctions at the time of trial.

(b) Pretrial Conferences. Prior to trial, the court may in its discretion and upon reasonable notice order a pretrial conference. Conferences by telephone are encouraged. Following a pretrial conference, the court may issue an order which may include limitations on the issues to be raised and the witnesses and exhibits to be allowed at trial, entry of judgment, or dismissal, if appropriate. Failure to appear at a pretrial conference may result in appropriate sanctions, including an award of attorney's fees and expenses incurred by the appearing party.

(c) Pretrial Discovery. If a pretrial conference is held, any party may request that discovery be permitted to assist in the preparation for trial. The request shall be made only during the conference. The discovery may include depositions, requests for admission, interrogatories, physical or mental examinations, or requests for production or inspection. If the court enters a discovery order, it shall set forth the extent and terms of the discovery as well as the time for compliance. If the court fails to specify any term, then the provisions of C.R.C.P. 30, 32, 33, 34, 35, and 36 shall be followed as to the missing term.

(d) Resolution of Disputes. All issues regarding discovery shall be resolved during the conference. No party shall be entitled to seek protective orders following the conference. Unless otherwise ordered by the court, a dispute over compliance with the discovery order shall be resolved at the time of trial, and the court may impose appropriate sanctions, including attorney's fees and costs, against the non-complying party.

(e) Juror Notebooks. The court may order the use of juror notebooks. If notebooks are to be used, counsel for each party shall confer about items to be included in juror notebooks and at the pretrial conference or other date set by the court make a joint submission to the court of items to be included in the juror notebook.

COMMITTEE COMMENT

Subsection (a) provides for the disclosure of a list of witnesses and copies of exhibits through the use of a form Disclosure Statement in simple cases. This rule also sets forth the procedure for pretrial conferences. A simplified form of discovery has been developed for the exceptional case warranting the expense of discovery due to the increased jurisdictional limit of the county court and is available only when there is a pretrial conference. The procedure is designed to provide discovery which is tailored to the particular needs of the parties. In order to

avoid disputes arising from discovery, all matters should be resolved by the court at the time of the conference.

Source: Entire rule added May 30, 1991, effective September 1, 1991. (e) added and adopted June 25, 1998, effective January 1, 1999; (a)(1) and (a)(3) amended and effective June 28, 2007; (a)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 317. Parties Plaintiff and Defendant

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but a fiduciary as defined in section 15-1-301, C.R.S., a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in such party's own name without joining the party for whose benefit the action is brought, and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado.

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

(c) Minors or Incapacitated Persons. Whenever a minor or incapacitated person has a representative, such as a fiduciary as defined in section 15-1-301, C.R.S., the fiduciary may sue or defend on behalf of the minor or incapacitated person. If a minor or incapacitated person does not have a duly appointed fiduciary, or such fiduciary fails to act, the minor or incapacitated person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incapacitated person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incapacitated person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be a minor or incapacitated person.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 318. Joinder of Claims and Remedies

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

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

Rule 319. Necessary Joinder of Parties

Persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or the person's consent cannot be obtained, that person may be made a defendant, or in proper cases, an involuntary plaintiff.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 320. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against that party, and may order separate trials or make other orders to prevent delay or prejudice.

(c) Parties Jointly or Severally Liable. Persons jointly or severally liable upon the same obligation or instrument, including the parties to negotiable instruments and sureties on the same or separate instruments, may all or any of them be sued in the same action, at the option of the plaintiff.

Source: (b) amended July 22, 1993, effective January 1, 1994.

Rule 321. Misjoinder and Nonjoinder of Parties

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

Rules 322 and 323.

(There are no present Colorado Rules 322 and 323.)

Rule 324. Intervention

Upon good cause shown, the court may permit intervention on such terms as it deems just.

Rule 325. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 305 and upon persons not parties in the manner provided in Rule 304 for the service of process, and may be served in any county. Suggestion of death upon the record is made by service of a statement of the fact of death as provided herein for the service of the motion and by filing of proof thereof. If the motion for substitution is not made within 91 days (13 weeks) after such service, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incapacity. If a party becomes incapacitated, the court upon motion served as provided in section (a) of this Rule may allow the action to be continued by or against the party's representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a)(1) of this Rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in the officer's official capacity, the officer may be described as a party by the official title rather than by name; but the court may require the official's name to be added.

Source: (b) and (d) amended July 22, 1993, effective January 1, 1994; (a)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 326. Depositions to Preserve Testimony

(a) After jurisdiction has been obtained over the defendant or over the property which is the subject of the action, a deposition by written interrogatories of a witness, including a party, may be ordered taken by the court upon motion pursuant to Rule 307 but only upon a showing (1) that the witness is or will be absent from the state at the time of trial or is or will be more than one hundred miles from the place of trial at the time of trial; or (2) that the witness will be unable to attend or testify because of age, sickness, infirmity, or imprisonment.

(b) If the court shall order such a deposition to be taken it shall be done in accordance with, and thereafter subject to, the provisions of Rule 331. Upon entry of such order, the deposition may be taken by oral examination upon agreement of the parties.

(c) The court, in lieu of a deposition to preserve testimony, may, where circumstances warrant, allow the witness to testify at the trial by telephone.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

Law reviews. For article, "Limited Discovery in Colorado's County Courts", see 18 Colo. Law. 1959 (1989).

Rules 327 to 330.

(There are no present Colorado Rules 327 to 330.)

Rule 331. Conducting Depositions to Preserve Testimony

(a) Serving Interrogatories; Notice. If the court shall order the taking of a deposition of any person, the party desiring to take the deposition shall serve upon every other party not in default at least 7 days prior to the scheduled deposition copies of the written interrogatories, including the name and address of the person who is to answer them and the name, descriptive title, and address of the officer who will administer the interrogatories and transcribe the responses. Within 7 days thereafter a party so served may serve cross-interrogatories upon the party proposing to take the deposition. No redirect or recross interrogatories shall be permitted.

(b) A copy of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the order who shall put the witness on oath and who shall personally, or by someone acting under the officer's direction and in the officer's presence, record the answers of the witness verbatim. When the answers are fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 332(d) hereof the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(c) Certification and Filing by Officer, Copies; Notice of Filing.

(1) The officer shall certify on the interrogatories and answers thereto that the witness was duly sworn and that the deposition is a true record of the answers given by the witness. The deposition shall then be securely sealed in an envelope endorsed with the title of the action and marked ''deposition of (here insert name of witness)'', and it shall be promptly delivered or sent by registered or certified mail to the attorney for the party taking the deposition and give written notice of the delivery or mailing to all other parties.

(2) Upon the payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) [Deleted]

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the order.

Source: (a), (b), and (c) amended July 22, 1993, effective January 1, 1994; (a) amended and effective June 28, 2007; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 332. Effect of Errors and Irregularities in Depositions to Preserve Testimony

(a) As to Notice. All errors and irregularities in the notice for taking a deposition under Rule 331 are waived unless written objection is promptly served upon the party after notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition. Objections to the form of written interrogatories submitted under Rule 331 are waived unless served in writing upon the party propounding them within **three days** of receipt of said interrogatories.

(d) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under these rules are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or, with due diligence might have been, ascertained.

Source: (d) amended July 22, 1993, effective January 1, 1994; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rules 333 to 337.

(There are no present Colorado Rules 333 to 337.)

Rule 338. Right to Trial by Jury

(a) Exercise of Right. Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury. The jury fee is not refundable; however, a demanding party may waive that party's demand for trial by jury pursuant to section (e) of this rule.

(b) Demand. A demand for trial by jury must be made on or before the appearance date. The demand may be made orally at the time of appearance or endorsed on the face of the complaint or answer. The demanding party shall pay the requisite jury fee at the time the demand is made and shall serve the demand on all other parties.

(c) Jury Fees. When a party to an action has exercised the right to demand a trial by jury, every other party to such action shall also pay the requisite jury fee unless such other party files and serves a notice of waiver of the right to trial by jury within 14 days after service of the demand.

(d) Specification of Issues. A demand may specify the issues to be tried to the jury; in the absence of such specification, the party filing the demand shall be deemed to have demanded trial by jury of all issues so triable. If a party demands trial by jury on fewer than all of the issues so triable, any other party, within 14 days after the demand is made, may file and serve a demand for trial by jury of any other issues so triable.

(e) Waiver; Withdrawal. The failure of a party to make a demand as required by this rule and simultaneously pay the requisite jury fee constitutes a waiver of that party's right to trial by jury. A demand for trial by jury made pursuant to this rule may not subsequently be withdrawn in the absence of the written consent of every party who has demanded a trial by jury and paid the requisite jury fee and of every party who has failed to waive the right to trial by jury and paid the requisite jury fee.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990; (c) and (d) amended and effective June 28, 2007; (c) and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 339. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded and the requisite jury fee has been paid pursuant to Rule 338, the action shall be designated upon the register of actions as a jury action. The trial shall be by jury of all issues so demanded, unless (1) all parties who have demanded a trial by jury and paid the requisite jury fee and all parties who have failed to waive the right to trial by jury and paid the requisite jury fee have, in writing, waived their rights to trial by jury, or (2) the court upon motion or on its own initiative finds that a right to trial by jury of some or all of those issues does not exist, or (3) all parties demanding trial by jury fail to appear at trial.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 338 shall be tried by the court.

(c) No Advisory Jury or Jury Without a Jury Demand. An issue not designated in a demand as an issue triable by jury shall not be tried by an advisory jury or by any jury.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990.

ANNOTATION

Litigant is denied right to jury trial by repeated continuances. By structuring the court system to require a civil litigant to undergo repeated continuances if a jury trial is requested, a civil litigant is denied the right to a jury trial. Halliburton v. County Court ex rel. City & County of Denver, 672 P.2d 1006 (Colo. 1983).

Applied in Husar v. Larimer County Court, 629 P.2d 1104 (Colo. App. 1981).

Rule 340. Assignment of Cases for Trial

Trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient.

Rule 341. Dismissal of Actions

(a) (1) Subject to the provisions of these rules, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing notice of dismissal at any time before filing or service by the adverse party of an answer, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) **By Order of Court.** Except as provided in subsection (a)(1) of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal.

(1) **By Defendant.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim. After the completion of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render a judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under Rule 303, operates as an adjudication upon the merits.

(2) **By the Court.** Actions not prosecuted or brought to trial with due diligence may, upon notice, be dismissed without prejudice unless otherwise specified by the court upon 28 days' notice in writing to all appearing parties or their counsel of record, unless a party shows cause in writing within said 28 days why the case should not be dismissed.

(c) Dismissal of Counterclaim or Cross Claim. The provisions of this Rule apply to the dismissal of a counterclaim or cross claim, except as provided in Rule 313(e).

Source: (b) and (c) amended July 22, 1993, effective January 1, 1994; (b)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

This rule provides for a plaintiff's voluntary dismissal of his action without prejudice if the notice of dismissal is filed before the adverse party files or serves his answer. The provisions of the rule also apply to the dismissal of a counterclaim. Where a reply to a counter-

claim was filed after the notice of dismissal was sought, there is no reason why the counterclaim should not be dismissed as a matter of course. Empiregas, Inc., of Pueblo v. County Court, 715 P.2d 937 (Colo. App. 1985).

Rule 342. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim or issue.

(c) Court Sessions Public; When Closed. All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case.

Rule 343. Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or any statute of this state or of the United States excepting the Federal Rules of Evidence.

(b) to **(d)** Repealed.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. This shall include applications to grant or dissolve an injunction and for the appointment or discharge of a receiver.

(f) and **(g)** Repealed.

(h) (1) **Request for absentee testimony.** A party may request that testimony be presented at a trial or hearing by a person absent from the courtroom by means of telephone or some other suitable and equivalent medium of communication. A request for absentee testimony shall be made by written motion or stipulation filed as soon as practicable after the need for absentee testimony becomes known. The motion shall include:

(A) The reason(s) for allowing such testimony.

(B) A detailed description of all testimony which is proposed to be taken by telephone or other medium of communication.

(C) Copies of all documents or reports which will be used or referred to in such testimony.

(2) **Response.** If any party objects to absentee testimony, said party shall file a written response within 7 days following service of the motion unless the opening of the proceeding occurs first, in which case the objection shall be made orally in open court at the commencement of the proceeding or as soon as practicable thereafter. If no response is filed or objection is made, the motion may be deemed confessed.

(3) **Determination.** The court shall determine whether in the interest of justice absentee testimony may be allowed. The facts to be considered by the court in determining whether to permit absentee testimony shall include but not be limited to the following:

(A) Whether there is a statutory right to absentee testimony.

(B) The cost savings to the parties of having absentee testimony versus the cost of the witness appearing in person.

(C) The availability of appropriate equipment at the court to permit the presentation of absentee testimony.

(D) The availability of the witness to appear personally in court.

(E) The relative importance of the issue or issues for which the witness is offered to testify.

(F) If credibility of the witness is an issue.

(G) Whether the case is to be tried to the court or to a jury.

(H) Whether the presentation of absentee testimony would inhibit the ability to cross examine the witness.

(I) The efforts of the requesting parties to obtain the presence of the witness.

If the court orders absentee testimony to be taken, the court may issue such orders as it deems appropriate to protect the integrity of the proceedings.

Source: (a) amended, (b) to (d), (f), and (g) repealed, and (h) added March 17, 1994, effective July 1, 1994; (a) corrected and effective January 9, 1995; (h) repealed and readopted and effective June 28, 2007; (h)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 344. Proof of Official Record

(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by the deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of the office.

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by the deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of the office, accompanied by a certificate as above provided, is admissible as evidence that the records of the office contain no such record or entry.

(c) Other Proof. This Rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence.

(d) Certified Copies of Records Read in Evidence. All copies of any record, or document, or paper, in the custody of a public officer of this state, or of the United States, certified by the officer having custody thereof, or verified by the oath of such officer to be a full, true and correct copy of the original in the officer's custody, may be read in evidence in an action or proceeding in the courts of this state, in like manner and with like effects as the original could be if produced.

(e) Seal Dispensed With. In the event any office or officer, authenticating any documents under the provisions of this Rule, has no official seal, then authentication by seal is dispensed with.

(f) Statutes and Laws of Other States and Countries. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the supreme court shall be

limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this subdivision, with the same force and effect as if the same had been admitted in evidence.

Source: (a) to (d) amended July 22, 1993, effective January 1, 1994; (a) corrected and effective January 9, 1995.

Rule 345. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. Subpoenas may be issued under Rule 345 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon oral motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees for one day's attendance and mileage allowed by law. Service is also valid if the person named in the subpoena has signed a written admission or waiver of personal service. When the subpoena is issued on behalf of the state of Colorado, or an officer or agency thereof, fees and mileage need not be tendered. Proof of service shall be made as in Rule 304(g). Unless otherwise ordered by the court for good cause shown, such subpoena shall be served no later than 48 hours before the time for appearance set out in said subpoena.

(d) Subpoena for Taking Depositions on Written Interrogatories; Place of Examination. (1) Presentation of a notice to take a deposition by written interrogatories as provided in Rule 331, constitutes a sufficient authorization for the issuance by the judge or clerk of any court of record in the county where the deposition is to be taken, or by the notary public or other officer authorized to take the deposition, of subpoenas for the persons named or described therein.

(2) A resident of this state may be required by subpoena to attend an examination upon deposition by written interrogatories only in the county wherein the person resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of the court. A nonresident of this state may be required by subpoena to attend only in the county wherein the person is served with the subpoena, or within forty miles from the place of service, or at such other convenient place as is fixed by the order of the court.

(e) Subpoena for Deposition to Preserve Testimony, Hearing or Trial. Subpoenas shall be issued either by the clerk of the court in which the case is docketed or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. A subpoena requiring the attendance of a witness at a deposition to preserve testimony, hearing or trial may be served any place within the state.

Source: (a), (c), (d)(2), and (e) amended July 22, 1993, effective January 1, 1994; (c) amended and effective April 10, 2008.

Rule 346. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or states the objection to the action of the court

and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 347. Jurors

(a) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case, utilizing the parties' CJI(3d) Instruction 2:1 or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief, non-argumentative statements.

(V) General legal principles applicable to the case, including burdens of proof, definitions of preponderance and other pertinent evidentiary standards and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall explain the general principles of law applicable to civil cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.

(b) Alternate Jurors. No alternate jurors shall be called or impaneled to sit on juries in the county court.

(c) Challenge to Array. A challenge to the array of jurors may not be made by either party.

(d) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory.

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror.

(2) Consanguinity or affinity within the third degree to any party.

(3) Standing in the relation of guardian, ward, employer, employee, principal, or agent to any party, or being a member of the family of any party, or a partner in business with any party or being security on any bond or obligation for any party.

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation.

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

(f) Order and Determination of Challenges for Cause. The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness.

(g) Order of Selecting Jury. The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining in the order called and each side beginning with plaintiff shall indicate thereon its peremptory challenge. The clerk shall then swear the remaining jurors to the number required to try the cause and these shall constitute the jury.

(h) Peremptory Challenges. Each side shall be entitled to one peremptory challenge, and if there be more than one party to a side they must join in such challenge. One additional peremptory challenge shall be allowed to each party appearing under Rule 324 if the trial court in its discretion determines that the ends of justice so require.

(i) Oath of Jurors. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.

(j) When Juror Disqualified. If before verdict a juror becomes unable or disqualified to perform the juror's duty the parties may agree to proceed with the other jurors or agree that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew.

(k) Examination of Premises by Jury. The court may not order or permit the jury to see or examine any property or place.

(l) Deliberation of Jury. After hearing the charge the jury may either decide in court or retire for deliberation. If it retires, except as hereinafter provided in this section, it shall be kept together in a separate room or other convenient place under the charge of one or more officers until it agrees upon a verdict or is discharged. While the jury is deliberating the officer shall, to the utmost of the officer's ability, keep the jury together, separate from other persons. The officer shall not communicate or allow any communication to be made to any juror unless by order of the court except to ask it if it has agreed upon a verdict, and shall not, before the verdict is rendered, communicate with any person the state of its deliberations or the verdict agreed upon. The court in its discretion in any individual case may modify the procedure under this Rule by permitting a jury which is deliberating to separate during the luncheon or dinner hour or separate for the night under appropriate cautionary instructions, with directions that they meet again at a time certain to resume deliberations again under the charge of the appropriate officer.

(m) Items Taken to Deliberation. Upon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence.

(n) Additional Instructions. After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties.

(o) New Trial if No Verdict. When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) When Sealed Verdict. While the jury is absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term shall discharge the jury.

(q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer be in the affirmative, they shall hand the same to the clerk. The clerk shall enter in the record the names of the jurors. Upon a request of any party the jury may be polled.

(r) Correction of Verdict. If the verdict be informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out.

(s) Verdict Recorded, Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

(t) Juror Notebooks. Juror notebooks may be available during trial and deliberation to aid jurors in the performance of their duties.

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

Source: (e)(3), (j), (l), (m), and (q) amended July 22, 1993, effective January 1, 1994. (a) repealed and readopted, (m) amended, and (t) added June 25, 1998, effective January 1, 1999; (u) added and adopted March 13, 2003, effective July 1, 2003.

Cross references: For jury selection and service, see the "Colorado Uniform Jury Selection and Service Act", article 71 of title 13, C.R.S.

Rule 348. Number of Jurors

The jury shall consist of the number provided by statute.

Cross references: For the number of jurors, see § 13-71-103, C.R.S.

Rule 349. No Colorado Rule

Rule 350. Motion for a Directed Verdict

A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without the assent of the jury.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 351. Instructions to Jury

(a) Any party may submit proposed jury instructions by filing with the court two sets of proposed jury instructions and verdict forms. Both sets may be photocopies, but one copy of each instruction shall contain a brief statement of the legal authority on which the proposed instruction is based. The party submitting such instructions and forms shall,

simultaneously with the filing of the jury instructions and forms, serve copies on all other appearing parties or their counsel of record.

(b) The parties shall make all objections to the instructions before they are given to the jury. Only the objections specified shall be considered on motion for post-trial relief or on appeal or certiorari. Before closing argument, the court shall read its instructions to the jury but shall not comment upon the evidence. The court's instructions may be taken by the jury when it retires. All instructions offered or given shall be filed with the clerk and, with the indorsement thereon indicating the action of the court, shall be taken as a part of the record of the cause.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 351.1. Colorado Jury Instructions

(1) In instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instructions (CJI) as are applicable to the evidence and the prevailing law.

(2) In cases in which there are no CJI instructions on the subject, or in which the factual situation or changes in the law warrant a departure from the CJI instructions, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner which is clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible.

Rule 352. Judgment by the Court

Entry of Judgment. In all actions tried upon the facts without a jury the court shall, at the conclusion of the case, forthwith orally announce its decision, including findings of fact and conclusions of law, and direct the entry of the appropriate judgment. No written findings shall be required. The court may, under exceptional circumstances, take a case under advisement.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 353. No Colorado Rule

Rule 354. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order to or from which an appeal lies.

(b) Judgment Upon Multiple Claims. Whether as a claim, counterclaim or cross claim, the court may not direct the entry of a final judgment upon less than all of the claims presented.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) Against Partnership. Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served.

(f) After Death, How Payable. If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate.

(g) Against Unknown Defendants. The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint.

(h) Revival of Judgments. A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 14 days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 304. If the judgment debtor answers, any issue so presented may be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. A judgment entered on or after July 1, 1981 must be revived within six years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

Source: (h) amended and effective April 5, 2010; (d) and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 355. Default

(a) Entry at Time of Appearance. Upon the date and at the time set for appearance, if the defendant has filed no answer or fails to appear and if the plaintiff proves by appropriate return that the summons was served at least 14 days before the appearance date, the judge may enter judgment for the plaintiff for the amount due, including interest, costs and other items provided by statute or the agreement. However, before judgment is entered, the court shall be satisfied that the venue of the action is proper under Rule 398(c).

(b) At Time of Trial. Failure to appear on any date set for trial shall be grounds for entering a default and judgment thereon against the non-appearing party. For good cause shown, the court may set aside an entry of default and the judgment entered thereon in accordance with Rule 360.

Source: (a) amended and effective June 28, 2007; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rules 356 and 357.

(There are no present Colorado Rules 356 and 357.)

Rule 358. Entry and Satisfaction of Judgment

(a) Entry. Judgment upon the verdict of a jury or upon trial by the court in all actions shall be entered forthwith by the judge or the clerk at the discretion of the judge. A notation of the judgment shall be made in the register of actions as provided in Rule 379(a) and such notation of the judgment shall constitute the entry of judgment. The judgment shall not be effective for the purpose of placing a lien upon property unless so recorded in the register of actions. Money judgments shall also be entered in the judgment record as

provided for in Rule 379(c). Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed by the court, pursuant to Rule 305, to each absent party who has previously appeared.

(b) Satisfaction. Satisfaction in whole or in part of a money judgment may be entered in the judgment record (Rule 379(c)) upon an execution returned satisfied in whole or in part, or upon the filing of a satisfaction with the clerk, signed by the judgment creditor's attorney of record unless a revocation of that authority be previously filed, or by the signing of such satisfaction, by the judgment creditor, attested by the clerk or notary public, or by the signing of the judgment record (Rule 379(c)) by one herein authorized to execute satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the judgment creditor or the judgment creditor's attorney to give such satisfaction, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it. With respect to judgments entered on or after July 1, 1981 the clerk shall, after six years from the entry of final judgment, satisfy the judgment and shall enter a full satisfaction in the judgment record (Rule 379(c)) unless the judgment is revived pursuant to Rule 354(h).

Source: (b) amended July 2, 1986, effective January 1, 1987; entire rule amended July 22, 1993, effective January 1, 1994; (b) amended and adopted February 27, 1997, effective July 1, 1997.

Rule 359. New Trials; Amendment of Judgments

(a) No Motion for New Trial Necessary. Motion for new trial shall not be a condition of appeal from the county to district court.

(b) Time for Motion. A motion for new trial (which must be in writing) may be made within 14 days of entry of judgment and if so made the time for appeal shall be extended until 14 days after disposition of the motion. Only matters raised in said motion shall be considered on appeal.

(c) Grounds. A new trial may be granted to all or any of the parties, and on all or a part of the issues, after trial by jury or by the court. On a motion for a new trial in an action tried without a jury, the court may upon the judgment, if one has been entered, take additional testimony and direct the entry of a new judgment. Subject to the provisions of Rule 361, a new trial may be granted for any of the following causes:

(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial.

(2) Misconduct of the jury.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages.

(6) Insufficiency of the evidence.

(7) Error in law.

When application is made under subsection 1, 2, 3, or 4 of section (c) of this Rule it shall be supported by affidavit filed with the motion. When application is made under any of the subsections (1) to (7) of section (c) of this Rule there shall be filed with the motion a short memorandum brief including authorities, if any, upon which the applicant relies in support of the motion.

(d) Time for Filing and Serving Affidavits. When a motion for a new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten calendar days after service thereof within which to file opposing affidavits, which period maybe extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(e) On Initiative of Court. Not later than fifteen days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(f) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than 21 days after entry of the judgment.

(g) Effect of Granting Motion. The granting of a motion for a new trial shall not be an appealable order, but a party by participating in the new trial shall not be deemed to have waived any objections to the granting of the motion, and the validity of the order granting the motion may be raised on appeal to the district court and in the petition in the Supreme Court for writ of certiorari.

Source: (d) amended and effective June 28, 2007; (b) and (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b) amended and adopted January 29, 2016, effective April 1, 2016.

ANNOTATION

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rule 360. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the records and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2), not more than six months after the judgment, order, or proceeding complained of was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding; or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or the defendant's legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; (b) corrected and effective January 2, 1996.

ANNOTATION

This rule applies to default judgments. Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Applied in Pollard v. Walsh, 194 Colo. 566, 575 P.2d 411 (1978).

Rule 361. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the

court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 362. Stay of Proceedings to Enforce a Judgment

(a) No Automatic Stay. If, upon the rendition of a judgment, payment is not made forthwith, an execution may issue immediately and proceedings may be taken for its enforcement unless the defendant requests a stay of execution and the court grants such request. Proceedings to enforce execution and other process after judgment and the fees therefor shall be as provided by law or these rules.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 359, or of a motion for relief from a judgment or order made pursuant to Rule 360, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 350, or pending the filing and determination of an appeal to the district court.

Rule 363. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or finding of fact and conclusions of law are filed, then any other judge lawfully sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that the judge cannot perform those duties having not presided at the trial or for any other reason, a new trial may be ordered.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 364. No Colorado Rule

Rule 365. Injunctions, Restraining Orders and Orders for Emergency Protection

(a) Civil Protection Orders. No civil protection order, restraining order, or injunction under Title 13, Article 14, shall be issued by the court, except as provided therein.

(b) Repealed.

(c) Restrictive Covenants on Residential Real Property.

(1) Upon the filing of a duly verified complaint alleging that the defendant has violated a restrictive covenant on residential real property, the court shall issue a summons, which shall include notice to the defendant that it will hear the plaintiff's request for a preliminary injunction on the appearance date. A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if: (a) it clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or the party's attorney can be heard in opposition, and (b) the plaintiff or the plaintiff's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give notice and the reasons supporting a claim that notice should not be required. The restraining order shall be served upon the defendant, together with the summons and complaint, and shall be effective until the appearance date.

(2) On the appearance date, the court shall examine the record and the evidence and, if upon such record and evidence the court shall be of the opinion that the defendant has violated the restrictive covenant, the court shall issue a preliminary injunction which shall remain in effect until the trial of the action. If merely restraining the doing of an act or acts will not effectuate the relief to which the plaintiff is entitled, the injunction may be made mandatory. The court may, upon agreement of the parties, order that the trial of the action be advanced and consolidated with the preliminary injunction hearing.

(3) Any restraining order or injunction issued under this section (c) shall inform the defendant that a violation thereof will constitute contempt of court and subject the defendant to such punishment as may be provided by law.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; (a) and (c)(1) amended and (b) repealed, effective April 27, 2017.

ANNOTATION

County court has no jurisdiction to enter restraining order limiting visitation with a child when a custody proceeding is pending in another state. G.B. v. Arapahoe County Ct., 890 P.2d 1153 (Colo. 1995).

Rule 366. No Colorado Rule

Rule 367. Deposit in Court

(a) By Party. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

(b) By Trustee. When it is admitted by the pleadings or examination of a party that the party has possession or control of any money or other things capable of delivery which, being the subject of litigation, is held by that party as trustee for another party, or which belongs or is due to another party, upon motion, the court may order the same to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Source: (b) amended July 22, 1993, effective January 1, 1994.

Rule 368. Offer of Judgment

Repealed July 12, 1990, effective, nunc pro tunc, July 1, 1990.

Rule 369. Execution and Proceedings Subsequent to Judgment

(a) In General. Except as provided in Rule 403 herein, process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.

(b) Execution for Costs. Whenever costs are finally awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment. Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same upon filing a remittance with the clerk of the court below, and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution on application therefor.

(c) Debtor of Judgment; Debtor May Pay Sheriff. After issuance of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of the debt, or so much as may be necessary to satisfy the execution, and the sheriff's receipt shall be sufficient discharge for the amount so paid.

(d) Order for Debtor to Answer. At any time when execution may issue on a judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to answer such interrogatories concerning his property as shall be approved by the court. The interrogatories when so approved shall be mailed by the clerk to the judgment debtor, who shall answer the said interrogatories and mail or file them with the court within 14 days after receipt thereof by the judgment debtor. The interrogatories, upon approval, may also be served upon the judgment debtor in accordance with Rule 304.

(e) Order for Interrogatories to Debtor of Judgment Debtor. At any time when execution may issue on a judgment, upon proof to the satisfaction of the court, by affidavit

or otherwise, that any person or corporation has property of the judgment debtor or is indebted to the judgment creditor in an amount exceeding fifty dollars not exempt from execution, the court may order such person to answer such interrogatories as the court may approve touching upon the matters set forth in the affidavit of the judgment creditor.

(f) Order for Property to be Applied on Judgment; Contempt. The court may order any property of the judgment debtor not exempt from execution in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. If any person, party or witness disobeys an order of the court properly made in proceedings under this Rule, he shall be punished by the court for contempt. Nothing in this Rule shall be construed to prevent an action in the nature of a creditor's bill.

(g) Pattern Interrogatories - Use Automatically Approved. The pattern interrogatories set forth in Appendix to Chapter 25, Form Numbers 7 and 7A are approved, and as part of the judgment order, may be mailed by the clerk or served by the judgment creditor in accordance with rule 304 without any further order of court. Any proposed non-pattern interrogatory must be specifically approved by the court.

Source: (c) and (e) amended and effective and (g) added and effective June 28, 2007; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 370. Judgment for Specific Acts; Personal Property

If a judgment directs a party to execute a transfer of documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party on application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt.

If personal property is within the state, the court in lieu of directing a transfer thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a transfer executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

ANNOTATION

This rule properly may be read with the understanding that county courts have jurisdiction to issue decrees of specific performance. Snyder v. Sullivan, 705 P.2d 510 (Colo. 1985).

Rule 371. Procedure in Behalf of and Against Persons Not Parties

An order made in favor of a person who is not a party to the action may be enforced by the same procedure as if the person were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, the person is liable to the same procedure for enforcing obedience to the order as any party.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rules 372 to 376.

(There are no present Colorado Rules 372 to 376.)

Rule 377. Courts and Clerks

(a) Courts Always Open. Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and the conducting of court business.

(b) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or deputy in attendance shall be open at such hours and on such days as may be provided by law, and by local rule not in conflict with law. All motions and all applications in the clerk's office for issuing process, for entering defaults and judgments by default, and for other proceedings which do not require allowance or order of the court are grantable as a matter of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court or judge upon cause shown.

(c) Orders in Any County. Any ex parte order in any pending action may be entered by the court, or by any judge thereof.

Source: (a) and (b) amended July 22, 1993, effective January 1, 1994.

Rule 378. No Colorado Rule

Rule 379. Records

(a) Register of Actions (Civil Docket). The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below. The register of actions may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file, or the cover of the case jacket.

(2) A microfilm roll, film jacket, or microfiche card.

(3) Computer magnetic tape or magnetic disc storage, where the register of actions items appear on the terminal screen, or on a paper print-out of the screen display.

(4) Any other form or style prescribed by supreme court directive.

A register of actions shall be prepared for each case or matter filed. The file number of each case or matter shall be noted on every page, jacket cover, film or computer record whereon the first and all subsequent entries of actions are made. All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. The notation of the judgment in the register of actions shall constitute the entry of judgment. When trial by jury has been demanded or ordered, the clerk shall enter the word jury on the page, jacket cover, film or computer record assigned to that case.

(b) Indices; Calendars. The clerk shall keep suitable indices of all records as directed by the court. The clerk shall also keep, as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any of the following forms or styles:

(1) A page or sheet in a book or separate file.

(2) A mechanical or hand operated index machine or card file.

(3) Computer magnetic tape or magnetic disc storage, where the information appears on the terminal screen, or on a print-out of the screen display.

(4) Microfilm copies of 1, 2, and 3 above.

(5) Any other form or style prescribed by supreme court directive.

(c) Judgment Record. The clerk shall keep a judgment record in which a notation shall be made of every money judgment. The judgment record may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket or separate file, or the cover of the case jacket.

(2) Computer magnetic tape or magnetic disc storage, where the judgment and subsequent transactions appear on the terminal screen, or on a paper print-out of the screen display.

(3) A microfilm copy or variation of 1 and 2 above.

(4) Any other form or style prescribed by supreme court directive.

(d) Retention and Disposition of Records. The clerk shall retain and dispose of all court records in accordance with instructions provided in the manual entitled, Colorado Judicial Department, Records Management.

Rule 380. Reporter; Stenographic Report or Transcript as Evidence

(a) A record of the proceedings and evidence at trials in the county court shall be maintained by electronic devices except as such record may be unnecessary in certain proceedings pursuant to specific provisions of law.

(b) Whenever the testimony of a witness at a trial or hearing which was recorded by electronic devices or by stenographic means is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported or transcribed the testimony, or by the judge.

(c) Reporter's Notes, Electronic or Mechanical Recording; Custody, Use, Ownership, Retention. All electronic or mechanical recordings shall be the property of the state. The recordings shall be retained by the court for no less than six months after the creation of the recordings, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department Record Retention Manual. During the period of retention, recordings shall be made available to the person the court may designate. During the trial or the taking of other matters on the record, the recordings shall be considered the property of the state, even though in the custody of the reporter, judge, or clerk.

Source: Entire rule amended June 9, 1988, effective January 1, 1989; (c) amended February 14, 2019, effective immediately.

Editor's note: The June 9, 1988, amendment to this rule resulted in the renumbering of the paragraphs contained therein.

Rule 381. Applicability in General

Special Statutory Proceedings. These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

Rule 382. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of any court.

Rule 383. Rules by Trial Courts

All county court local rules, including local county court procedures and standing orders having the effect of county court local rules, enacted before February 1, 1992, are hereby repealed. Each county court, by a majority of its judges, may from time to time propose county court local rules and amendments of the county court local rules. A proposed local rule or amendment shall not be inconsistent with the Colorado Rules of County Court Civil Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in county courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of county court local rules is required. Numbering and format of any county court local rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. The Supreme Court's approval of a county court local rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of

a county court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of County Court Civil Procedure.

Source: Entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Law reviews. For article, ''Limited Discovery in Colorado's County Courts'', see 18 Colo. Law. 1959 (1989).

Rule 384. Forms

Repealed July 22, 1993, effective January 1, 1994.

Rule 385. Title

Repealed December 5, 1996, effective January 1, 1997.

Rules 386 to 396.

(There are no present Colorado Rules 386 to 396.)

Rule 397. Change of Judge

A judge shall be disqualified in an action in which the judge is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or attorney as to render it improper to sit on the trial or other proceeding therein. The disqualification may be made on the judge's own initiative, or any party may move for such disqualification and any motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion, all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualification, the judge shall notify forthwith the presiding judge of the court, who shall assign another judge of the court to hear the action. If no other judge of the court is available, the judge shall notify forthwith the chief judge of the district, who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the state court administrator, who shall obtain from the Chief Justice the assignment of a replacement judge.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

Law reviews. For article, ''Disqualification of Judges'', see 13 Colo. Law. 54 (1984).

Rule 398. Place of Trial

(a) Venue of Real Property. All actions affecting real property shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.

(b) Venue for Recovery of Penalty, etc. Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream and opposite the place where the offense was committed.

(2) Against a public officer or person specially appointed to execute his duties, for an

act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

(c) Venue for Tort and Contract and Other Actions. (1) Except as provided in sections (a) and (b) and subsections (c)(2) through (5) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(2) Except as provided in subsection (3) of this section an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county where the same was to be performed.

(3) (A) For the purposes of this Rule, a consumer contract is any sale, lease or loan in which (i) the buyer, lessee or debtor is a person other than an organization; (ii) the goods are purchased or leased, the services are obtained, or the debt is incurred, primarily for a personal, family, or household purpose; and (iii) the initial amount due under the contract, the total amount initially payable under the lease, or the initial principal does not exceed twenty-five thousand dollars.

(B) An action on a consumer contract shall be tried (i) in the county in which the contract was signed or entered into by any defendant; or (ii) in the county in which any defendant resided at the time the contract was entered into; or (iii) in the county in which any defendant resides at the time the action is commenced. If the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(C) In any action on a consumer contract, if the plaintiff fails to state facts in the complaint or by affidavit showing that the action has been commenced in the proper county as described in this Rule, or if it appears from the stated facts the venue is improper, the court may, upon its own motion or upon motion of any party, dismiss any such action without prejudice; however, if appropriate facts appear in the record, the court shall transfer the action to an appropriate county. Any provision or authorization in any consumer contract purporting to waive any rights under subsection (3) of section (c) of this Rule is void.

(D) Any debt collector covered by the provisions of the Federal ''Fair Debt Collection Practices Act'' shall comply with the provisions of said Act set forth in 15 U.S.C. 1692(i) concerning legal actions by debt collectors, notwithstanding any provision of this Rule.

(4) An action upon a contract for services may also be tried in the county in which the services were to be performed.

(5) An action for tort may also be tried in the county where the tort was committed.

(d) Motion to Change Venue. (1) Except for actions under subsection (c) (3) of this Rule, a motion for change of venue under the provisions of (a) through (c) hereof or on the grounds that the county designated in the complaint is not the proper county shall be made on the date fixed in the summons for appearance or answer. The motion shall be heard at that time and if overruled or granted the answer shall be filed immediately unless the court shall fix a different time. Unless filed as prescribed herein the right to have venue changed on said grounds is waived.

(2) A motion for change of venue on the grounds (A) that the convenience of witnesses and the ends of justice would be promoted by the change or (B) that a party fears that he will not receive a fair trial in the county in which the action is pending because the adverse party has an undue influence over the minds of the inhabitants thereof or that they are prejudiced against him so that he cannot expect a fair trial, or (C) that the venue of the action is improper under subsection (c) (3) of this Rule, may be made either on the date

fixed in the summons for appearance or at any time before ten days prior to the date fixed for trial. The court may by order permit the filing of affidavits and a written counter motion and affidavits. Unless such motions are filed as prescribed herein the right to have venue changed on said grounds is waived.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the court to which the action is removed.

(e) Transfer Where Concurrent Jurisdiction. All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of court, be transferred by either court to such other court of the same county. Upon transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein.

(f) Place Changed if Parties Agree. When all parties assent, or when all parties who have entered their appearance assent and the remaining nonappearing parties are in default, the place of trial of an action in a county court may be changed to any other county court in the county.

(g) Parties Must Agree on Change. Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all of the plaintiffs or defendants, as the case may be.

(h) Only One Change. No Waiver. In case the place of trial is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time.

ANNOTATION

When improper venue does not impair court's jurisdiction. In a civil case where the defendant does not interpose a timely motion to change the place of trial, improper venue does not impair a court's jurisdiction. Under such circumstances, a county court does not act properly in changing venue at its own instance, contrary to the agreement of the parties and over the express objection of one of them. Halliburton v. County Court ex rel. City & County of Denver, 672 P.2d 1006 (Colo. 1983).

Rules 399 and 400.

(There are no present Colorado Rules 399 and 400.)

Rule 401. Arrest and Exemplary Damages

Repealed May 29, 1986, effective January 1, 1987.

Rule 402. Attachments

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for any tort committed against the person or property of a resident of this state, or at any time afterward before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an ex parte order of court in the manner and on the grounds prescribed in this Rule, unless the defendant shall give good and sufficient security as required by section (f) of this Rule. No ex parte attachments before judgment shall be permitted other than those specified in this Rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), the plaintiff's agent or attorney, or some credible person for the plaintiff, shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed against the person or property of a resident of this state,

stating the nature and amount of such indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this Rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant hides, or defies an officer, so that process of law cannot be served upon the defendant.

(4) The defendant is presently about to remove any property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having any property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the plaintiff shall furnish a bond or written undertaking, sufficient to the court, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each is worth the amount for which the person has become surety over and above the person's just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding the sheriff to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of the right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposits the amount of money claimed by the plaintiff or gives and furnishes security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the

sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or the person's agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 21 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ to be executed on such day.

(k) No Final Judgment Until 35 Days After Levy.

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 35 days after such levy has been made; and any creditor of the defendant making and filing within said 35-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with the complaint setting forth the claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure the claim, as the law gives to the original plaintiff.

(2) **Judgment Creditors.** Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 35 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking or complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that the judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of the cause of action, or proceedings in attachments, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal has been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of the claim or demand, as found by the court to be due, together with costs incurred; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of the defendant's hands, for the purpose of

defrauding the defendant's creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) When Suit Transferred to District Court.

(1) **Indivisible Property Over $15,000.00.** Whenever in any attachment proceedings in the county court it is determined by the court that the ownership of indivisible property of the value of more than $15,000.00 is in issue, the county court shall suspend all proceedings in the entire action and certify the same, including a transcript of any judgment which may have been rendered, and transmit all papers therein to the district court of the same county, and the entire actions shall thereupon proceed as if originally instituted in the said district court, and any judgment so certified shall be entered in the judgment docket of the district court and when so entered shall have the same force and effect as if rendered originally by such district court; provided, however, that the judgment of the district court may be reviewed by the Supreme Court on writ of certiorari.

(2) **Intervenor or Attachment Creditor.** Whenever the original suit in which a writ of attachment shall be issued and served shall be begun in the county court of any county in this state, and the claim of an attaching creditor therein, as hereinbefore provided, shall exceed the sum of $15,000.00 exclusive of costs, it shall be the duty of such court to forthwith certify such case and transmit all papers issued or filed therein the district court of such county, and thereafter the case shall proceed in the same manner as if it had been originally begun in such district court.

(o) Traverse of Affidavit. (1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained; otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within 7 days from the filing of the traverse and upon no less than two business days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and reasonable attorney's fees. A claim for damages under this subsection may be brought as part of the existing action, and the defendant shall be permitted to amend the answer and any counterclaim for this purpose.

(p) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(q) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 324, and in case of a judgment in that person's favor may also recover such damages as have been suffered by reason of the attachment of the property.

(r) Perishable Property May Be Sold. Where property taken by writ of execution or attachment, or seized under order of court, is in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court.

(s) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due,

execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(t) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in the sheriff's hands, and any proceeds of the property attached unapplied on the judgment.

(u) Procedure When Judgment Is For Defendant. If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(v) Defendant May Release Property; Bond. The defendant may at any time before judgment have released any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided in section (w) of this Rule. All the proceeds of sales all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(w) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held under any writ of attachment without taking a sufficient bond, the sheriff and the sheriff's sureties shall be liable to the plaintiff for the damages sustained thereby.

(x) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued, for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(y) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 21 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(z) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

Source: (n)(1) and (n)(2) amended and effective July 1, 1993; (a), (b), (c)(4) to (c)(9), (d), (e), (f), (h)(2), (i), (k), (l), (m), (o)(2), (q), (t), (v), and (w) amended July 22, 1993, effective January 1, 1994; (n)(1) and (n)(2) amended and adopted October 10, 2002, effective January 1, 2003; (i), (k), (o)(1), and (y) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 403. Garnishment

NOTE: County Court Rule 403 is identical to C.R.C.P. 103 except for cross references within the County Court Rule to other County Court Rules. Forms used with the County Court are identical to those used with C.R.C.P. 103, and because County Court Rule 403 cites to and incorporates C.R.C.P. Forms 26 through 34, they need not be duplicated in the County Court Forms Section.

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment — Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1
WRIT OF CONTINUING GARNISHMENT
(ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) ''Continuing garnishment'' means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) ''Earnings'' shall be defined in Section 13-54.5-101(2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 26, C.R.C.P. It shall also include at least one (1) ''Calculation of Amount of Exempt Earnings'' form to be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request of the judgment creditor. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, ''Objection to the Calculation of the Amount of Exempt Earnings'' (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with C.R.C.P. 304, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due, the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to C.R.S. 14-14-105 is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the Exemption Chart contained in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings and the blank copy of C.R.C.P. Form 28, ''Objection to the Calculation of the Amount of Exempt Earnings'' (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ.

(2) For all pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings and the ''Judgment Debtor's Objection to the Calculation of the Amount of Exempt Earnings'' to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings. A judgment debtor's objection to calculation of exempt earnings shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(2) Unless payment is made to an attorney or licensed collection agency as provided in paragraph (k)(1), the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(3) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court and a copy is delivered to the garnishee, the garnishee shall send the garnished

nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2
WRIT OF GARNISHMENT
(ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON)
WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. ''Writ of garnishment with notice of exemption and pending levy'' means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated ''writ with notice.''

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with C.R.C.P. 304.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 ''Claim of Exemption to Writ of Garnishment with Notice'' (Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with C.R.S. 13-54.5-107 (2).

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness be paid to the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within 182 days from the date of service of such writ.

SECTION 3
WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) ''Writ of garnishment for support'' means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) ''Earnings'' shall be as defined in Section 13-54.5-101(2), C.R.S., as applicable.

COMMITTEE COMMENT

The Colorado Legislature amended Section 13-54-104 and 13-54.5-101, C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of ''earnings'' applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced. Sections 1 and 3 of the Rule and Forms 26 and 31 have been revised to deal with this legislative amendment.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17A, Form 31, C.R.C.P. and shall include at least four (4) ''Calculation of Amount of Exempt Earnings'' forms which shall be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with C.R.S. 14-10-122 (1)(c), a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with C.R.C.P. 304.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall

give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period to such writ.

(h) Disbursement of Garnished Earnings. The clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4
WRIT OF GARNISHMENT — JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. ''Writ of garnishment — judgment debtor other than natural person'' means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by the garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated ''writ of garnishment — other than natural person.''

(b) Form of Writ of Garnishment — Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17A, Form 32, C.R.C.P.

(c) When Writ of Garnishment — Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment — Other Than Natural Person. Service of the writ of garnishment — other than natural person shall be made in accordance with C.R.C.P. 304. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment — other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and

against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5
WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. ''Writ of garnishment in aid of writ of attachment'' means the exclusive procedure through which the personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For the purposes of this rule such writ is designated ''writ of garnishment in aid of attachment.''

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17A, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with C.R.C.P. 402, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with C.R.C.P. 304. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by C.R.S. 13-55-102. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than

the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6
JUDGMENT DEBTOR'S OBJECTION — WRITTEN CLAIM OF EXEMPTION — HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) The written objection shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of

record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq, C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(5) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor, the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2(d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6(a) of this rule or the filing of a claim of exemption pursuant to Section 6(b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within 182 days.

(1) Notwithstanding the provisions of Section 6(a)(2) and Section 6(b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within 182 days from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings or property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor,

or such other grounds as the court may allow, but in no event shall a hearing be held pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6(a)(2) and Section 6(b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6(c)(5) and 6(d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7
FAILURE OF GARNISHEE TO ANSWER
(ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 42 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with C.R.C.P. 345 and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8
TRAVERSE OF ANSWER
(ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with C.R.C.P. 305.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment of intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with C.R.C.P. 345, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9
INTERVENTION
(ALL FORMS OF GARNISHMENT)

Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in C.R.C.P. 324 at any time prior to entry of judgment against the garnishee.

SECTION 10
SET-OFF BY GARNISHEE
(ALL FORMS OF GARNISHMENT)

Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings,

which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11
GARNISHEE NOT REQUIRED TO DEFEND CLAIMS OF THIRD PERSONS
(ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in C.R.C.P. 312 to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to C.R.C.P. 304, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12
RELEASE AND DISCHARGE OF GARNISHEE
(ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1(k)(2) or 3(g)(2) of this rule shall release and discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) Release by Judgment Creditor or Plaintiff in Attachment. A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

SECTION 13
GARNISHMENT OF PUBLIC BODY
(ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public

body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

EFFECTIVE DATE OF RULE AND AMENDMENTS OF THIS RULE

Repealed October 31, 1991, effective November 1, 1991.

Source: Repealed and readopted November 5, 1984, effective January 1, 1985; section 1(d), (f)(1), (f)(2), and (h)(1), section 2(a), (d)(2), and (e), section 3(a)(1) and (c), section 4(a) and (d), section 5(a) and (d), section 7(a)(1), (b)(3), and (b)(4), section 8(b)(3), section 12, and effective date amended February 16, 1989, effective July 1, 1989; section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; section 1(d), (f), and (j) and section 3(f) and (g)(2) amended and adopted June 28, 2001, effective August 8, 2001; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012; section 2(g)(1) amended and effective June 7, 2013; section 4(f)(1) amended and adopted January 29, 2016, effective March 1, 2016; section 1(b), (c), (g), (h)(1), (h)(2), (k)(1), (k)(2), (l)(1), and (l)(2), section 2(i), section 6 IP(d), (d)(1), and section 7(a)(2) amended and adopted January 12, 2017, effective March 1, 2017.

Rule 404. Replevin

(a) Personal Property. The plaintiff in an action in the county court to recover the possession of personal property, the value of which does not exceed fifteen thousand dollars, may, at the time of the commencement of the action, or at any time before trial, claim the delivery of such property to the plaintiff as provided in this Rule.

(b) Causes, Affidavit. Where a delivery is claimed, the plaintiff, the plaintiff's agent or attorney, or some credible person for the plaintiff, shall, by verified complaint or by complaint and affidavit under penalty of perjury show to the court as follows:

(1) That the plaintiff is the owner of the property claimed or is entitled to possession thereof and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached;

(2) That the property is being detained by the defendant against the plaintiff's claim of right to possession; the means by which the defendant came into possession thereof, and the specific facts constituting detention against the right of the plaintiff to possession;

(3) A particular description of the property, a statement of its actual value, and a statement to the plaintiff's best knowledge, information and belief concerning the location of the property and of the residence and the business address, if any, of the defendant;

(4) That the property has not been taken for a tax assessment or fine pursuant to a statute; or seized under an execution against the property of the plaintiff; or if so seized, that it is by statute exempt from seizure.

(c) Show Cause Order; Hearing within 14 Days. The court shall without delay, examine the complaint and affidavit, and if it is satisfied that they meet the requirements of subsection (b), it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereof. The hearing date shall be not more than 14 days from the date of the issuance of the order and the order must have been served at least 7 days prior to the hearing date. The plaintiff may request a hearing date beyond 14

days, which request shall constitute a waiver of the right to a hearing not more than 14 days from the date of issuance of the order. Such order shall inform the defendant that if the hearing date on the order to show cause and the appearance date fixed in the summons are different dates, the defendant must appear at both times, that the defendant may file affidavits on the defendant's behalf with the court and may appear and present testimony on the defendant's behalf at the time of such hearing, or that the defendant may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of section (j) of this Rule, and that, if the defendant fails to appear at the hearing on the order to show cause or to file an undertaking, plaintiff may apply to the court for an order requiring the sheriff to take immediate possession of the property described in the complaint and deliver same to the plaintiff. The summons and complaint, if not previously served, and the order shall be served on the defendant and the order shall fix the manner in which service shall be made, which shall be by service in accordance with the provisions of Rule 4, C.R.C.P., or in such manner as the court may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the complaint and affidavit.

(d) Order for Possession prior to Hearing. Subject to the provisions of 5-5-104, C.R.S., and upon examination of the complaint and affidavit and such other evidence or testimony as the court may thereupon require, an order of possession may be issued prior to hearing, if probable cause appears that any of the following exist:

(1) The defendant gained possession of the property by theft.

(2) The property consists of one or more negotiable instruments or credit cards.

(3) By reason of specific, competent evidence shown, by testimony with the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or that the defendant may destroy, dismantle, remove parts from, or in any way substantially change the character of the property, or the defendant may conceal or remove the property from the jurisdiction of the court to sell the property to an innocent purchaser.

(4) That the defendant has by contract voluntarily and intelligently and knowingly waived the right to a hearing prior to losing possession of the property by means of a court order.

Where an order of possession has been issued prior to hearing under the provisions of this section, the defendant or other persons from whom possession of said property has been taken, may apply to the court for an order shortening time for hearing on the order to show cause, and the court may, upon such application, shorten the time for hearing, and direct that the matter shall be heard on not less than forty-eight hours' notice to the plaintiff.

(e) Bond. An order of possession shall not issue pursuant to section (d) of this Rule until plaintiff has filed with the court in an amount set by the court in its discretion not to exceed double the value of the property a written undertaking executed by plaintiff and such surety as the court may require for the return of the property to the defendant, if return thereof be ordered, and for the payment to the defendant of any sum that may from any cause be recovered against the plaintiff.

(f) Temporary Order to Preserve Property. Under the circumstances described in section (b) of this Rule, or in lieu of the immediate issuance of an order of possession under any circumstances described in section (d) of this Rule, the court may, in addition to the issuance of the order to show cause, issue such temporary orders, directed to the defendant, prohibiting or requiring such acts with respect to the property as may appear to be necessary for the preservation of the rights of the parties and the status of the property.

(g) Order for Possession after Hearing; Bond; Directed to Sheriff. Upon the hearing on the order to show cause, which hearing shall be held as a matter of course by the court, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination of which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties. If the court determines that the action is one in which a prejudgment order of possession should issue, it shall direct the issuance of such order and may require a bond in such amount and with such surety as the court may determine to protect the rights of the

parties. Failure of the defendant to be present or represented at the hearing on the order to show cause shall not constitute a default in the main action. The order of possession shall be directed to the sheriff within whose jurisdiction the property is located.

(h) Contents of Possession Order. The order of possession shall describe the specific property to be seized, and shall specify the location or locations where there is probable cause to believe the property or some part thereof will be found. It shall direct the sheriff to seize the same as it is found, and to retain it in the sheriff's custody. There shall be attached to such order a copy of the written undertaking filed by the plaintiff, and such order shall inform the defendant of the right to except to the sureties or to the amount of the bond upon the undertaking or to file a written undertaking for the redelivery of such property as provided in section (j).

Upon probable cause shown by further affidavit or declaration by the plaintiff or someone in the plaintiff's behalf, filed with the court, an order of possession may be endorsed by the court, without further notice, to direct the sheriff to search for the property at another specified location or locations and to seize the same if found. The sheriff shall forthwith take the property if it be in the possession of the defendant or the defendant's agent, and retain it to the sheriff's custody.

(i) Sheriff May Break Building: When. If the property or any part thereof is in a building or an enclosure, the sheriff shall demand its delivery, announcing the sheriff's identity, purpose, and authority under which the sheriff acts. If it is not voluntarily delivered, the sheriff shall cause the building or enclosure to be broken open in such a manner as the sheriff reasonably believes will cause the least damage to the building or enclosure, and take the property into the sheriff's possession. The sheriff may call upon the power of the county to provide aid and protection, but if the sheriff reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, the sheriff shall refrain from seizing the property, and shall forthwith make a return before the court from which the order was issued, setting forth the reasons for the belief that such risk exists. The court may make such orders and decrees as may be appropriate.

The sheriff shall, without delay, serve upon the defendant a copy of the order of possession and written undertaking by delivering the same to the defendant personally, if the defendant can be found or to the defendant's agent for whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or if neither has any known place of abode, by mailing them to the last known address of either.

(j) When Returned to Defendant; Bond. At any time prior to the hearing on the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking, in an amount set by the court in its discretion not to exceed double the value of the property and executed by the defendant and such surety as the court may direct for the delivery of the property to the plaintiff, if such delivery be ordered, and for the payment to the plaintiff of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or Plaintiff's attorney, in the manner provided by Rule 305, C.R.C.P., a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing on the order to show cause, proceedings thereunder shall terminate, unless exception is taken to the amount of the bond or the sufficiency of the surety. If, at the time of filing of such undertaking, the property shall be in the custody of the sheriff, such property shall be redelivered to the defendant 7 days after service of notice of filing such undertaking upon the plaintiff or his attorney.

(k) Exception to Sureties. Either party may, within two business days after service of an undertaking or notice of filing and undertaking under the provisions of this Rule, give written notice to the court and the other party that the party excepts to do the sufficiency of the surety or the amount of the bond. If the party fails to do so, the party is deemed to have waived all objections to them. When a party excepts the court shall hold a hearing to determine the sufficiency of the bond or surety. If the property be in the custody of the

sheriff, he shall retain custody thereof until the hearing is completed or waived. If the excepting party prevails at the hearing, the sheriff shall proceed as if no such undertaking has been filed. If the excepting party does not prevail at the hearing, or the exception is waived, the sheriff shall deliver the property to the party filing such undertaking.

(l) Duty of Sheriff in Holding Goods. When the sheriff has taken property as provided in this Rule, it shall be kept in a secure place and delivered to the party entitled thereto, upon receiving the sheriff's fees for taking and the necessary expenses for keeping the same, after expiration of the time for filing of an undertaking for redelivery and for the exception to the sufficiency of the bond, unless the court shall by order stay such delivery.

(m) Claim by Third Person. If the property taken is claimed by any other person than the defendant or the plaintiff, such person may intervene under the provisions of Rule 324, C.R.C.P., and in the event of a judgment in the person's favor, the person may also recover such damages as may have been suffered by reason of any wrongful detention of the property.

(n) Return; Papers by Sheriff. The sheriff shall return the order of possession and undertakings and affidavits with the sheriff's proceedings thereon, to the court in which the action is pending, within 21 days after taking the property mentioned therein.

(o) Precedence on Docket. In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

(p) Judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 313, C.R.C.P., shall apply to replevin actions.

Source: (a) amended and effective July 1, 1993; (a), (b)(3), (c), (d)(4), and (h) to (n) amended July 22, 1993, effective January 1, 1994; (c), (d)(4), (h), and (m) corrected and effective January 9, 1995; (c) corrected and effective January 23, 1995; (a) amended and adopted October 10, 2002, effective January 1, 2003; entire rule amended and adopted December 4, 2003, effective January 1, 2004; (c), (j), (k), and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 405. No Colorado Rule

Rule 406. Remedial Writs

Except for certiorari to the Supreme Court as provided by these rules the common law writs and any relief as provided in Rule 106, C.R.C.P., are not available in the county court.

Rule 407. Remedial and Punitive Sanctions for Contempt

(a) Definitions.

(1) Contempt. Disorderly or disruptive behavior, a breach of the peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings; behavior that obstructs the administration of justice; disobedience or resistance by any person to or interference with any lawful writ, process, or order of the court; or any other act or omission designated as contempt by the statutes or these rules.

(2) Direct Contempt. Contempt that the court has seen or heard and is so extreme that no warning is necessary or that has been repeated despite the court's warning to desist.

(3) Indirect Contempt. Contempt that occurs out of the direct sight or hearing of the court.

(4) Punitive Sanctions for Contempt. Punishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.

(5) Remedial Sanctions for Contempt. Sanctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.

(6) Court. For purposes of this rule, ''court'' means any judge, magistrate, commissioner, referee, or a master while performing official duties.

(b) Direct Contempt Proceedings. When a direct contempt is committed, it may be punished summarily. In such case an order shall be made on the record or in writing reciting the facts constituting the contempt, including a description of the person's conduct, a finding that the conduct was so extreme that no warning was necessary or the person's conduct was repeated after the court's warning to desist, and a finding that the conduct is offensive to the authority and dignity of the court. Prior to the imposition of sanctions, the person shall have the right to make a statement in mitigation.

(c) Indirect Contempt Proceedings. When it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may ex parte order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished. The citation and a copy of the motion, affidavit and order shall be served directly upon such person at least 21 days before the time designated for the person to appear. If such person fails to appear at the time so designated, and it is evident to the court that the person was properly served with copies of the motion, affidavit, order, and citation, a warrant for the person's arrest may issue to the sheriff. The warrant shall fix the date, time and place for the production of the person in court. The court shall state on the warrant the amount and kind of bond required. The person shall be discharged upon delivery to and approval by the sheriff or clerk of the bond directing the person to appear at the date, time and place designated in the warrant, and at any time to which the hearing may be continued, or pay the sum specified. If the person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the bond may be forfeited upon proper notice of hearing to the surety, if any, and to the extent of the damages suffered because of the contempt, the bond may be paid to the aggrieved party. If the person fails to make bond, the sheriff shall keep the person in custody subject to the order of the court.

(d) Trial and Punishment. (1) Punitive Sanctions. In an indirect contempt proceeding where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt action. If the judge initiates the contempt proceedings, the person shall be advised of the right to have the action heard by another judge. At the first appearance, the person shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel. The maximum jail sentence shall not exceed six months unless the person has been advised of the right to a jury trial. The person shall also be advised of the right to plead either guilty or not guilty to the charges, the presumption of innocence, the right to require proof of the charge beyond a reasonable doubt, the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, the right to have subpoenas issued to compel attendance of witnesses at trial, the right to remain silent, the right to testify at trial, and the right to appeal any adverse decision. The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The person shall have the right to make a statement in mitigation prior to the imposition of sentence.

(2) Remedial Sanctions. In a contempt proceeding where remedial sanctions may be imposed, the court shall hear and consider the evidence for and against the person charged and it may find the person in contempt and order sanctions. The court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and

remedies that may be imposed shall be described in the motion or citation. Costs and reasonable attorney's fees in connection with the contempt proceeding may be assessed in the discretion of the court. If the contempt consists of the failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be fined or imprisoned until its performance.

(e) Limitations. The court shall not suspend any part of a punitive sanction based upon the performance or non-performance of any future acts. The court may reconsider any punitive sanction. Probation shall not be permitted as a condition of any punitive sanction. Remedial and punitive sanctions may be combined by the court, provided appropriate procedures are followed relative to each type of sanction and findings are made to support the adjudication of both types of sanctions.

(f) Appeal. For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.

Source: Entire rule amended January 26, 1995, effective April 1, 1995; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 408. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands.

Rule 409. No Colorado Rule

Rule 410. Miscellaneous

(a) Amendments. No writ or process shall be quashed, nor any order or decree set aside, nor any undertaking be held invalid, nor any affidavit, traverse or other paper be held insufficient if the same be corrected within the time and manner prescribed by the court, which shall be liberal in permitting amendments.

(b) Use of Terms. Words used in the present tense shall include the future; singular shall include the plural; masculine shall include the feminine; person or party shall include all manner of organizations which may sue or be sued. The use of the word clerk, sheriff, marshal, or other officer means such officer or his deputy or other person authorized to perform his duties. The word ''oath'' includes the word ''affirmation''; and the phrase ''to swear'' includes ''to affirm''; signature or subscription shall include mark, when the person is unable to write, his name being written near it and witnessed by a person who writes his own name as a witness. A superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules.

(c) Certificates. Certificates shall be made in the name of the officer either by the officer or by his deputy.

(d) Counterclaimants. Where a counterclaim is filed, the claimant thereunder shall have the same rights and remedies as the plaintiff.

Rule 411. Appeals

(a) Notice of Appeal; Time for Filing; Bond. If either party in a civil action believes that the judgment of the county court is in error, that party may appeal to the district court by filing a notice of appeal in the county court within 14 days after the date of entry of judgment. The notice shall be in the form appearing in the Appendix to Chapter 25, Form 4, C.R.C.P. If the notice of the entry of judgment is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice. The appealing party shall also file within the said 14 days an appeal bond with the clerk of the county court. The bond shall be furnished by a corporate surety authorized and licensed to do business in this state as a surety, or one or more sufficient private sureties, or may be a cash deposit by the appellant and, if the appeal is taken by the

plaintiff, shall be conditioned to pay the costs of the appeal and the counterclaim, if any, and, if the appeal be taken by the defendant, shall be conditioned to pay the costs and judgment if the appealing party fail. The bond shall be approved by the judge or the clerk. Upon filing of the notice of appeal, the posting and approval of the bond, and the deposit by the appellant of an estimated fee in advance for preparing the record, the county court shall discontinue all further proceedings and recall any execution issued. The appellant shall also, within 35 days after the filing of the notice of appeal, docket the case in the district court and pay the docket fee.

(b) Preparation of Record on Appeal. Upon the deposit of the estimated record fee, the clerk of the court shall prepare and issue as soon as may be possible a record of the proceedings in the county court, including the summons, the complaint, proof of service, and the judgment. The record shall also include a transcription of such part of the actual evidence and other proceedings as the parties may designate or, in lieu of transcription, to which they may stipulate. If a stenographic record has been maintained or the parties agree to stipulate, the party appealing shall lodge with the clerk of the court the reporter's transcript of the designated evidence or proceedings, or a stipulation covering such items within 42 days after the filing of the notice of appeal. If the proceedings have been electronically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the county court or under the supervision of the clerk, within 42 days after the filing of the notice of appeal. The clerk shall notify, in writing, the opposing parties of the completion of the record, and such parties shall have 14 days within which to file objections. If none are received, the record shall be certified forthwith by the clerk. If objections are made, the parties shall be called for hearing and the objections settled by the county judge as soon as possible, and the record then certified.

(c) Filing of record. When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county court, and the opposing parties shall be notified of such filing by the clerk of the county court.

(d) Briefs. A written brief shall contain a statement of the matters relied upon as constituting error and the arguments with respect thereto. It shall be filed in the district court by the appellant 21 days after filing of the record therein. A copy of such brief shall be served on the appellee. The appellee may file an answering brief within 21 days after such service. In the discretion of the district court, the time for filing of briefs and answers may be extended. When the briefs have been filed the matter shall stand at issue and shall be determined on the record and the briefs, with such oral argument as the court in its discretion may allow. No trial shall be held de novo in the district court unless the record of the proceedings in the county court have been lost or destroyed or for some other valid reason cannot be produced; or unless a party by proper proof to the court establishes that there is new and material evidence unknown and undiscoverable at the time of the trial in the county court which, if presented in a de novo trial in the district court, might affect the outcome.

(e) Determination of Appeal. Unless there is further review by the Supreme Court upon writ of certiorari and pursuant to the rules of such court, after final disposition of the appeal by the district court, the judgment on appeal therein shall be certified to the county court for action as directed by the district court, except upon trials de novo held in the district court or in cases in which the judgment is modified, in which cases the judgment shall be that of the district court and enforced therefrom.

Source: (a)(2) amended June 9, 1988, effective January 1, 1989; entire rule amended July 22, 1993, effective January 1, 1994; (a), (b), and (d) amended and adopted December 14, 2011, effective July 1, 2012; (a) and (b) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012; (b) amended and effective June 7, 2013; (a) and (b) amended and effective October 10, 2013; (b) amended and effective September 18, 2014.

ANNOTATION

The provisions of this section requiring the filing of an appeal bond for costs are not applicable to indigent plaintiffs. Bell v. Simpson, 918 P.2d 1123 (Colo. 1996).

A county court party found to be indigent and allowed to proceed in forma pauperis is not required to post a judgment bond before appealing to district court. O'Donnell v. State Farm Mut. Auto. Ins. Co., 186 P.3d 46 (Colo. 2008).

However, as with appeals from the district court to the court of appeals, the prevailing party in the county court would be able to execute the judgment while the appeal is still pending because the judgment would not have been stayed by a judgment bond. O'Donnell v. State Farm Mut. Auto. Ins. Co., 186 P.3d 46 (Colo. 2008).

Time for docketing appeals. Subsection (1)(b) of § 13-6-311, relating to appeals from county court, and section (a)(1) of this rule clearly provide that the docketing must take place no later than the time allowed for completing and lodging the record. Tumbarello v. Superior Court, 195 Colo. 83, 575 P.2d 431 (1978).

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rules 412 to 420.

(There are no present Colorado Rules 412 to 420.)

APPENDIX TO CHAPTER 25

The Colorado Rules of County Court Civil Procedure

APPENDIX TO CHAPTER 25

FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us)

Introductory Statement.

1. Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary depending on the type of form being used. See the applicable form shown below to determine the correct name and party designation for that particular form. Documents initiated by a party shall use a form of caption shown in sample caption A. Documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B.

2. An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

3. Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

☐ County Court _____ County, Colorado Court Address:	
Plaintiff(s): v. [Substitute appropriate party designations & names] **Defendant(s):**	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Sample Caption B for documents issued by the court under the signature of the clerk or judge

☐ County Court _____ County, Colorado Court Address:	
Plaintiff(s): v. [Substitute appropriate party designations & names] **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

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COLORADO RULES OF
COUNTY COURT CIVIL PROCEDURE

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CHAPTER 26

The Colorado Rules of Procedure for Small Claims Courts

Repealed and Readopted by the

SUPREME COURT OF COLORADO

February 24, 1994,

Effective July 1, 1994

ANALYSIS BY RULE

CHAPTER 26

COLORADO RULES OF PROCEDURE FOR SMALL CLAIMS COURTS

Rule 501. Scope and Purpose

(a) How Known and Cited. These rules for the small claims division for the county court are additions to C.R.C.P. and shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P. These rules are promulgated pursuant to section 13-6-413, C.R.S.

(b) Procedure Governed. These rules govern the procedure in all small claims courts. They shall be liberally construed to secure the just, speedy, informal, and inexpensive determination of every small claims action.

(c) Purpose. Each small claims court shall provide for the expeditious resolution of all cases before it. Where practicable, at least one weekend session and at least one evening session shall be scheduled or available to be scheduled for trial in each small claims court each month.

(d) Record of Proceedings. A record shall be made of all small claims court proceedings.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

ANNOTATION

Law reviews. For article, "Changes to the Statutes and Rules Governing Procedures in Colorado Small Claims Courts", see 31 Colo. Law. 29 (February 2002).

The strict technical application of procedural filing deadlines is to be avoided in cases where it would result in a punitive disposition of litigation and an arbitrary denial of substantial justice contrary to the spirit of the rules of civil procedure. The district court's order emphasized the importance of the timely and inexpensive resolution of small claims at the expense of an equally important concern: The tenet that requires courts to construe procedural rules in a manner that ensures the just determination of every action. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Rule 502. Commencement of Action

(a) How Commenced. A small claims action is commenced by filing with the court a short statement of the plaintiff's claim setting forth the facts giving rise to the action in the manner and form provided in C.R.C.P. 506 and by paying the appropriate docket fee.

(b) Jurisdiction. The court shall have jurisdiction from the time the claim is filed.

(c) Setting of the Trial Date. At the time the small claims action is filed, the clerk shall set the trial on a date, time and place certain. The first scheduled trial date shall not be less than thirty days from the date of issuance of the notice of claim by the clerk.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 503. Place of Action

(a) Where Brought, Generally. All actions in the small claims court shall be brought in the county in which at the time of filing of the claim any of the defendants resides, or is regularly employed, or has an office for the transaction of business, or is a student at an institution of higher education. In an action to enforce restrictive covenants or arising from

a security deposit dispute, the action may be brought in the county in which the subject real property is located.

(b) Consent to venue. If a defendant appears and defends a small claims action on the merits at trial, the defendant agrees to the place of trial.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (a) amended and effective November 13, 2008.

ANNOTATION

Law reviews. For article, "What Is a Lawyer Doing in Small Claims Court"? see 13 Colo. Law. 430 (1984).

Applied in Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983).

Rule 504. Service of the Notice, Claim and Summons to Appear for Trial

(a) Time for Serving the Notice, Claim and Summons to Appear for Trial. A copy of the notice, claim and summons to appear for trial shall be served at least fifteen days prior to the trial date.

(b) Personal Service of the Notice, Claim and Summons to Appear for Trial. Personal service of the notice, claim and summons to appear for trial shall be in accordance with C.R.C.P. 304(c), (d) and (e), with proof of service filed in accordance with C.R.C.P. 304(g), and refusal of service dealt with as described in C.R.C.P. 304(j).

(c) Clerk's Service of the Notice, Claim and Summons to Appear for Trial by Certified Mail.

(1) Within three days after the action is filed, the clerk shall send a signed and sealed notice, pursuant to Forms appended to these rules, to the defendant(s), by certified mail, return receipt requested to be signed by addressee only, at the address supplied or designated by the plaintiff. If the notice is delivered, the clerk shall note on the register of actions the mailing date and address, the date of delivery shown on the receipt, and the name of the person who signed the receipt. If the notice was refused, the clerk shall note the date of refusal.

(2) When Service is Complete. Notice shall be sufficient even if refused by the defendant and returned. Service shall be complete upon the date of delivery or refusal.

(3) Notification by Clerk and Fees and Expenses for Service. If the notice is returned for any reason other than refusal to accept it, or if the receipt is signed by any person other than the addressee, the clerk shall so notify the plaintiff. The clerk may then issue additional notices, at the request of the plaintiff. All fees and expenses for the certified mailing by the clerk shall be paid by the plaintiff and treated as costs of the action. Issuance of each notice shall be noted upon the register of actions or in the file.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (b)(2)(H) corrected and effective December 5, 2001; (b) and (c)(3) amended and effective March 23, 2006.

Rule 505. Pleadings and Motions

(a) Pleadings. There shall be a claim and a response which may or may not include a counterclaim. No other pleadings shall be allowed.

(b) No Motions. There shall be no motions allowed except as contemplated by these rules.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 506. General Rules of Pleading

(a) Claims for Relief and Responses. Except as provided in subsection (b), claims and responses, with or without a counterclaim, in the small claims court shall be filed in the

manner and form prescribed by Forms appended to these rules, and shall be signed by the party under penalty of perjury. Claims and responses, with or without a counterclaim, for an action to enforce restrictive covenants on residential property shall be filed pursuant to Forms appended to these rules, and shall be signed by the party under penalty of perjury.

(b) Availability of Forms; Assistance by Court Personnel. The clerk of the court shall provide such assistance as may be requested by a plaintiff or defendant regarding the forms, operations, procedures, jurisdictional limits, and functions of the small claims court; however, court personnel shall not engage in the practice of law. The clerk shall also advise parties of the availability of subpoenas to obtain witnesses and documents. All necessary and appropriate forms shall be available in the office of the clerk.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; (a) amended June 7, 1994, effective July 1, 1994; (a) amended June 1, 2000, effective July 1, 2000; entire rule amended and effective September 6, 2001.

Rule 507. Responses and Defenses

Each defendant shall file a written and signed response on or before the trial date. At the time of filing the response or appearing, whichever occurs first, each defendant shall pay the docket fee prescribed by law.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 508. Counterclaim

(a) When Counterclaim to be Filed; Effect on Hearing Date. If at the time of the trial date it appears that a defendant has a counterclaim within the jurisdiction of the small claims court, the court may either proceed to hear the entire case or may continue the hearing for a reasonable time, at which continued hearing the entire case shall be heard.

(b) Counterclaim Within the Jurisdiction of the Small Claims Court. If at the time the action is commenced a defendant possesses a claim against the plaintiff that: (1) is within the jurisdiction of the small claims court, exclusive of interest and costs; (2) arises out of the same transaction or event that is the subject matter of the plaintiff's claim; (3) does not require for its adjudication the joinder of third parties; and (4) is not the subject of another pending action, the defendant shall file such claim as a counterclaim in the answer or thereafter be barred from suit on the counterclaim. The defendant may also elect to file a counterclaim against the plaintiff that does not arise out of the transaction or occurrence.

(c) Counterclaim Exceeding the Jurisdiction of the Small Claims Court. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is not within the jurisdictional limit of the small claims court, exclusive of interest and costs, and the defendant wishes to assert the counterclaim, the defendant may:

(1) file the counterclaim in the pending small claims court action, but unless the defendant follows the procedure set forth in subsection (2) below, any judgment in the defendant's favor shall be limited to the jurisdictional limit of the small claims court, exclusive of interest and costs, and suit for the excess due the defendant over that sum will be barred thereafter; or

(2) file the counterclaim together with the answer in the pending small claims court action at least seven days before the first scheduled trial date and request in the answer that the action be removed to county court or district court, whichever has appropriate jurisdiction, as selected by the defendant, to be tried pursuant to the rules of civil procedure applicable to the court to which the case has been removed. Upon filing the answer and counterclaim, the defendant shall tender the filing fee for a complaint in the court to which the case has been removed. Upon compliance by the defendant with the requirements of this subsection (2), all small claims court proceedings shall be discontinued and the clerk of the small claims court shall deliver the case and fee to the appropriate court.

(d) Defendant Notified if Counterclaim Exceeds Court's Jurisdiction. All counterclaims asserted over the jurisdictional limit of the small claims court shall be subject to the provisions of Section 13-6-408, C.R.S., and all defendants shall be advised of those provisions on Forms appended to these rules.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 509. Parties, Representation and Intervention

(a) Parties. Any natural person, corporation, partnership, association, or other organization may commence or defend an action in the small claims court, but no assignee or other person not a real party to the transaction which is the subject of the action may commence an action therein, except as a court-appointed personal representative, conservator, or guardian of the real party in interest.

(b) Representation.

(1) **Partnerships and Associations.** Notwithstanding the provisions of article 5 of title 12, C.R.S., in the small claims court, an individual shall represent himself or herself; a partnership shall be represented by an active general partner or an authorized full-time employee; a union shall be represented by an authorized active union member or full-time employee; a for-profit corporation shall be represented by one of its full-time officers or full-time employees; an association shall be represented by one of its active members or by a full-time employee of the association; and any other kind of organization or entity shall be represented by one of its active members or full-time employees or, in the case of a nonprofit corporation, a duly elected nonattorney officer or an employee.

(2) **Attorney Representatives of Entities.** No attorney, except pro se or as an authorized full-time employee or active general partner of a partnership, an authorized active member or full-time employee of a union, a full-time officer or full-time employee of a for-profit corporation, or a full-time employee or active member of an association, which partnership, union, corporation, or association is a party, shall appear or take any part in the filing or prosecution or defense of any matter in the small claims court, except as permitted by rule 520(b).

(3) **Property Managers.** In actions arising from a landlord-tenant relationship, a property manager who has received security deposits, rents, or both, or who has signed a lease agreement on behalf of the owner of the real property that is the subject of the small claims action, shall be permitted to represent the owner of the property in such action.

(4) **Defendants in the Military.** In any action to which the federal ''Soldiers' and Sailors' Civil Relief Act of 1940'', 50 U.S.C. App. §§ 501 et seq., is applicable, the court may enter a default against a defendant who is in the military without entering judgment, and the court shall appoint an attorney to represent the interests of the defendant prior to the entry of judgment against the defendant.

(c) Intervention. There shall be no intervention, addition, or substitution of parties, unless otherwise ordered by the court in the interest of justice.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 510. Discovery and Subpoenas

(a) Depositions, discovery, disclosure statements, and pre-trial conferences shall not be permitted in small claims court proceedings.

(b) Subpoenas for the attendance of witnesses or the production of evidence at trial shall be issued and served pursuant to C.R.C.P. 345.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 511. Magistrates - No Jury Trial

(a) No Jury Trial. There is no right to a trial by jury in small claims court proceedings.

(b) Magistrates. Magistrates may hear and decide claims and shall have the same powers as a judge, except as provided by C.R.M. 5. A party objecting to a magistrate pursuant to Section 13-6-405 (4), C.R.S., shall file the objection seven days prior to the first scheduled trial date. Cases in which an objection to a magistrate has been timely filed shall be heard and decided by a judge pursuant to the rules and procedures of the small claims court.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 512. Trial

(a) Date of Trial. The trial shall be held on the date set forth in the notice, claim, and summons to appear for trial unless the court grants a continuance for good cause shown. Good cause for a continuance may include a defense made in good faith raising jurisdictional grounds or defects in service of process. A plaintiff may request one continuance if a defendant files a counterclaim.

(b) Settlement Discussions. On the trial date, but before trial, the court may require settlement discussions between the parties, but the court shall not participate in such discussions. If a settlement is achieved, the terms of such settlement shall be presented to the court for approval. If an approved settlement is not achieved, the trial shall be held pursuant to subsection (a) of this rule.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 513. Evidence

The hearing of all cases shall be informal, the object being to dispense justice promptly and economically between the parties. Rules of evidence shall not be strictly applied; however, all constitutional and statutory privileges shall be recognized. The parties may testify and offer evidence and testimony of witnesses at the hearing.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 514. Judgment

At the end of the trial, the court shall immediately state its findings and decision and direct the entry of judgment. Judgment shall be entered immediately pursuant to the provisions of C.R.C.P. 358. No written findings shall be required.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 515. Default and Judgment

(a) Entry at the Time of Trial. Upon the date and at the time set for trial, if the defendant has filed no response or fails to appear and if the plaintiff proves by appropriate return that proper service was made upon the defendant as provided herein at least fifteen days prior to the trial date, the court may enter judgment for the plaintiff for the amount due, as stated in the complaint, but in no event more than the amount requested in the plaintiff's claim, plus interest, costs, and other items provided by statute or agreement. However, before any judgment is entered pursuant to this rule, the court shall be satisfied that venue of the action is proper pursuant to C.R.C.P. 503 and may require the plaintiff to present sufficient evidence to support the plaintiff's claim.

(b) Entry at the Time of Continued Trial. Failure to appear at any other date set for trial shall be grounds for entering a default and judgment against the non-appearing party, whether on a plaintiff's claim or a defendant's counterclaim.

(c) Default and Judgment - Soldiers' and Sailors' Civil Relief. If a defendant is a member on active duty in the United States military services, and if the defendant fails to appear on the trial date without having requested a stay of proceedings, the court shall enter the defendant's default and it shall appoint an attorney to represent the defendant's interests in accordance with the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501, et seq. Judgment shall enter three business days after the appointment of the attorney unless the attorney shall have filed a written objection to the entry of judgment, stating the legal and factual bases for such objection. The fees of the attorney shall be paid by the plaintiff and shall be assessed as costs in accordance with C.R.C.P. 516.

(d) Setting Aside a Default. For good cause shown, within a reasonable period and in any event not more than thirty days after the entry of judgment, the court may set aside an entry of default and the judgment entered thereon.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 516. Costs

The prevailing party in the action in a small claims court shall have judgment to recover costs of the action and also the costs to enforce the judgment as provided by law.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective June 16, 2011.

Rule 517. Stay of Proceedings to Enforce Judgment

(a) No Automatic Stay. If upon rendition of a judgment payment is not made forthwith, an execution may issue immediately and proceedings may be taken for its enforcement unless the party against whom the judgment was entered requests a stay of execution and the court grants such request. Proceedings to enforce execution and other process after judgment and any fees shall be as provided by law or the Colorado Rules of Civil Procedure applicable in county court.

(b) Stay on Motion for Relief From Judgment or Appeal. In its discretion the court may stay the commencement of any proceeding to enforce a judgment pending the disposition of a motion for relief from a judgment or order made pursuant to C.R.C.P. 515(d), or pending the filing and determination of an appeal.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 518. Execution and Proceedings Subsequent to Judgment

(a) Judgment Debtor to File List of Assets and Property. Immediately following the entry of judgment, the party against whom the judgment was entered, if present in court, shall complete and file the information of judgment debtor's assets and property, pursuant to forms appended to these rules, where appropriate and as ordered by the court, unless the judgment debtor tenders immediate payment of the judgment or the court orders otherwise.

(b) Enforcement Procedures.

(1) Execution and the proceedings subsequent to judgment shall be the same as in a civil action in the county court.

(2) In addition, at any time when execution may issue on a small claims court judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear before the court at a specified time and place to answer concerning assets and property.

(c) Enforcement of Nonmonetary Judgments. The judgment may compel delivery, compliance, or performance or the value thereof, and damages or other remedies for the failure to comply with the judgment, including contempt of court.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; (a) amended June 7, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 519. Post Trial Relief and Appeals

No motion for new trial shall be filed in the small claims court, whether or not an appeal is taken. Appeal procedures shall be as provided by Section 13-6-410, C.R.S., and C.R.C.P. 411.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 520. Attorneys

(a) No Attorneys. Except as authorized by Section 13-6-407, C.R.S., rule 509(b)(2) and this rule, no attorney shall appear on behalf of any party in the small claims court.

(b) When Attorneys are Permitted in Small Claims Court. On the written notice of the defendant, that the defendant will be represented by an attorney, pursuant to forms appended to these rules filed not less than seven days before the first scheduled trial date, the defendant may be represented by an attorney. The notice of Representation shall advise the plaintiff of the plaintiff's right to counsel. Thereupon, plaintiff may also be represented by an attorney. If the notice is not filed at least seven days before the date set for the first scheduled trial date in the small claims court, no attorney shall appear for either party.

(c) Cases Heard by County Court Judge. Cases in which attorneys will appear may be heard by a county court judge pursuant to a standing order of the chief judge of any judicial district or of the presiding judge of the Denver county court.

(d) Sanctions. If the defendant appears at the trial without an attorney or fails to appear at the trial, and the court finds that the defendant's notice of representation by an attorney was made in bad faith, the court may award the plaintiff any costs, including reasonable attorney fees, occasioned thereby.

(e) Small Claims Court Rules to Apply. Any small claims court action in which an attorney appears shall be processed and tried pursuant to the statutes and court rules governing small claims court actions.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (b) and (e) amended and effective and (f) deleted and effective January 11, 2007.

ANNOTATION

It is within the discretion of the small claims court to continue an appearance date, the trial, or both, for good cause. When the court continues the appearance date, the court must also recognize a defendant's right to file a motion to transfer pursuant to section (b) so long as said motion is filed at least seven days prior to the continued appearance date. This interpretation of rule is particularly reasonable where small claims court continues a trial on its own motion to give the petitioner time to file a responsive pleading, pay the filing fee, and secure the assistance of a translator. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Given the liberal interpretation afforded to procedural rules, district court abused its discretion by dismissing petitioner's motion for transfer as untimely filed under section (b) and appellate remedy would be inadequate. Accordingly, court makes the rule to show cause absolute and directs district court to grant petitioner's motion for transfer to county court. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Rule 521. Special Procedures to Enforce Restrictive Covenants on Residential Property

(a) The small claims division shall dismiss without prejudice any claim to enforce a restrictive covenant if it affects the title to the real property.

(b) The owners of the residential property, subject of the action, shall be joined as codefendants to the action.

(c) Upon the filing of a claim under oath (see Forms appended to these rules) alleging that the defendant has violated any restrictive covenant regarding residential property, where the cost to comply with such restrictive covenant is not more than $7,500.00, the clerk shall issue the notice and summons to appear. The notice shall be served pursuant to C.R.C.P. 504.

(d) The general procedures applicable to the small claims court, C.R.C.P. 501 through 520, shall apply to actions to enforce a restrictive covenant on residential property, except as they are modified by this Rule.

(e) On the date set for appearance and trial pursuant to C.R.C.P. 512, the court shall proceed to determine the issues and render judgment and enter appropriate orders according to the law and the facts operative in the case.

(f) If the defendant fails to appear at the trial, the court may proceed pursuant to C.R.C.P. 514 and the provisions of this Rule, except that the court shall require the plaintiff to present sufficient evidence to support the plaintiff's claim.

(g) An order enforcing a restrictive covenant on residential property shall be reduced to writing by the magistrate and shall be personally served upon every party subject to the order (see Forms appended to these rules). If any party subject to the order is present in the courtroom at the time the order is made, the magistrate or judge shall at that time serve a copy of the order on such party and shall note such service on the order or file. Any party subject to the order who is not present shall be served as provided by C.R.C.P. 345, except that no fees or mileage need be tendered.

(h) If the plaintiff requests a temporary order directing the defendant to immediately comply with the restrictive covenant before the defendant has had an opportunity to be heard, the plaintiff shall attach to plaintiff's complaint a certified copy of the current deed showing ownership of the residential property, and a certified copy of the restrictive covenant. The request for temporary order shall be heard by the court, ex parte, at the earliest time the court is available. If the court is satisfied from the claim filed and the testimony of the plaintiff, that there is a substantial likelihood that the plaintiff will prevail at a trial on the merits of the claim and that irreparable damage will accrue to the plaintiff unless a temporary order is issued without notice, the court may issue a temporary order and citation to the defendant to appear and show cause, at a date and time certain, why the temporary order should not be made permanent, see Forms appended to these rules.

(1) A copy of the claim and notice with the attachments and with a copy of the temporary order and citation shall be served on the defendant as provided by C.R.C.P. 504, and the citation shall inform the defendant that if the defendant fails to appear in court in accordance with the terms of the citation, the restraining order may be made permanent.

(2) On the trial date or any date to which the matter has been continued, the court shall proceed as provided in subsections (e) and (g) of this Rule.

(i) A temporary order shall not be an appealable order. A permanent order shall be an appealable order.

(j) When it appears to the court by motion supported by affidavit that a violation of the temporary or permanent order issued pursuant to this Rule has occurred, the court shall immediately order the clerk to issue a citation to the defendant so charged to appear and show cause before a county judge at a time designated why the defendant should not be held in contempt for violation of the court's order. The citation shall direct the defendant to appear in the county court. Such contempt proceedings shall be governed by C.R.C.P. 407. The citation and a copy of the motion and affidavit shall be served upon the defendant in the manner required by C.R.C.P. 345. If such defendant fails to appear at the time designated in the citation, a warrant for the defendant's arrest may issue to the sheriff. The

warrant shall fix the time for the production of the defendant in court. A bond set in a reasonable amount not to exceed $7,500.00 shall be stated on the face of the warrant.

Source: Added May 12, 1994, effective July 1, 1994; (h) amended June 7, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

APPENDIX TO CHAPTER 26

The Colorado Rules of Procedure for Small Claims Courts

APPENDIX TO CHAPTER 26

SMALL CLAIMS COURTS FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us/.)

Introductory Statement.

Forms of captions are to be consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

(Forms are available on the Colorado judicial branch website
at https://www.courts.state.co.us.)

SPECIAL FORM INDEX

JDF 249	Notice of Non-compliance and Order
JDF 250	Notice, Claim and Summons to Appear for Trial (four parts)
JDF 251	Notice of Removal
JDF 252A	Motion and Order for Interrogatories — Short Form
JDF 252B	Motion and Order for Interrogatories — Long Form
JDF 253	Request to Set Aside Dismissal/Default Judgment
JDF 254	Subpoena or Subpoena to Produce
JDF 255	Notice of No Service
JDF 256	Notice of Representation by Attorney
JDF 258	Temporary Order and Citation for Enforcement of Restrictive Covenant
JDF 259	Objection to Magistrate Hearing Case
JDF 260	Permanent Order

INDEX TO
COLORADO RULES OF PROCEDURE
FOR SMALL CLAIMS COURTS

CHAPTER 27

The Colorado Rules of Probate Procedure

Adopted by the

SUPREME COURT OF COLORADO

July 31, 1975,

Effective August 1, 1975,

and as Repealed

and Reenacted March 27, 1981,

effective July 1, 1981

and as Amended

and Adopted June 28, 2018,

effective September 1, 2018.

ANALYSIS BY RULE

PART 6. DECEDENT'S ESTATES

PART 7. PROTECTIVE PROCEEDINGS

PART 8. TRUSTS

CHAPTER 27

COLORADO RULES OF PROBATE PROCEDURE

Editor's note: The Colorado Rules of Probate Procedure, as amended by Rule Change 2018(11), adopted June 28, 2018, effective September 1, 2018, resulted in the reorganization of the chapter. For the text of this chapter that existed prior to September 1, 2018, see the Colorado Court Rules 2018.

Law reviews: For article, ''Overview of the Revised and Reenacted Colorado Rules of Probate Procedure'', see 47 Colo. Law. 60 (Nov. 2018); for article, ''Five Common Misconceptions about Estate Planning: Clarifying the Plan'', see 47 Colo. Law. 60 (Dec. 2018).

PART 1. GENERAL

Rule 1. Scope of Rules - How Known and Cited

(a) Procedure Governed. These rules govern the procedure in the probate court for the city and county of Denver and district courts when sitting in probate. In case of conflict between these rules and the Colorado Rules of Civil Procedure (C.R.C.P.), or between these rules and any local rules of probate procedure, these rules will control.

(b) How Known and Cited. These rules will be known and cited as the Colorado Rules of Probate Procedure, or C.R.P.P.

(c) In General. ''Colorado Probate Code'' means Articles 10 to 17 of Title 15 of the Colorado Revised Statutes (C.R.S.). Except as otherwise provided, terms used in these rules are defined in the applicable sections of Title 15, C.R.S., as amended.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''A Potpourri of Probate Practice Aids'', see 11 Colo. Law. 1850 (1982). For article, ''Will Contests — Some Procedural Aspects'', see 15 Colo. Law. 787 (1986).

When magistrates act in probate matters. The powers of magistrates and appellate review of their orders are governed, in the first instance, by the Colorado Rules for Magistrates. When magistrates are acting in probate matters, their powers are additionally controlled by these rules. Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995) (decided prior to 1996 amendment).

Rule 2. Definitions

[Reserved]

Rule 3. Registry of Court - Payments and Withdrawals

Payments into and withdrawals from the registry of the court must be made only upon order of court.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 4. Delegation of Powers to Clerk and Deputy Clerk

(a) The court by written order may, in addition to duties and powers exercised as registrar in informal proceedings, delegate to the clerk or deputy clerk any one or more of the following duties, powers and authorities to be exercised under the supervision of the court:

(1) To appoint fiduciaries and to issue letters, if there is no written objection to the appointment or issuance on file;
(2) To set a date for hearing on any matter and to vacate any such setting;
(3) To issue dedimus to take testimony of a witness to a will;
(4) To approve the bond of a fiduciary;
(5) To appoint a guardian ad litem, subject to the provisions of law;
(6) To certify copies of documents filed in the court;
(7) To order a deposited will lodged in the records and to notify the named personal representative;
(8) To enter an order for service by mailing or by publication where such order is authorized by law or by the Colorado Rules of Civil Procedure;
(9) To correct any clerical error in documents filed in the court;
(10) To appoint a special administrator in connection with the claim of a fiduciary;
(11) To order a will transferred to another jurisdiction pursuant to Rule 51 herein;
(12) To admit wills to formal probate and to determine heirship, if there is no objection to such admission or determination by any interested person;
(13) To enter estate closing orders in formal proceedings, if there is no objection to entry of such order by any interested person;
(14) To issue a citation to appear to be examined regarding assets alleged to be concealed, etc., pursuant to § 15-12-723, C.R.S.;
(15) To order an estate reopened for subsequent administration pursuant to § 15-12-1008, C.R.S.;
(16) To enter other orders upon the stipulation of all interested persons.

(b) All orders and proceedings by the clerk or deputy clerk under this rule must be made part of the permanent record.

(c) Any person in interest affected by an order entered or action taken under the authority of this rule may have the matter heard by the judge by filing a motion for such hearing within 14 days after the entering of the order or the taking of the action. Upon the filing of such a motion, the order or action in question must be vacated and the motion placed on the calendar of the court for as early a hearing as possible, and the matter must then be heard by the judge. The judge may, within the same 14 day period referred to above, vacate the order or action on the court's own motion. If a motion for hearing by the judge is not filed within the 14 day period, or the order or action is not vacated by the judge on the court's own motion within such period, the order or action of the clerk or deputy clerk will be final as of its date subject to applicable rights of appeal. The acts, records, orders, and judgments of the clerk or deputy clerk not vacated pursuant to the foregoing provision will have the same force, validity, and effect as if made by the judge.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''A Potpourri of Probate Practice Aids'', see 11 Colo. Law. 1850 (1982).

Determination of the sequence of death is not a power that may be delegated under this rule. Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995).

Determination of the intent of a decedent is not a power that may be exercised under this rule. In re Estate of Hillebrandt, 979 P.2d 36 (Colo. App. 1999).

Rule 5. Rules of Court

(a) Repeal of Local Rules. All local probate rules are hereby repealed. Local rules may be enacted pursuant to C.R.C.P. 121(b).

(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule or statute, the court may proceed in any lawful manner not inconsistent with these

rules of probate procedure and the Colorado Probate Code and must look to the Colorado Rules of Civil Procedure and to the applicable law if no rule of probate procedure exists.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''Will Contests — Some Procedural Aspects'', see 15 Colo. Law. 787 (1986).

Rules 6 to 9. Reserved

ANNOTATION

Law reviews. For article, ''A Potpourri of Probate Practice Aids'', see 11 Colo. Law. 1850 (1982).

Personal representative's petition under rule to formally close the estate converted the informal proceeding into a formal one. As such, the court had authority to order a reduction in fees. In re Estate of Santarelli, 74 P.3d 523 (Colo. App. 2003) (decided under former rule 8.3).

PART 2. PLEADINGS

Rule 10. Judicial Department Forms

The Judicial Department Forms (JDF) approved by the Supreme Court should be used where applicable. Any pleading, document, or form filed in a probate proceeding should, insofar as possible, substantially follow the format and content of the approved JDF, if applicable.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 11. Correction of Clerical Errors

(a) Documents with clerical errors filed with the court may be made the subject of a written request for correction by filing JDF 740 or a document that substantially follows the format and content of the approved JDF, if applicable, and may file a corrected document.

(b) A clerical error may include, but is not limited to:

(1) Errors in captions;

(2) Misspellings;

(3) Errors in dates, other than dates for settings, hearings, and limitations periods; or

(4) Transposition errors.

(c) A clerical error does not include the addition of an argument, allegation, or fact that has legal significance. If the court is not satisfied that a written request for correction is a clerical error, the request may be denied.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 12. Petitions Must Indicate Persons Under Legal Disability

(a) Petition Requirements and Notice. If a person under legal disability has any interest in the subject matter of a petition which requires the issuance of notice, the petition must state:

(1) That an interested person is under legal disability as defined in subsection (b) below;

(2) The name, age, and residence of the person under legal disability; and
(3) The name of the guardian, conservator, or personal representative, if any.
(b) Legal Disability. A person under legal disability includes, but is not limited to, a person who is:
(1) Under 18 years of age; or
(2) Incompetent or incapacitated to such an extent that the individual is incapable of adequately representing his or her own interest.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 13 to 19. Reserved

PART 3. NOTICE

Rule 20. Process and Notice

The issuance, service, and proof of service of any process, notice, or order of court under the Colorado Probate Code will be governed by the provisions of the Colorado Probate Code and these rules. When no provision of the Colorado Probate Code or these rules is applicable, the Colorado Rules of Civil Procedure will govern. Except when otherwise ordered by the court in any specific case or when service is by publication, if notice of a hearing on any petition or other pleading is required, the petition or other pleading, unless previously served, must be served with the notice. When served by publication, the notice must briefly state the nature of the relief requested. The petition or other pleading need not be attached to or filed with the proof of service, waiver of notice, or waiver of service.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''The Basics on Juveniles in Probate Court for Protective Proceedings'', see 36 Colo. Law. 15 (February 2007).

Rule 21. Demands and Requests for Notice

(a) Demands for Notice. Demands for notice in decedents' estates are governed by § 15-12-204, C.R.S. After a demand for notice has been filed with the court, the clerk or registrar may thereafter take any authorized action, including, accepting and acting upon an application for informal appointment of a personal representative.
(b) Requests for Notice. Requests for Notice in Protective Proceedings are governed by § 15-14-116, C.R.S.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 22. Constitutional Adequacy of Notice

When statutory notice is deemed by the court to be constitutionally inadequate, the court must provide on a case-by-case basis for such notice as will meet constitutional requirements.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''Notice and Due Process in Probate Revisited'', see 14 Colo. Law. 29 (1985).

Rule 23. Waiver of Notice

Unless otherwise approved by the court, a waiver of notice where authorized must identify the nature of the hearings or other matters to which the waiver of notice applies.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 24. Determination of Matters by Hearing Without Appearance

(a) A hearing without appearance is a setting before or with the court for a ruling without the appearance of the parties.

(b) Unless otherwise required by statute, these rules, or court order, any appropriate matter may be set for a hearing without appearance.

(c) The procedure governing a hearing without appearance is as follows:

(1) Attendance at the hearing without appearance is not required or expected.

(2) Any interested person wishing to object to the requested action set forth in the court filing attached to the notice must file a specific written objection with the court at or before the hearing, and must serve a copy of the objection on the person requesting the court order and all persons listed on the notice of hearing without appearance. Form JDF 722, or a form that substantially conforms to JDF 722, may be used and will be sufficient.

(3) If no objection is filed, the court may take action on the matter without further notice or hearing.

(4) If any objection is filed, the objecting party must, within 14 days after filing the objection, contact the court to set the objection for an appearance hearing. If a hearing is scheduled, the objecting party must file a notice of hearing, and serve a copy on all persons listed on the notice of hearing without appearance. Failure to timely set the objection for an appearance hearing as required will result in action by the court as set forth in subsection (d).

(d) Upon the filing of an objection, the court may, in its discretion:

(1) Rule upon the written filings and briefs submitted;

(2) Require oral argument;

(3) Require an evidentiary hearing;

(4) Order the petitioner, movant, objector, and any other interested person who has entered an appearance to participate in alternative dispute resolution; or

(5) Enter any other orders the court deems appropriate.

(e) The Notice of a Hearing Without Appearance, together with copies of the court filing and proposed order must be served on all interested persons no less than 14 days prior to the setting of the hearing and must include a clear statement of this rule governing a hearing without appearance. Form JDF 712 or JDF 963, or a form that substantially conforms to such forms, may be used and will be sufficient.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

COMMENTS

2018

[1] Before the 2018 amendments, the rule was titled ''Non-Appearance Hearings,'' which engendered confusion for practitioners and self-represented parties as it referred to a hearing, which denotes an appearance, and then directed the party not to appear before the court. As a part of the 2018 amendments, the title of the rule changed to ''Determination of Matters by

Hearing Without Appearance'' that more appropriately describes the actual practice; the rule is useful for matters required by statute to have a hearing when a party appearance is not required or mandated.

[2] The pre-2018 rule directed that matters which are ''routine and unopposed'' may be scheduled for hearing without appearance, however, there was no definition contained within the rule for what matters are considered to be ''routine and unopposed.'' With the 2018 amendments, language defining a hearing without appearance was added in subsection (a), and language generally describing what may be set on the docket in subsection (b). Motions for summary judgment and motions to dismiss are not appropriate for placement on a docket for hearing without appearance, and these motions should be filed using the procedure set forth in C.R.C.P. 121 § 1-15.

[3] The rule does not contain a requirement that the court rule on a motion on the date scheduled for hearing without an appearance. There is confusion among practitioners and self-represented parties regarding when the court is required to rule on a matter scheduled under this rule; the court may rule on these matters in due course after the date for hearing without appearance has passed. This rule allows for expediting many matters before the probate court while specifying that matters may be determined by the probate court without an appearance hearing, such as accommodating a real estate closing or other deadline such as a move-in date for a party.

[4] Matters denoted as requiring immediate action should not be scheduled for hearing without appearance.

[5] Concerns were raised regarding the shortened time frame in subsection (c)(4) for ruling on motions contained within the rule and whether the failure of a party or counsel to respond within these time frames would unfairly prejudice a party. Practitioners should bear in mind their ethical obligations to opposing parties and counsel when choosing to schedule a motion that may be opposed on the docket for hearing without appearance. Scheduling a motion on the docket for hearing without an appearance for determination on the merits where no responsive pleading has been filed with the court increases judicial economy by placing an opposing party or counsel on notice that a ruling may be entered unless a responsive pleading is filed with the court.

ANNOTATION

Law reviews. For article, ''Rule 8.8 Non-Appearance Hearings in Probate Court'', see 37 Colo. Law. 45 (Jan. 2008). For article, ''New Probate Rule 24: Balancing Efficiency and Due Process'', see 48 Colo. Law. 42 (Feb. 2019).

Rule 25. Notice of Formal Proceedings Terminating Estates

The notice of hearing on a petition under § 15-12-1001 or § 15-12-1002, C.R.S., must include statements:

(a) That interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys, and others, and the distribution of estate assets, because the court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person; and

(b) That if any interested person desires to object to any matter such person must file specific written objections at or before the hearing and must serve the personal representative with a copy pursuant to C.R.C.P. 5.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 26. Conservatorship - Closing

Notice of the hearing on a petition for termination of conservatorship must be served on the protected person, if then living, and all other interested persons, as defined by law or by the court pursuant to § 15-10-201(27), C.R.S., if any. Such hearing may be held pursuant to Rule 24.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 27 to 29. Reserved

PART 4. FIDUCIARIES

Rule 30. Change of Contact Information

(a) Every fiduciary must promptly notify the court of any change to the name, physical or mailing address, e-mail address, or telephone number of:

(1) The fiduciary; or

(2) The ward or protected person.

(b) Notice to the court will be accomplished by filing the appropriate JDF or a form that substantially conforms to the JDF.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 31. Accountings and Reports

(a) A fiduciary accounting or report must contain sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period.

(b) An accounting or report prepared by a personal representative, conservator, guardian, trustee, or other fiduciary must show with reasonable detail:

(1) The receipts and disbursements for the period covered by the accounting or report;

(2) The assets remaining at the end of the period; and

(3) All other transactions affecting administration during the accounting or report period.

(c) Accountings and reports that substantially conform to JDF 942 for decedents' estates, JDF 885 for conservatorships, JDF 834 for minor guardianships, and JDF 850 for adult guardianships will be considered acceptable as to both content and format for purposes of this rule. All other fiduciary accountings and reports must comply with the requirements of subsection (b).

(d) The court may require the fiduciary to produce supporting evidence for any and all transactions.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 32. Appointment of Nonresident - Power of Attorney

Any person, resident or nonresident of this state, who is qualified to act under the Colorado Probate Code may be appointed as a fiduciary. When appointment is made of a nonresident, the person appointed must file an irrevocable power of attorney designating the clerk of the court and the clerk's successors in office, as the person upon whom all notices and process issued by a court or tribunal in the state of Colorado may be served, with like effect as personal service on such fiduciary, in relation to any suit, matter, cause, hearing, or thing, affecting or pertaining to the proceeding in regard to which the fiduciary was appointed. The power of attorney required by the provisions of this rule must set forth the address of the nonresident fiduciary. The clerk must promptly forward, by certified, registered, or ordinary first-class mail any notice or process served upon him or her, to the fiduciary at the address last provided in writing to the clerk. The clerk must file a certificate of service. Such service will be deemed complete 14 days after mailing. The clerk may require the person issuing or serving such notice or process to furnish sufficient copies, and the person desiring service must advance the costs and mailing expenses of the clerk.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''Choosing a Fiduciary'', see 15 Colo. Law. 203 (1986).

Rule 33. Bond and Surety

A fiduciary must file any required bond, or complete other arrangements for security before letters are issued. If there is a substantial deviation in the value of assets under protection or administration the fiduciary must petition the court for a review of the bond.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 34 to 39. Reserved

PART 5. CONTESTED PROCEEDINGS

Rule 40. Discovery

(a) This rule establishes the provisions and structure for discovery in all proceedings seeking relief under Title 15, C.R.S. Nothing in this rule will alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate motion or sua sponte, the court may apply the Colorado Rules of Civil Procedure in whole or in part, may fashion discovery rules applicable to specific proceedings, and may apply different discovery rules to different parts of the proceeding.

(b) Unless otherwise ordered by the court, the parties may engage in the discovery provided by C.R.C.P. 27 through 36. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order will be subject to C.R.C.P. 26(a)(2)(A), 26(a)(2)(B), 26(a)(4) and (5), and 26(b) through (g). However, due to the unique, expedited and often exigent circumstances in which probate proceedings take place, C.R.C.P. 16, 16.1, 16.2, and 26(a)(1) do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.

(c) C.R.C.P. 37, 45, and 121 § 1-12 are applicable to proceedings under Title 15.

(d) Notwithstanding subsections (a) through (c) of this rule, subpoenas and discovery directed to a respondent in proceedings under Title 15, Article 14, Part 3, must not be permitted without leave of court, or until a petition for appointment of a guardian has been granted under § 15-14-311, C.R.S.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 41. Jury Trial - Demand and Waiver

If a jury trial is permitted by law, any jury demand must be filed with the court, and the requisite fee paid, before the matter is first set for trial. The demanding party must pay the requisite jury fee upon the filing of the demand. Failure of a party to file and serve a demand for jury trial and pay the requisite fee as provided in this rule will constitute a waiver of trial by jury as provided in C.R.C.P. 38(e).

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''Will Contests — Some Procedural Aspects'', see 15 Colo. Law. 787 (1986).

Rule 42. Objections to Accounting, Final Settlement, Distribution or Discharge

(a) If any interested person desires to object to any accounting, the final settlement or distribution of an estate, the discharge of a fiduciary, or any other matter, the interested person must file specific written objections at or before the hearing thereon, and shall serve all interested persons with copies of the objections.

(b) If the matter is uncontested and set for a hearing without appearance, any interested person wishing to object must file specific written objections with the court at or before the hearing, and must serve all interested persons with copies of the specific written objections. An objector must set an appearance hearing in accordance with Rule 24.

(c) If the matter is set for an appearance hearing, the objector must file specific written objections 14 or more days before the scheduled hearing. If the objector fails to provide copies of the specific written objections within the required time frame, the petitioner is entitled to a continuance of the hearing.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 43 to 49. Reserved

PART 6. DECEDENT'S ESTATES

Rule 50. Wills - Deposit for Safekeeping and Withdrawals

A will of a living person tendered to the court for safekeeping in accordance with § 15-11-515, C.R.S., must be placed in a ''Deposited Will File'' and a certificate of deposit issued. In the testator's lifetime, the deposited will may be withdrawn only in strict accordance with § 15-11-515, C.R.S. After the testator's death, a deposited will must be transferred to the ''Lodged Will File.''

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 51. Transfer of Lodged Wills

If a petition under § 15-11-516, C.R.S., to transfer a will is filed and if the requested transfer is to a court within this state, no notice need be given; if the requested transfer is to a court outside this state, notice must be given to the person nominated as personal representative and such other persons as the court may direct. No filing fee will be charged for this petition, but the petitioner must pay any other costs of transferring the original will to the proper court.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 52. Informal Probate - Separate Writings

The existence of one or more separate written statements disposing of tangible personal property under the provisions of § 15-11-513, C.R.S., will not cause informal probate to be declined under the provisions of § 15-12-304, C.R.S.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''A Potpourri of Probate Practice Aids'', see 11 Colo. Law. 1850 (1982).

Rule 53. Heirs and Devisees - Unknown, Missing or Nonexistent - Notice to Attorney General

In a decedent's estate, whenever it appears that there is an unknown heir or devisee, or that the address of any heir or devisee is unknown, or that there is no person qualified to receive a devise or distributive share from the estate, the personal representative must promptly notify the attorney general. Thereafter, the attorney general must be given the same information and notice required to be given to persons qualified to receive a devise or distributive share. When making any payment to the state treasurer of any devise or distributive share, the personal representative must include a copy of the court order obtained under § 15-12-914, C.R.S.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 54. Supervised Administration - Scope of Supervision - Inventory and Accounting

(a) In considering the scope of supervised administration under § 15-12-501, C.R.S., the court must order such supervision as deemed necessary, after considering the reasons for the request.

(b) If supervised administration is ordered, the personal representative must file with the court and serve interested persons:

(1) An inventory;

(2) Annual interim accountings;

(3) A final accounting; and

(4) Other documentation as ordered by the court.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 55. Court Order Supporting Deed of Distribution

When a court order is requested to vest title in a distributee free from the rights of other persons interested in the estate, such order must not be granted ex parte, but must require either the stipulation of all interested persons or notice and hearing, initiated by the requesting party.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

COMMENTS

2018

Note that Colorado Bar Association Real Estate Title Standard 11.1.7 discusses certain requirements for the vesting of merchantable title in a distributee. A court order is necessary to vest merchantable title in a distributee, free from the rights of all persons interested in the estate to recover the property in case of an improper distribution. This rule requires a notice and hearing procedure as a condition of issuance of such order. A certified copy of the court's order should be recorded with the deed of distribution. Under the title standard, an order is not required to vest merchantable title in a purchaser for value from or a lender to such distributee. See § 38-35-109, C.R.S.

Rule 56. Foreign Personal Representatives

(a) After the death of a nonresident decedent, copies of the documents evidencing appointment of a domiciliary foreign personal representative may be filed as provided in § 15-13-204, C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than 60 days prior to filing with a Colorado court, and must include copies of all of the following that may have been issued by the foreign court:

(1) The order appointing the domiciliary foreign personal representative, and

(2) The letters or other documents evidencing or affecting the domiciliary foreign personal representative's authority to act.

(b) Upon filing such documents and a sworn statement by the domiciliary foreign personal representative stating that no administration, or application or petition for administration, is pending in Colorado, the court must issue a Certificate of Ancillary Filing, attesting that the clerk has in his or her possession the documents referenced in subsection (a) of this rule.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 57 to 59. Reserved

PART 7. PROTECTIVE PROCEEDINGS

Rule 60. Physicians' Letters or Professional Evaluation

Any physician's letter or professional evaluation utilized as the evidentiary basis to support a petition for the appointment of a guardian, conservator or other protective order under Article 14 of the Colorado Probate Code, unless otherwise directed by the court, should contain:

(a) A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any;

(b) An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(c) A prognosis for improvement and recommendation as to the appropriate treatment or rehabilitation plan; and

(d) The date of any assessment or examination upon which the report is based.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 61. Financial Plan with Inventory and Motion for Approval - Conservatorships

A Conservator's Financial Plan with Inventory and Motion for Approval must be filed with the court and served on all interested persons. The request for approval of the plan may be set on the hearing without appearance docket, the appearance docket, or not set for hearing and treated as a motion under C.R.C.P. 121.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rule 62. Court Approval of Settlement of Claims of Persons Under Disability

(a) This rule sets forth procedures by which a court considers requests for approval of the proposed settlement of claims on behalf of a minor or an adult in need of protection pursuant to § 15-14-401, et seq., C.R.S., (''respondent''). In connection with a proceeding brought under this rule, the court must:

(1) Consider the reasonableness of the proposed settlement and enter appropriate orders as the court finds will serve the best interest of the respondent;

(2) Ensure that the adult respondent, a minor respondent's parent, an adult respondent's or minor respondent's legal guardian, conservator, other fiduciary, next friend, guardian ad litem, and other interested persons as the court deems proper, have been advised of the finality of the proposed settlement;

(3) Adjudicate the allowance or disallowance, in whole or in part, of any outstanding liens and claims against settlement funds, including attorney fees; and

(4) Make protective arrangements for the conservation and use of the net settlement funds, in the best interest of the respondent, taking into account the nature and scope of the proposed settlement, the anticipated duration and nature of the respondent's disability, the cost of any future medical treatment and care required to treat respondent's disability, and any other relevant factors, pursuant to § 15-14-101, et seq., C.R.S.

(b) Venue for a petition brought under this rule must be in accordance with § 15-14-108(3), C.R.S.

(c) A petition for approval of a proposed settlement of a claim on behalf of the respondent may be filed by an adult respondent, a fiduciary for a respondent, an interested person as defined in § 15-10-201(27), C.R.S., a next friend, or guardian ad litem. The petition must be presented in accordance with the procedures set forth in this rule.

(d) A petition for approval of settlement must include the following information:

(1) Facts.

A. The respondent's name and address;

B. The respondent's date of birth;

C. If the respondent is a minor, the name and contact information of each legal guardian. If the identity or contact information of any legal guardian is unknown, or if any parental rights have been terminated, the petition must so state;

D. The name and contact information of the respondent's spouse, partner in a civil union, or if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition;

E. The name and contact information of any guardian, conservator, custodian, trustee, agent under a power of attorney, or any other court appointed fiduciary for the respondent; and

F. The date and a brief description of the event or transaction giving rise to the claim.

(2) Claims and Liabilities.

A. The contact information of each party against whom the respondent may have a claim;

B. The basis for each of the respondent's claims;

C. The defenses and counterclaims if any, to the respondent's claims; and

D. The name and contact information of each insurance company involved in the claim, the type of policy, the policy limits, and the identity of the insured.

(3) Damages.

A. A description of the respondent's injuries;

B. The amount of any time missed by the respondent from school or employment and a summary of any lost income resulting from the respondent's injuries;

C. A summary of any damage to respondent's property;

D. A summary of any expenses incurred for medical or other care provider services as a result of the respondent's injuries; and

E. The identification of any person, organization, institution, or state or federal agency that paid any of the respondent's expenses and a summary of any expenses that have been or will be paid by each particular source.

(4) Medical Status.

A. A description of the respondent's current condition including but not limited to the nature and extent of any disability, disfigurement, or physical or psychological impairments and any current treatments and therapies; and

B. An explanation of the respondent's prognosis and any anticipated treatments and therapies.

(5) Status of Claims.

A. For this claim and any other related claim, the status of the claim and if any civil action has been filed, the court, case number, and parties; and

B. For this claim and any other related claim, identify the amount of the claim and contact information of any party having a subrogation right including any state or federal agency paying or planning to pay benefits to or for the respondent. A list of all subrogation claims and liens against the settlement proceeds must be included as well as a summary of efforts to negotiate them.

(6) Proposed Settlement and Proposed Disposition of Settlement Proceeds.

A. The name and contact information of any party or entity making and receiving payment under the proposed settlement;

B. The proposed settlement amount, payment terms, and proposed disposition, including any restrictions on the accessibility of the funds and whether any proceeds will be deposited into a restricted account;

C. The details of any structured settlement, annuity, insurance policy or trust instrument, including the terms, present value, discount rate, if applicable, payment structure and the identity of the trustee or entity administering such arrangements;

D. The legal fees and costs being requested to be paid from the settlement proceeds; and

E. Whether there is a need for continuing court supervision, the appointment of a fiduciary or the continuation of an existing fiduciary appointment. The court may appoint a conservator, trustee, or other fiduciary to manage the settlement proceeds or make other protective arrangements in the best interest of the respondent.

(7) Exhibits.

A. The petition must list each exhibit filed with the petition.

B. The following exhibits must be attached to the petition:

(i) A written statement by the respondent's physician or other health care provider, if any. The statement must set forth the information required by subsection (d)(4) of this rule and comply with Rule 60 unless otherwise ordered by the court;

(ii) Relevant legal fee agreements, statement of costs and billing records and billing summary; and

(iii) Any proposed settlement agreements and proposed releases.

C. The court may continue, vacate, or place conditions on approval of the proposed settlement in response to petitioner's failure to include such exhibits.

(e) Notice of a hearing and a copy of the petition must be given in accordance with § 15-14-404(1) and (2), C.R.S., and Rule 20, unless otherwise ordered by the court.

(f) An appearance hearing is required for petitions brought under this rule.

(g) The petitioner, the respondent, and any nominated fiduciary must attend the hearing, unless excused by the court for good cause.

(h) The court may appoint a guardian ad litem, attorney, or other professional to investigate and report to the court, or represent the respondent. The court may order the payment of fees and costs for such guardian ad litem, attorney, or other professional to be paid from the settlement or other sources as may be deemed appropriate by the court.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

ANNOTATION

Law reviews. For article, ''Personal Injury Settlements With Minors'', see 21 Colo. Law. 1167 (1992). For article, ''Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I'', see 30 Colo. Law. 43 (January 2001). For article, ''Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II'', see 30 Colo. Law. 56 (February 2001). For article, ''Issues for the Elderly and Disabled Client—Part II: Estate and Health Care Planning'', see 30 Colo. Law. 5 (March 2001). For article ''Court Approval of the Settlement of Claims of Persons Under Disability'', see 35 Colo. Law. 97 (August 2006).

Rule 63. Foreign Conservators

(a) After the appointment of a conservator for a person who is not a resident of this state, copies of documents evidencing the appointment of such foreign conservator may be filed as provided in § 15-14-433, C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than 60 days prior to filing with a Colorado court, and must include copies of all of the following:

(1) The order appointing the foreign conservator;

(2) The letters or other documents evidencing or affecting the foreign conservator's authority to act; and

(3) Any bond of foreign conservator.

(b) Upon filing such documents and a sworn statement by the foreign conservator stating that a conservator has not been appointed in this state and that no petition in a protective proceeding is pending in this state concerning the person for whom the foreign conservator was appointed, the court must issue a Certificate of Ancillary Filing, substantially conforming to JDF 892.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 64 to 69. Reserved

PART 8. TRUSTS

Rule 70. Trust Registration - Amendment, Release and Transfer

(a) A trustee must file with the court of current registration an amended trust registration statement to advise the court of any change in the trusteeship, of any change in the principal place of administration, or of termination of the trust.

(b) If the principal place of administration of a trust has been removed from this state, the court may release a trust from registration in this state upon request and after notice to interested parties.

(c) If the principal place of administration of a trust has changed within this state, the trustee may transfer the registration from one court to another within this state by filing in the court to which the registration is transferred an amended trust registration statement with attached thereto a copy of the original trust registration statement and of any amended trust registration statement prior to the current amendment, and by filing in the court from which the registration is being transferred a copy of the amended trust registration statement. The amended statement must indicate that the trust was registered previously in another court of this state and that the registration is being transferred.

Source: Entire chapter amended and adopted June 28, 2018, effective September 1, 2018.

Rules 71 to 79. Reserved

APPENDIX TO CHAPTER 27

The Colorado Rules of Probate Procedure

APPENDIX TO CHAPTER 27

COLORADO PROBATE CODE FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

SPECIAL FORM INDEX

Form 884	Order Appointing Co-Conservator or Successor Conservator
Form 885	Conservator's Report Adult or Minor
Form 888	Petition for Termination of Conservatorship Adult or Minor
Form 889	Waiver of Hearing, Waiver of Final Conservator's Report, Waiver of Audit, And Approval of Schedule of Distribution
Form 890	Order Terminating Conservatorship
Form 891	Registration and Recognition of Protective Orders from other States and Sworn Statements - Conservator for Adult Pursuant to § 15-14.5-402, C.R.S. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
Form 892	Certificate of Registration and Recognition of Protective Orders from Other States - Conservatorship for Adult
Form 897	Online Conservator's Report Attachment Sheet (OCRA)
Form 898	Public Administrator's Statement of Account Pursuant to Small Estate(s) Procedure
Form 902	Demand for Notice of Filings or Orders Pursuant to § 15-12-204, C.R.S. and C.R.P.P. 21
Form 903	Withdrawal of Demand for Notice of Filings or Orders Pursuant to § 15-12-204, C.R.S.
Form 910	Application for Informal Probate of Will and Informal Appointment of Personal Representative
Form 911	Acceptance of Appointment
Form 912	Renunciation And/Or Nomination of Personal Representative
Form 913	Order for Informal Probate of Will and Informal Appointment of Personal Representative
Form 915	Letters Testamentary/Of Administration
Form 916	Application for Informal Appointment of Personal Representative
Form 917	Order for Informal Appointment of Personal Representative
Form 920	Petition for Formal Probate of Will and Formal Appointment of Personal Representative
Form 921	Order Admitting Will to Formal Probate and Formal Appointment of Personal Representative
Form 922	Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative
Form 923	Order of Intestacy, Determination of Heirs and Formal Appointment of Personal Representative
Form 924	Application for Informal Appointment of Special Administrator Pursuant to § 15-12-614, C.R.S.
Form 925	Order for Informal Appointment of Special Administrator
Form 926	Petition for Formal Appointment of Special Administrator Pursuant to § 15-12-614, C.R.S.
Form 927	Order for Formal Appointment of Special Administrator
Form 928	Letters of Special Administration
Form 929	Domiciliary Foreign Personal Representative's Sworn Statement
Form 930	Certificate of Ancillary Filing - Decedent's Estate
Form 940	Information of Appointment
Form 941	Decedent's Estate Inventory
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Form 943	Notice to Creditors by Publication Pursuant to § 15-12-801, C.R.S.
Form 944	Notice to Creditors by Mail or Delivery Pursuant to § 15-12-801, C.R.S.
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INDEX TO
COLORADO RULES OF PROBATE PROCEDURE

CHAPTER 28

The Colorado Rules of Juvenile Procedure

Repealed and Reenacted by the

SUPREME COURT OF COLORADO

June 16, 1988,

Effective January 1, 1989

ANALYSIS BY RULE

PART SIX — ADOPTION AND RELINQUISHMENT

PART SEVEN — SUPPORT

(No Rule)

CHAPTER 28

COLORADO RULES OF JUVENILE PROCEDURE

Cross references: For the juvenile court of Denver, see article 8 of title 13, C.R.S.

PART ONE — APPLICABILITY

Rule 1.

These rules govern proceedings brought in the juvenile court under Title 19, 8B C.R.S. (1987 Supp.), also hereinafter referred to as the Children's Code. All statutory references herein are to the Children's Code as amended. Proceedings are civil in nature and where not governed by these rules or the procedures set forth in Title 19, 8B C.R.S. (1987 Supp.), shall be conducted according to the Colorado Rules of Civil Procedure. Proceedings in delinquency shall be conducted in accordance with the Colorado Rules of Criminal Procedure, except as otherwise provided by statute or by these rules.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted April 17, 1997, effective July 1, 1997.

ANNOTATION

Law reviews. For article, ''Confessions and the Juvenile Offender'', see 11 Colo. Law. 96 (1982). For article, ''Toward an Integrated Theory of Delinquency Responsibility'', see 60 Den. L.J. 485 (1983). For article, ''Colorado Juvenile Court History: The First Hundred Years'', see 32 Colo. Law. 63 (April 2003).

Juvenile who is detained is entitled to a preliminary hearing by constitutional mandate. The right to a preliminary hearing in all other instances is based upon interpretation of the Colorado children's code and the Colorado rules of juvenile procedure. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

When juvenile entitled to preliminary hearing. Juveniles charged in delinquency proceedings with crimes (Felonies and class 1 misdemeanors) subject to Crim. P. 5 and 7 are entitled to a preliminary hearing. Juveniles held on lesser charges are not granted a right to a preliminary hearing by statute or by rule. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

Applicability of rules of civil procedure. The Rules of Juvenile Procedure and the applicable statutes are silent as to the effect of a direction from the court or commissioner to counsel to prepare an order; and the Rules of Civil Procedure, therefore, are applicable. People ex rel. M.C.L., 671 P.2d 1339 (Colo. App. 1983).

Applied in People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976); People in Interest of C.R., 38 Colo. App. 252, 557 P.2d 1225 (1976); People in Interest of D.A.K., 198 Colo. 11, 596 P.2d 747 (1979); People v. District Court, 199 Colo. 197, 606 P.2d 450 (1980); People in re J.B.P., 44 Colo. App. 95, 608 P.2d 847 (1980); People in Interest of C.A.K., 628 P.2d 136 (Colo. App. 1980); In re U.M. v. District Court, 631 P.2d 165 (Colo. 1981); People in Interest of M.R.J., 633 P.2d 474 (Colo. 1981); People in Interest of B.J.D., 626 P.2d 727 (Colo. App. 1981); People in Interest of A.M.D., 648 P.2d 625 (Colo. 1982); People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982); People in Interest of A.L.C., 660 P.2d 917 (Colo. App. 1982); People ex rel. J.F., 672 P.2d 544 (Colo. App. 1983); People in Interest of M.M.T., 676 P.2d 1238 (Colo. App. 1983).

PART TWO — GENERAL PROVISIONS

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of juvenile proceedings. They shall be construed to secure simplicity in procedure and fairness in administration.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Colorado rules of juvenile procedure reflect supreme court's judgment concerning the manner in which juvenile courts should proceed in applying the Colorado children's code. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

Juvenile defendants best served by informal judicial setting. The juvenile system is premised on the concept that a more informal, simple, and speedy judicial setting will best serve the needs and welfare of juvenile defendants. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

Applied in S.A.S. v. District Court, 623 P.2d 58 (Colo. 1981).

Rule 2.1. Attorney of Record

(a) An attorney shall be deemed of record when the attorney appears personally before the court, files a written entry of appearance, or has been appointed by the court.

(b) The clerk shall notify an attorney appointed by the court. An order of appointment shall appear in the file.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

Rule 2.2. Summons — Content and Service

(a) Juvenile Delinquency Proceedings.

(1) The summons served in juvenile delinquency proceedings shall contain the notifications required by §19-2-514, C.R.S. The summons and petition shall be served upon the juvenile in the manner provided in §19-2-514, C.R.S.

(2) When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Juvenile Procedure, subsequent pleadings and notice may be served by regular mail.

(3) If a juvenile is issued a promise to appear pursuant to §19-2-507(5), C.R.S., the promise to appear shall contain the notifications required by §19-2-507(5), C.R.S.

(b) Dependency and Neglect Proceedings.

(1) The summons served in dependency and neglect proceedings shall contain the notifications required by §19-3-503, C.R.S. The summons and petition shall be served upon respondent(s) in the manner provided in §19-3-503(7) and (8), C.R.S.

(2) When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Juvenile Procedure, subsequent pleadings and notice may be served by regular mail.

(c) Relinquishment Proceedings.

(1) The summons served in relinquishment proceedings shall contain the notifications required by §19-5-105(5), C.R.S.

(2) The summons and petition shall be served upon the non-relinquishing parent as follows:

A. As ordered by the court; or

B. In the same manner as a summons in a civil action; or

C. By mailing it to the respondent ('s/s') last known address, not less than 14 days prior to the time the respondent(s) is/are required to appear, by registered mail return receipt requested or certified mail return receipt requested. Service by mail shall be complete upon return of the receipt signed by the respondent(s) or signed on behalf of the respondent(s) by one authorized by law.

(3) When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

(4) When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Juvenile Procedure, subsequent pleadings and notice may be served by regular mail.

(d) Truancy Proceedings.

(1) The summons served in truancy proceedings shall comply with the provisions of C.R.C.P. 4(c). If the summons is combined with the notice required by §22-33-108(5)(c), C.R.S., it shall also comply with the provisions of that section. In any jurisdiction in which juvenile detention may be used as a sanction after a finding of a violation of a valid court order, the summons shall inform the juvenile served of his or her right to a hearing and to due process as guaranteed by the United States Constitution prior to the entry of a valid court order.

(2) The summons and petition shall be served upon the respondent(s) as required pursuant to C.R.C.P. 4.

(3) When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

(4) When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Civil Procedure, subsequent pleadings and notice may be served by regular mail.

(e) Uniform Parentage Act Proceedings.

(1) The petition and summons served in Uniform Parentage Act proceedings shall comply with all requirements of Title 19, Article 4 of the Colorado Revised Statutes.

(2) The petition and summons, filed by one party, shall be personally served upon all other parties in accordance with §19-4-105.5, C.R.S., or §19-4-109(2), C.R.S., or the Colorado Rules of Civil Procedure.

(3) When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g). Affidavits in support of motions for service by publication shall include a detailed statement of the specific efforts made to locate an absent parent.

(4) The summons issued upon commencement of a proceeding under Article 4 shall include the specified advisements and notice requirements of §19-4-105.5(5), C.R.S.

(5) If the child support enforcement unit is initiating a proceeding under the Uniform Parentage Act, a delegate shall serve the petition and notice of financial responsibility in the manner identified in §26-13.5-104, C.R.S.

(f) Adoption Proceedings.

(1) In adoption proceedings where either parent's parental rights have not been terminated or relinquished, that parent must be personally served with a copy of the petition for adoption.

(2) When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g). Affidavits in support of motions for service by publication shall include a detailed statement of the specific efforts made to locate an absent parent.

(3) If the motion for service through publication is granted, the court shall order service by one publication of the notice in a newspaper of general circulation in the county in which the hearing is to be held. The hearing shall not be held sooner than 35 days after service of the notice is complete.

(4) If the subject child in the adoption proceeding is an enrolled member of a federally recognized American Indian Nation, the petition for adoption must be sent to the parent or Indian custodian of the Indian child and to the Indian child's tribe by registered mail, return receipt requested, pursuant to §19-1-126, C.R.S., and §19-5-208, C.R.S., and proof shall be filed with the court. Postal receipts, or copies thereof, shall be attached to the petition for adoption when it is filed with the court or filed within 10 days after the filing of the petition, as specified in §19-1-126(1)(c), C.R.S.

(5) Service of petition and notice requirements do not apply to validation of a foreign adoption decree proceedings.

(6) A petition for adult adoption shall be filed in accordance with §19-5-208, C.R.S. The petition and summons shall be served on the identified adult adoptee by the petitioner.

(g) Support Proceedings under the Children's Code.

(1) Upon filing of the petition for support, the clerk of court, petitioner, or child support enforcement unit shall issue a summons stating the hearing date and the substance

of the petition. A copy of the petition may be attached to the summons in lieu of stating the substance of the petition in the summons.

(2) Service of the summons shall be by personal service pursuant to C.R.C.P. 4(e). If the obligor is a nonresident of this state, the summons and petition may be served by sending the copies by certified mail with proof of actual receipt by the individual.

(3) The hearing to establish support shall occur at least 10 days after service is completed, or any later date the court orders.

(h) Administrative Procedure for Establishing Child Support by the Child Support Enforcement Unit.

(1) The child support enforcement unit shall issue a notice of financial responsibility to an obligor who owes child support.

(2) The child support enforcement unit shall serve the notice of financial responsibility on the obligor not less than 10 days prior to the date stated in the notice for the negotiation conference. Service can be accomplished in accordance with the Colorado Rules of Civil Procedure, by an employee appointed by the child support enforcement unit to serve process, or by certified mail, return receipt requested, signed by the obligor only. The receipt will be prima facie evidence of service.

(3) If process is served through the administrative process, there will be no additional service necessary if the case is referred to court for further review.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a) amended and adopted, effective February 24, 1999; entire rule amended and adopted and committee comment added and adopted December 14, 2000, effective January 1, 2001; entire rule amended and adopted October 30, 2014, effective November 1, 2014; (h)(2) corrected and effective March 2, 2015.

COMMITTEE COMMENT

Under Rule 2.2, a single publication is sufficient. There is no need for four weeks of publication.

Rule 2.3. Emergency Orders

(a) On the basis of a report that a child's or juvenile's welfare or safety may be endangered, and if the court believes action is reasonably necessary, the court may issue an ex parte order.

(b) Where the need for emergency orders arises, and the court is not in regular session, the judge or magistrate may issue such orders orally, by facsimile, or by electronic filing. Such orders shall have the same force and effect. Oral orders shall be followed promptly by a written order entered on the first regular court day thereafter.

(c) Any time when a child or juvenile is subject to an emergency order of court, as herein provided, and the child or juvenile requires medical or hospital care, reasonable effort shall be made to notify the parent(s), guardian, or other legal custodian for the purpose of gaining consent for such care; provided, however, that if such consent cannot be secured and the child's or juvenile's welfare or safety so requires, the court may authorize needed medical or hospital care.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

ANNOTATION

Emergency custody order constitutional. An ex parte emergency order placing children under protective custody, pursuant to this rule, does not violate the parent's right to due process. People v. Coyle, 654 P.2d 815 (Colo. 1982) (decided under rule 15 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures).

Rule 2.4. Limitation on Authority of Juvenile Magistrates

No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.

Source: Entire section added and effective February 3, 1994.

PART THREE — DELINQUENCY

Rule 3. Advisement

(a) At the juvenile's first appearance after the detention hearing, or at first appearance on summons, the juvenile and parent, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:

(1) The nature of the allegations contained in the petition;

(2) The juvenile's continuing right to counsel and if the juvenile, parent, guardian, or other legal custodian is indigent, that the juvenile may be assigned counsel, as provided by law;

(3) The juvenile need make no statement, and that any statement made may be used against the juvenile;

(4) The juvenile's right to a preliminary hearing, as provided by §19-2-705, C.R.S.;

(5) The juvenile's right to a jury trial, as provided by §19-2-107, C.R.S.;

(6) That any plea of guilty by the juvenile must be voluntary and not the result of undue influence or coercion on the part of anyone;

(7) The sentencing alternatives available to the court if the juvenile pleads guilty or is found guilty;

(8) The juvenile's right to bail as limited by §19-2-508, C.R.S., and §19-2-509, C.R.S., and the amount of bail, if any, that has been set by the court;

(9) That the juvenile may be subject to transfer to the criminal division of the district court to be tried as an adult, as provided by §19-2-518, C.R.S.; and

(b) If the juvenile pleads guilty to the allegations in the petition, the court shall not accept the plea without first determining that the juvenile is advised of all the matters set forth in (a) of this Rule and also determines that:

(1) The juvenile understands the nature of the delinquent act alleged, the elements of the offense to which the juvenile is pleading guilty, and the effect of the juvenile's plea;

(2) The plea of guilty is voluntary on the juvenile's part and is not the result of undue influence or coercion on the part of anyone;

(3) The juvenile understands and waives his or her right to trial, including the right to a jury trial, if authorized by statute, on all issues;

(4) The juvenile understands the possible sentencing alternatives available to the court;

(5) The juvenile understands that the court will not be bound by representations made to the juvenile by anyone concerning the sentence to be imposed; and

(6) There is a factual basis for the plea of guilty. If the plea is entered as a result of plea agreement, the court shall satisfy itself that the juvenile understands the basis for the plea agreement, and the juvenile may then waive the establishment of a factual basis for the particular charge to which the juvenile is pleading guilty.

(c) If the juvenile pleads not guilty to the allegations in the petition, the court shall set the matter for an adjudicatory trial.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a)(4), (a)(5), (a)(8), (a)(9), and (b)(3) amended and adopted April 17, 1997, effective July 1, 1997; (a) amended and adopted October 30, 2014, effective November 1, 2014.

ANNOTATION

Law reviews. For article, ''Representing the Mentally Retarded or Disabled Parent in a Colorado Dependent or Neglected Child Action'', see 11 Colo. Law. 693 (1982). For article, ''The Nuts and Bolts of Juvenile Delinquency'', see 31 Colo. Law. 19 (October 2002).

This rule is the substantial equivalent of Rule 11, Crim. P., so that the court may analogize to it and the cases dealing with a guilty plea withdrawal. People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982).

And codifies juvenile's constitutional rights. This rule is the codification of the standards guaranteeing a juvenile's constitutional rights. People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982).

Test to determine valid waiver of rights. In determining whether there has been a valid waiver of a juvenile's rights, the factual circumstances of each case must be examined; that is, the ''totality of circumstances'' test is applied. People v. Cunningham, 678 P.2d 1058 (Colo. App. 1983).

Presence of parent. The parent is there to assure that the juvenile is provided with parental guidance and moral support, as well as some assurance that any waiver of the juvenile's rights is made knowingly and intelligently. People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982).

Of critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile is the presence of the parent. People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982); People v. Cunningham, 678 P.2d 1058 (Colo. App. 1983).

The Colorado rules of juvenile procedure do not require that a child must be accompanied by a parent, guardian, or legal custodian at all proceedings, even though the juvenile's first court appearance requires that a parent, guardian, or legal custodian be fully advised of the child's rights. Therefore, juvenile's waiver of rights during trial, adjudication of delinquency, or sentencing is not necessarily invalid. People in Interest of S.A.R., 860 P.2d 573 (Colo. App. 1993).

Failure to comply with rule voids disposition. Where the referee in two prior delinquency hearings failed to comply with the mandates of this rule, those prior dispositions are constitutionally void, and cannot be used as to basis for enhanced punishment proceedings under § 19-3-113.1. People v. M.A.W., 651 P.2d 433 (Colo. App. 1982).

Court not required to warn of possible future consequences of guilty plea. In the absence of a specific requirement by statute or rule, a juvenile court is not required to advise the juvenile of consequences of a guilty plea which would result from the future commission of felonies. People v. District Court, 191 Colo. 298, 552 P.2d 297 (1976).

Child does not have an absolute constitutional or statutory right to bail pending adjudication of the charges filed against him in juvenile court. L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

Applicability of Rule 46, C.R. Crim. P., to juvenile proceedings. Rule 46, C.R. Crim. P., does not apply to admission to bail in juvenile proceedings to the extent it is inconsistent with this rule and the children's code. L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

Presumption of release pending dispositional hearing. A trial court may detain a juvenile without bail only after giving due weight to a presumption that a juvenile should be released pending a dispositional hearing, except in narrowly defined circumstances where the state establishes that detention is necessary to protect the child from imminent harm or to protect others in the community from serious bodily harm which the child is likely to inflict. L.O.W. v. District Court, 623 P.2d 1253 (Colo. 1981).

Where juvenile's natural parents' parental rights have been terminated and the juvenile has been placed in the custody of the state department of social services, the department could act properly on juvenile's behalf as his legal custodian. People v. Cunningham, 678 P.2d 1058 (Colo. App. 1983).

Applied in People in Interest of M.M., 41 Colo. App. 44, 582 P.2d 692 (1978); People v. Alward, 654 P.2d 327 (Colo. App. 1982); People in Interest of C.R.B., 662 P.2d 198 (Colo. App. 1983).

Rule 3.1. Petition Initiation, Form and Content, Time Limit for Filing Petition

(a) A petition concerning a juvenile who is alleged to be delinquent shall be initiated in accordance with Section 19-2-512 and 513, C.R.S.

(b) If the petition is not filed within seventy-two (72) hours (excluding Saturdays, Sundays, and official court holidays) after a juvenile is taken into custody and not released to a parent, guardian or legal custodian, said juvenile shall be released upon order of court; provided that upon application to the court by the district attorney or any interested party

and for good cause shown, the above time period may, in the discretion of the court, be extended for a reasonable period of time to be fixed by said court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted April 17, 1997, effective July 1, 1997.

ANNOTATION

Annotator's note. Since rule 3.1 is similar to rule 7 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure, a relevant case construing that provision has been included in the annotations to this rule.

Petition is similar to information in criminal law. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Sufficiency of petition in delinquency. A petition in delinquency is sufficient if it advises the juvenile of the nature and cause of the accusation against him, so that he can adequately defend himself. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Petition need not specify lesser included offenses. A petition in delinquency need not specify lesser included offenses which may have been committed in commission of the described act. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

And incorrect citation of statutory reference in petition is not grounds for reversal, absent substantial prejudice. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Rule 3.2. Responsive Pleadings and Motions

(a) No written responsive pleadings are required. Jurisdictional matters of age and residence of the juvenile shall be deemed admitted unless specifically denied.

(b) Any defense or objection which is capable of determination without trial of the general issues may be raised by motion.

(c) Defenses and objections based on defects in the institution of the action or in the petition, other than it fails to show jurisdiction in the court, shall be raised only by motion filed prior to the entry of a plea of guilty or not guilty. Failure thus to present any such defense or objection constitutes a waiver, but the court for good cause shown may grant relief from the waiver. Lack of jurisdiction shall be noticed by the court at any time during the proceedings.

(d) All motions shall be in writing and signed by the moving party or his counsel, except those made orally by leave of court.

(e) A request for waiver of jurisdiction to the district court for criminal proceedings shall be in writing and filed within 28 days of the initial advisement. Upon application to the court by the district attorney, and for good cause shown, a request may, in the discretion of the court, be filed at any time prior to the adjudicatory trial.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Annotator's note. Since rule 3.2 is similar to rule 8 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures relevant cases construing that provision have been included in the annotations to this rule.

Must prove juvenile's age even if not specifically denied in pleadings. Where the petition in delinquency states the respondent's age and the responsive pleading does not deny the asserted age, although section 19-3-106 and this rule specify that ''jurisdictional matters of the age and residence of the child shall be deemed admitted unless specifically denied'', the juvenile-defendant's age is not thereby admitted, and it is necessary to present evidence specifically on that issue. People in Interest of M.M., 41 Colo. App. 44, 582 P.2d 692 (1978).

Section not superseded by statutory procedure for waiving jurisdiction. This section is not superseded by the special statutory procedure provided in section 19-3-106(4)(b), C.R.S. 1973 (1978 Repl. Vol. 8), for waiving jurisdiction of the juvenile court. People v. District Court, 199 Colo. 197, 606 P.2d 450 (1980).

Denial of request for waiver of jurisdiction to district court upheld. In the absence of good cause to support the late filing by the people of a request for waiver of jurisdiction to

the district court for criminal proceedings, the court is within its authority in denying the motion. People v. District Court, 199 Colo. 197, 606 P.2d 450 (1980).

Rule 3.3. Discovery

Disclosure by the prosecution and by the juvenile to the prosecution shall be governed by Crim. P. 16. ''Prior criminal convictions'' shall include juvenile adjudications.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Applied in People in Interest of M.M., 41 Colo. App. 44, 582 P.2d 692 (1978) (decided under rule 9 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures).

Rule 3.4. Court Order for Nontestimonial Identification

Any request for a court order for nontestimonial identification shall be governed by Crim. P. 16 and Crim. P. 41.1.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 3.5. Jury Trial

(a) In any action in delinquency in which a juvenile is alleged to be an aggravated juvenile offender, as described in section 19-2-516, C.R.S. or is alleged to have committed an act that would constitute a crime of violence, as defined in section 18-1.3-406, C.R.S., if committed by an adult, the juvenile or the district attorney may demand a trial by a jury of not more than six persons except as provided in section 19-2-601(3)(a), C.R.S., or the court, on its own motion, may order a jury trial, with the exception that a juvenile is not entitled to a trial by jury when the petition alleges a delinquent act which is a misdemeanor, a petty offense, a violation of a municipal or county ordinance, or a violation of a court order. When requesting a jury trial pursuant to this rule, a juvenile is deemed to have waived the right to have an adjudicatory trial within 60 days and is subject instead to an adjudicatory trial within 6 months. Unless a jury is demanded pursuant to subsection (1) of section 19-2-107, C.R.S., it shall be deemed waived.

(b) Examination, selection, and challenges for jurors shall be as provided by C.R.C.P. 47, except that the grounds for challenge for cause shall be as provided by Crim. P. 24.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001; (a) amended and effective January 17, 2008.

ANNOTATION

Annotator's note. Since rule 3.5 is similar to rule 18 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedures relevant cases construing that provision have been included in the annotations to this rule.

Trial by jury in the adjudicative stage of a juvenile proceeding is not required by the due process clause of the fourteenth amendment. People in Interest of T.A.W., 38 Colo. App. 175, 556 P.2d 1225 (1976).

And six-member jury satisfies due process requirements. People in Interest of T.A.W., 38 Colo. App. 175, 556 P.2d 1225 (1976).

Applied in S.A.S. v. District Court, 623 P.2d 58 (Colo. 1981).

Rule 3.6. Probation Revocation

Revocation of probation proceedings shall be governed by Crim. P. 32(f).

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Probation revocation petitions and delinquency petitions based on same acts. Where the district attorney files petitions to have a juvenile's probation revoked and then files delinquency petitions based on the same alleged acts, the court may dismiss the petitions for revocation of probation without prejudice and order the prosecution to proceed on the delinquency petitions. People in Interest of M.H., 661 P.2d 1173 (Colo. 1983) (decided under rule 12 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure).

Rule 3.7. Detention

(a) Scope. This Rule only applies when a juvenile is taken into custody by a law enforcement officer or a probation officer in connection with a proceeding arising under Article 2 of Title 19 of the Colorado Children's Code or the Interstate Compact for Juveniles.

(b) Screening Team. The chief judge in each judicial district or the presiding judge of the Denver juvenile court shall designate one or more qualified persons or agencies to act as a screening team with authority to determine whether a juvenile who has been taken into custody should be released to a parent, guardian, or other legal custodian, or detained pending a detention hearing.

(c) Notice. When a juvenile is detained, the screening team shall notify the court, the district attorney, and the local office of the state public defender. The screening team shall also inform the juvenile and the juvenile's parent, guardian, or other legal custodian of the right to a prompt hearing to determine whether the juvenile should be detained further. Notice to the juvenile and the juvenile's parent, guardian, or other legal custodian shall include the date, time, and location of the detention hearing, if known. If the date, time, and location of the detention hearing have not been determined, the screening team will instruct the juvenile's parent, guardian, or other legal custodian to contact the court on the next day which is not a Saturday, Sunday, or legal holiday, during regular business hours, to obtain that information. If a juvenile's parent, guardian, or other legal custodian cannot be located in the county, the screening team will provide notice to the person with whom the juvenile has been residing. Notice as required by this section (c) may be given verbally or in writing. Notice as required by this Rule shall be given as soon as practicable and without unnecessary delay.

(d) Information Sharing. The law enforcement agency that took the juvenile into custody shall promptly provide to the court, the district attorney, and the local office of the state public defender, or other defense counsel if known, the affidavit in support of probable cause for the arrest and the arrest report, if available. The screening team shall promptly provide to the court, the district attorney, the local office of the state public defender, or other defense counsel if known, any screening material prepared pursuant to the juvenile's arrest. The information required to be disclosed by this Rule shall be disseminated as soon as practicable before the detention hearing. If defense counsel does not continue to represent the juvenile after the detention hearing, defense counsel shall return any written materials to the court and destroy any materials received in electronic form immediately.

(e) Time. Upon receipt of the notification required by section (c) of this Rule, the court shall schedule a detention hearing and notify the district attorney, the local office of the state public defender, any defense attorney of record in the case, any guardian ad litem appointed by the court in the case, and the screening team of the date and time of the hearing. The court shall hold a detention hearing within 48 hours after the juvenile was taken into custody unless the juvenile was taken into custody for violating a valid court order on a status offense. The time in which the detention hearing must be held may be

extended for a reasonable time by order of the court upon good cause shown. In computing any period of time prescribed by this section (e) Saturdays, Sundays, and legal holidays shall be excluded.

(f) Representation. A juvenile who is detained for committing a delinquent act shall be represented by counsel at a detention hearing as provided in C.R.J.P. 3.9. The court shall allow defense counsel sufficient time to consult with the juvenile before the detention hearing.

(g) Hearing. The purposes of a detention hearing are to determine if a juvenile should be detained further and to define conditions under which he or she may be released, if release is appropriate. Detention hearings shall be conducted in the manner prescribed by §19-2-508, C.R.S.

(h) Court Orders. At the conclusion of a detention hearing, the court shall enter orders prescribed by §19-2-508, C.R.S. The court may also issue temporary orders for legal custody of a juvenile as provided in §19-1-115, C.R.S. The court may further detain a juvenile only if it finds from information provided at the hearing that the juvenile is a danger to himself or herself or to the community.

(i) Court Oversight. The court shall maintain control over the admission, length of stay, and release of all juveniles placed in shelter or detention, subject to the limitations prescribed by §19-2-508(3)(c), C.R.S., and §19-2-509(1), C.R.S.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (b) amended and adopted April 17, 1997, effective July 1, 1997; entire rule amended and adopted October 30, 2014, effective November 1, 2014.

Rule 3.8. Status Offenders

Juveniles alleged to have committed offenses which would not be a crime if committed by an adult (i.e., status offenses), shall not be detained for more than 24 hours excluding non-judicial days unless there has been a detention hearing and judicial determination that there is probable cause to believe the juvenile has violated a valid court order (JDF 560). A juvenile in detention alleged to be a status offender and in violation of a valid court order shall be adjudicated within 72 hours exclusive of non-judicial days of the time detained. A juvenile adjudicated of being a status offender in violation of a valid court order (JDF 561) may not be disposed to a secure detention or correctional placement unless the court has first reviewed a written report (JDF 562) prepared by a public agency which is not a court or law enforcement agency. The purpose of the report is to provide the court with useful information prior to sentencing. The report shall address the juvenile's behavior and the circumstances which brought the juvenile before the court and shall assess whether all less restrictive dispositions have been exhausted or are clearly inappropriate. The court is not bound by the recommendations contained in the report. The written report must be signed and dated either before or on the date the juvenile is sentenced to detention. Nothing herein shall prohibit the court from ordering the placement of juveniles in shelter care where appropriate, and such placement shall not be considered detention within the meaning of this rule. Juveniles alleged to have violated C.R.S. 18-12-108.5 or adjudicated delinquent for having violated C.R.S. 18-12-108.5 are exempt from the provisions of this rule.

COMMITTEE COMMENT

The reference to ''valid court orders'' is taken from the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974, as amended, which is found at 42 U.S.C.A. 5601 et seq. The Office of Juvenile Justice and Delinquency Prevention in April, 1995, issued final regulations to implement that portion of the JJDPA, as amended in 1992, which addresses the detention and secure confinement of status offenders. These regulations, which are found at 28 C.F.R. 31.303 (f)(3) set forth the legal requirements for issuing of ''valid court orders,'' the violation of which by a status offender may, in certain circumstances, authorize juvenile courts to detain and/or commit such youth to secure confinement. The appendix to these rules contains a form for issuing a valid court order, a form order for making a secure placement disposition for violation of a valid court order, and a form for a written report to the court.

The Committee's intent in drafting this rule is not to encourage more frequent use of deten-

tion for status offenders. The Committee recognizes that Congress and the OJJDP assumed that courts would exhibit self-restraint and exercise the valid court order exclusion only in cases of status offenders who chronically fail to follow court orders. The Colorado supreme court in In the Interest of J.E.S., 817 P.2d 508 (Colo. 1991) quoted from In Re Ronald S., 9 Cal. App. 3D 866, 138 Cal. Rptr. 387 (1977) to comment on the use of secure confinement for status offenders.

> Certainly not all [status offenders] need to be placed in secure facilities. However, some do and in these cases the juvenile court judge must have the authority to detain in a secure facility—if status offenders are to remain in the juvenile court. 69 Cal. App. 3d at 875, 138 Cal. Rptr. at 393.

Ohio Representative Ashbrook, who sponsored the valid court order amendment, stated that without the amendment courts would be limited in their ability to work with youths who continually flout the will of the court and that it would make ''helping that young person much more difficult.'' (126 Cong. Rec. H. 10 10932). Ashbrook contemplated that the valid court order exception would primarily be used to provide treatment rather than punishment.

The Committee recommends that the Courts adopt this benevolent approach and use the valid court order exception to ensure that secure placements are used only for recalcitrant status offenders.

Runaways who are in violation of their probation do not fall under this rule.

Trial courts are encouraged to use the forms provided for in this rule and contained in the special forms index (JDF 560, JDF 561 and JDF 562). The order to secure placement as a disposition for violation of valid court order (JDF 561) must be signed and dated on the day the juvenile enters detention. When the provided forms are utilized, signed and dated properly, the court's order sentencing the status offender to detention complies with the requirements of the Juvenile Justice and Delinquency Prevention Act.

Source: Entire rule and committee comment added and adopted June 12, 1997, effective January 1, 1998; committee comment corrected November 19, 1997; committee comment amended and adopted December 14, 2000, effective January 1, 2001; entire rule and committee comment amended and effective February 21, 2008.

Rule 3.9. Counsel

(a) Appointment of Counsel.

(1) **Detention Hearing.** Any juvenile who is detained for committing a delinquent act shall be represented at the detention hearing by counsel. The court shall appoint the office of the state public defender or, in the case of a conflict, the office of alternate defense counsel. Appointment of the office of the state public defender or alternate defense counsel shall continue and counsel shall be available for the juvenile's first appearance.

(2) **First Appearance.** Unless the juvenile has made an early application for or retained his or her own counsel, or the juvenile has made a knowing, intelligent, and voluntary waiver, at the first appearance the court shall appoint the office of the state public defender or, in the case of a conflict, alternative defense counsel if:

A. The juvenile is indigent. Unless a preliminary determination of indigency has been made by the office of the state public defender prior to the first appearance the court shall determine if the juvenile is indigent pursuant to §21-1-103(3), C.R.S. and applicable Chief Justice Directives; or

B. The juvenile's parent, guardian, or other legal custodian, except the State or County Department of Human Services, refuses to retain counsel. The court shall advise any non-indigent parent, guardian, or other legal custodian that they will be ordered to reimburse the cost of the representation as provided by Chief Justice Directive; or

C. The court on its own motion determines that counsel is necessary to protect the interests of the juvenile; or

D. The juvenile is in custody of the State or County Department of Human Services.

(b) Waiver. Before accepting any waiver of counsel by the juvenile the court must place the following findings on the record, based on a dialog conducted with the juvenile:

(1) The juvenile is sufficiently mature to make a knowing, intelligent, and voluntary waiver;

(2) The juvenile understands the dispositional and/or sentencing options that are available in the event of an adjudication or conviction of an offense which the juvenile is charged;

(3) The juvenile has not been coerced by another party, like his or her parent, guardian, or other legal custodian;

(4) The juvenile understands that the court will provide counsel if the juvenile's parent, guardian, or other legal custodian is unable or unwilling to retain counsel; and

(5) The juvenile understands the possible consequences from an adjudication or conviction from the offense charged.

(c) Termination or Withdrawal of Counsel.

(1) The appointment of counsel shall continue until:

A. The court's jurisdiction is terminated; or

B. The court finds that the juvenile or his or her parent, guardian, or other legal custodian have sufficient means to retain counsel; or

C. The juvenile's parent, guardian, or other legal custodian no longer refuse to retain counsel; or

D. The juvenile makes a knowing, intelligent, and voluntary waiver of counsel.

(2) A lawyer may withdraw from a case only upon order of the court. In the discretion of the court, a hearing on a motion to withdraw may be waived with the consent of the prosecution and if a written substitution of counsel is filed which is signed by current counsel, future counsel, and the juvenile. A request to withdraw shall be in writing or may be made orally in the discretion of the court and shall state the grounds for the request. A request to withdraw shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Advance notice of a request to withdraw shall be given to the juvenile before any hearing, if practicable. Such notice to withdraw shall include:

A. That the attorney wishes to withdraw;

B. The grounds for withdrawal;

C. That the juvenile has the right to object to withdrawal;

D. That a hearing will be held and withdrawal will only be allowed if the court approves;

E. That the juvenile has the obligation to appear at all previously scheduled court dates; and

F. That if the request to withdraw is granted, then the juvenile will have the obligation to hire other counsel, request the appointment of counsel by the court, or waive counsel, and elect to represent himself or herself.

(3) Upon setting of a hearing on a motion to withdraw, the lawyer shall make reasonable efforts to give the juvenile and his or her parent, guardian, or other legal custodian actual notice of the date, time, and place of the hearing. No hearing shall be conducted without the presence of the juvenile unless the motion is made subsequent to the failure of the juvenile to appear in court, for reason(s) directly attributable to the juvenile, as scheduled. A hearing need not be held and notice need not be given to a juvenile when a motion to withdraw is filed after a juvenile has failed to appear for a scheduled court appearance and has not reappeared within six months.

Source: Entire rule added and adopted October 30, 2014, effective November 1, 2014.

FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

SPECIAL FORM INDEX

JDF 560.	Valid Court Order for Status Offenders Pursuant to Colorado Rules of Juvenile Procedure 3.8
JDF 561.	Secure Placement As Disposition for Violation of Valid Court Order Pursuant to Colorado Rules of Juvenile Procedure 3.8
JDF 562.	Valid Court Order for Written Report Pursuant to Colorado Rules of Juvenile Procedure 3.8

PART FOUR — DEPENDENCY AND NEGLECT

Rule 4. Petition Initiation, Form and Content

A petition concerning a child who is alleged to be dependent and neglected shall be initiated in accordance with Section 19-3-501, C.R.S., and shall be in the form set forth in Section 19-3-502, C.R.S. Said petition shall be filed within 14 days from the day a child is taken into custody, unless otherwise directed by the court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: Letter designation ''(a)'' removed on revision (2018).

ANNOTATION

Annotator's note. Since rule 4 is similar to rule 7 as it existed prior to the 1988 repeal and reenactment of the rules of juvenile procedure, a relevant cases construing that provision has been included in the annotations to this rule.

Failure of attorney representing county department of social services to sign verified dependency petition held to be harmless error. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

Failure to file a dependency and neglect petition within prescribed time does not result in release of child absent a motion by an interested party, and even release of the child does not affect the right to file a dependency and neglect petition. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

Rule 4.1. Responsive Pleadings and Motions

(a) No written responsive pleadings are required. Jurisdictional matters of age and residence of the child which shall be deemed admitted unless specifically denied.

(b) Any defense or objection which is capable of determination without trial of the general issues may be raised by motion.

(c) Defenses and objections based on defects in the institution of the action or in the petition, other than it fails to show jurisdiction in the court, shall be raised only by motion filed prior to the entry of an admission or denial of the allegations of the petition. Failure to present any such defense or objection constitutes a waiver, but the court for good cause shown may grant relief from the waiver. Lack of jurisdiction shall be noticed by the court at any time during the proceeding.

(d) All motions shall be in writing and signed by the moving party or counsel, except those made orally by leave of court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 8 on responsive pleadings and motions, see the annotations under rule 3.2.

Rule 4.2. Advisement — Dependency and Neglect

(a) At the first appearance before the court, the respondent(s) shall be fully advised by the court as to all rights and the possible consequences of a finding that a child is

dependent or neglected. The court shall make certain that the respondent(s) understand the following:

(1) The nature of the allegations contained in the petition;

(2) As a party to the proceeding, the right to counsel;

(3) That if the respondent(s) is a parent, guardian, or legal custodian, and is indigent, the respondent may be assigned counsel as provided by law.

(4) The right to a trial by jury;

(5) That any admission to the petition must be voluntary;

(6) The general dispositional alternatives available to the court if the petition is sustained, as set forth in Section 19-3-508, C.R.S.;

(7) That termination of the parent-child legal relationship is a possible remedy which is available if the petition is sustained;

(8) That if a motion to terminate the parent-child legal relationship is filed, the court will set a separate hearing at which the allegations of the motion must be proven by clear and convincing evidence;

(9) That termination of the parent-child legal relationship means that the subject child would be available for adoption;

(10) That any party has the right to appeal any final decision made by the court; and

(11) That if the petition is admitted, the court is not bound by any promises or representations made by anyone about dispositional alternatives selected by the court.

(b) The respondent(s), after being advised, shall admit or deny the allegations of the petition.

(c) If a respondent(s) admits the allegations in the petition, the court may accept the admission after making the following finding:

(1) That the respondent(s) understand his or her rights, the allegations contained in the petition, and the effect of the admission;

(2) That the admission is voluntary.

(d) Notwithstanding any provision of this Rule to the contrary, the court may advise a non-appearing respondent(s) pursuant to this Rule in writing and may accept a written admission to the petition if the respondent has affirmed under oath that the respondent(s) understands the advisement and the consequences of the admission, and if, based upon such sworn statement, the court is able to make the findings set forth in part (c) of this Rule.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 3 on advisement, see the annotations under rule 3.

Rule 4.3. Jury Trial

(a) At the time the allegations of a petition are denied, a respondent, petitioner, the court, or guardian ad litem may demand a jury of not more than six. Unless a jury is demanded, it shall be deemed waived.

(b) Examination, selection, and challenges for jurors in such cases shall be as provided by C.R.C.P. 47, except that the petitioner, all respondents, and the guardian ad litem shall be entitled to three peremptory challenges. No more than nine peremptory challenges are authorized.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

ANNOTATION

Annotator's note. For cases decided under former rule 18 on the right to a jury trial, see the annotations under rule 3.5.

Section (b) expressly requires a collective total of three challenges for "all respondents", irrespective of the number of parties who are respondents. People ex rel. J.J.M., 2013 COA 159, 318 P.3d 559.

Rule 4.4. Certification of Custody Matters to Juvenile Court

(a) Any party to a dependency or neglect action who becomes aware of any other proceeding in which the custody of a subject child is at issue shall file in such other proceedings a notice that an action is pending in juvenile court together with a request that such other court certify the issue of legal custody to the juvenile court pursuant to Section 19-1-104(4) and (5), C.R.S.

(b) When the custody issue is certified to the juvenile court, a copy of the order certifying the issue to juvenile court shall be filed in the dependency or neglect case.

(c) When the juvenile court enters a custody order pursuant to the certification, a certified copy of such custody order shall be filed in the certifying court. Such order shall thereafter be the order of the certifying court.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 4.5. Contempt in Dependency and Neglect Cases

The citation, copy of the motion, affidavit, and order in contempt proceedings pursuant to C.R.C.P. 107, shall be served personally upon any respondent or party to the dependency and neglect action, at least 14 days before the time designated for the person to appear before the court. Proceedings in contempt shall be conducted pursuant to C.R.C.P. 107, except that the time for service under subsection (c) shall be not less than 14 days before the time designated for the person to appear.

Source: Entire rule and committee comment added and adopted December 14, 2000, effective January 1, 2001; entire rule amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The old rule read twenty days; however, given the new time constraints imposed by other statutes and policies in dependency and neglect cases, contempt proceedings should be dealt with accordingly. The committee believes that this will not infringe upon the respondents' ability to respond. Respondents' counsel can always request more time in exceptional cases.

PART FIVE — UNIFORM PARENTAGE ACT

(No Rule)

PART SIX — ADOPTION AND RELINQUISHMENT

Rule 6. Petition in Adoption

(a) Every petition in adoption shall be verified and shall include the following information:

(1) All information required by Section 19-5-208, C.R.S.;

(2) A statement detailing why venue is proper;

(3) A statement as to the factual basis of the child's availability for adoption;

(4) The name of the person or agency placing the child in the home of petitioner(s) and

the date of such placement. If placement is pursuant to court order, a copy of that order shall be attached to the petition;

(5) If the petition is for a designated adoption, a complete statement as to the facts surrounding the designation;

(6) A statement by petitioner(s) of any fee charged relative to the adoption and any charges, gifts, charitable contributions, medical expenses, or other consideration or thing of value as may be subject to the approval of the court; and

(7) A statement as to what, if any, additional charges, gifts, charitable contributions, medical expenses, or other consideration or thing of value that are anticipated to be paid.

(b) At least 14 days prior to the hearing on the petition, petitioner(s) shall file with the court the following documentation:

(1) All documents concerning the child's availability for adoption;

(2) The consent for adoption and report for adoption, as set forth in Section 19-5-207, C.R.S.;

(3) Where adoption of a foreign-born child is sought, the parties must present certified copies of the original documents with certified translations of the documents adjudicating the child as available for adoption;

(4) A statement of fees by counsel itemizing the hourly rate, services provided, and time spent on the case. A statement of fees in any agency adoption shall detail the services provided; and

(5) The report of the county department of social services or licensed child placement agency, as required by law.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001; IP(b) amended and adopted December 14, 2011, effective July 1, 2012.

Rule 6.1. Service by Publication

Affidavits in support of motions for service by publication shall be governed by C.R.C.P. 4(h), and shall include a detailed statement of the specific efforts made to locate an absent parent. A single publication is sufficient.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Rule 6.2. Decree in Adoption

(a) Every decree in adoption shall be in conformance with the Colorado Children's Code, and shall include, but not be limited to:

(1) The name(s) of the adoptive parent(s);

(2) A finding that the court has jurisdiction over the parties and the subject matter of the petition;

(3) A finding that the child is available for adoption; that written consents of all persons, as provided by law, are on file with the court and are valid; that the rights of all parents, whether known or unknown, have been terminated or that such parents have been given notice of a right to a hearing on fitness, pursuant to Section 19-3-102, C.R.S.;

(4) A finding that if the termination of parental rights of any party in interest was an issue, the party has been given notice in the time and in the manner provided by law and these Rules; that the party has appeared or is in default; that parental rights should be and are terminated and the reason(s) therefor;

(5) A finding that the petitioner(s) are of good moral character, able to support and educate the child, and have a suitable home;

(6) A finding that the child's mental and physical condition is such that the child is a proper subject for adoption by the petitioner(s); and

(7) The name to be given the child.

(b) The former name of the child shall not be stated in the final decree, pursuant to Section 19-5-210 (3), C.R.S.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989; entire rule amended and adopted December 14, 2000, effective January 1, 2001.

Rule 6.3. Relinquishment

(a) Every petition in relinquishment shall contain the following:
(1) All information required by Section 19-5-103, C.R.S.;
(2) A statement as to venue being proper; and
(3) A statement if the relinquishment is part of a designated adoption, with particular details as to the designation and whether any fees or costs are being paid by the prospective adoptive parent(s).
(b) Prior to the hearing on relinquishment, a copy of a report shall be filed with the court by a county department of social services or licensed child placement agency detailing the counseling provided to the petitioner(s).
(c) Any motion for service by publication of an absent parent shall be governed by C.R.C.P. 4(h), and an affidavit must accompany the motion detailing what steps have been taken to determine the whereabouts of the absent parent. A single publication is sufficient.

Source: Entire chapter repealed and reenacted June 16, 1988, effective January 1, 1989.

Editor's note: Changed numbering system on revision (2018).

PART SEVEN — SUPPORT

(No Rule)

INDEX TO
COLORADO RULES OF JUVENILE PROCEDURE

CHAPTER 29

The Colorado Rules of Criminal Procedure For All Courts of Record In Colorado

N.B. These rules do not apply to Municipal Ordinance and Charter violations.

Adopted by the

SUPREME COURT OF COLORADO

November 29, 1973,

Effective April 1, 1974,

and as Amended

ANALYSIS BY RULE

V. VENUE

VI. TRIAL

VII. JUDGMENT

VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

CHAPTER 29

COLORADO RULES OF CRIMINAL PROCEDURE

I. SCOPE, PURPOSE, AND CONSTRUCTION

Rule 1. Scope

These Rules govern the procedure in all criminal proceedings in all courts of record with the exceptions stated in Rule 54.

ANNOTATION

Law reviews. For article on the Rules of Criminal Procedure, see 34 Rocky Mt. L. Rev. 1 (1961). For article, ''1963 Amendments to Colorado Rules of Criminal Procedure'', see 35 U. Colo. L. Rev. 303 (1963).

Rules of criminal procedure must be read in pari materia. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Rule 2. Purpose and Construction

These Rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

II. INITIATION OF PRELIMINARY FELONY PROCEEDINGS

Rule 3. The Felony Complaint

(a) The felony complaint shall be a written statement of the essential facts constituting the offense charged, signed by the prosecutor and filed in the court having jurisdiction over the offense charged.

(b) Repealed.

Source: Amended and adopted September 4, 1997, effective January 1, 1998; (a) amended and adopted November 22, 2006, effective January 1, 2007.

ANNOTATION

Applied in People v. Stoppel, 637 P.2d 384 (Colo. 1981); People v. Abbott, 638 P.2d 781 (Colo. 1981).

Rule 4. Warrant or Summons Upon Felony Complaint

(a) Issuance.

(1) **Request by Prosecution.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall request that the court issue either a warrant for the arrest of the defendant or a summons to be served on the defendant.

(2) **Affidavits or Sworn Testimony.** If a warrant is requested, the felony complaint must contain or be accompanied by a sworn statement of facts establishing probable cause to believe that a criminal offense has been committed, and that the offense was committed by the person for whom the warrant is sought. In lieu of such a sworn statement, the felony

complaint may be supplemented by sworn testimony of such facts. Such testimony must be transcribed and then signed under oath by the witness giving the testimony.

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, whenever a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court shall have power to issue a summons commanding the appearance of the defendant in lieu of an arrest warrant, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.

(4) **Standards Relating to Issuance of Summons.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

(I) The defendant's residence;

(II) The defendant's employment;

(III) The defendant's family relationships;

(IV) The defendant's past history of response to legal process; and

(V) The defendant's past criminal record.

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the arrest of that person.

(6) **Corporations.** When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) Form.

(1) **Warrant.** The arrest warrant shall be a written order issued by a judge of a court of record directed to any peace officer and shall:

(I) State the defendant's name or if that is unknown, any name or description by which the defendant can be identified with reasonable certainty;

(II) Command that the defendant be arrested and brought without unnecessary delay before the nearest available judge of a county or district court;

(III) Identify the nature of the offense;

(IV) Have endorsed upon it the amount of bail if the offense is bailable; and

(V) Be signed by the issuing county judge.

(2) **Summons.** If a summons is issued in lieu of a warrant pursuant to this Rule, the summons shall:

(I) Be in writing;

(II) State the defendant's name and address;

(III) Identify the nature of the offense;

(IV) State the date when issued and the county where issued;

(V) Be signed by the judge or the clerk with the title of the office; and

(VI) Command the person to appear before the court at a certain time and place.

(c) Execution or Service and Return.

(1) **Warrant.**

(I) By Whom. The warrant may be executed by any peace officer.

(II) Territorial Limits. The warrant may be executed anywhere within Colorado.

(III) Manner. The warrant shall be executed by arresting the defendant. The warrant need not be in the officer's possession at the time of the arrest, in which event the officers shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request shall show the warrant to the defendant as soon as possible. If the warrant is in the officer's possession at the time of the arrest, then the officer shall show the warrant to the defendant immediately upon request.

(IV) Return. The peace officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecuting attorney any unexecuted warrant shall be returned and cancelled. At the request of the prosecuting attorney, made while a complaint is pending, a warrant returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the county judge to any officer or other authorized person for execution.

(2) **Summons.**

(I) By Whom. The summons may be served by any person authorized to effect service in a civil action.

(II) Territorial Limits. The summons may be served anywhere within Colorado.

(III) Manner. A summons issued pursuant to this Rule may be served in the same manner as the summons in a civil action or by mailing it to the defendant's last known address, not less than 14 days prior to the time the defendant is required to appear, by registered mail with return receipt requested or certified mail with return receipt requested. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. The summons for the appearance of a corporation may be served by a peace officer in the manner provided for service of summons upon a corporation in a civil action.

(IV) Return. At least one day prior to the return day, the person to whom a summons has been delivered for service shall make return thereof to the county court before whom the summons is returnable. At the request of the prosecuting attorney, made while a complaint is pending, a summons returned unserved, or a duplicate thereof, may be delivered by the county judge to any peace officer or other authorized person for service.

Source: (c)(2)(III) amended and adopted October 15, 2009, effective January 1, 2010; (c)(2)(III) and (c)(2)(IV) amended and adopted December 14, 2011, effective July 1, 2012; (c)(2)(IV) corrected and effective November 2, 2012; (a)(1), (a)(2), (a)(3), IP(a)(4), (a)(5), (a)(6), IP(b)(1), (b)(1)(I), (b)(2)(II), (b)(2)(V), (c)(1)(III), and (c)(1)(IV) amended and effective September 11, 2017.

ANNOTATION

I. GENERAL CONSIDERATION.

Applied in People v. Kelderman, 44 Colo. App. 487, 618 P.2d 723 (1980).

II. ISSUANCE.

Probable cause necessary for issuance of warrant. To support the issuance of an arrest warrant, the complaint must comply with the probable cause requirements of the fourth amendment to the United States constitution, § 7 of art. II, Colo. Const., and this rule. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

And the existence of probable cause must be determined by member of the judiciary, rather than by a law enforcement officer who is employed to apprehend criminals and to bring charges against those who choose to violate the law. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

Judge not to accept mere conclusion of complainant. In determining whether or not probable cause exists, a judge should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

But should require and examine underlying facts. Before a warrant for arrest can be issued, the judicial officer issuing such a warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

A complaint standing alone will not support an arrest warrant where no facts are set forth to establish probable cause. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

So judge may require supplemental sworn testimony or amendment of complaint. Should the judge to whom application has been made for the issuance of an arrest warrant determine that the complaint is insufficient, he can require that sworn testimony be offered to supplement the complaint or that the complaint be amended to set forth additional facts if an arrest warrant is to be issued. And under § 7 of art. II, Colo. Const., any testimony taken to supplement the complaint must be reduced to writing and signed by the witness or witnesses who offer the testimony under oath. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

Warrant and supporting affidavits may overcome insufficiency of complaint. Where

federal warrants are supported by affidavits which square with all constitutional requirements, they provide a legitimate basis for an arrest, notwithstanding the insufficiency of the complaint to support an arrest warrant. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

III. EXECUTION.

There are no constitutional requirements dictating that an arrest warrant be executed at the earliest opportunity. People v. Nisser, 189 Colo. 471, 542 P.2d 84 (1975).

Nor does this rule contain limitations regarding the time within which an arrest warrant must be executed. People v. Nisser, 189 Colo. 471, 542 P.2d 84 (1975).

No abuse of process where delay in service not prejudicial. Where the record contains no evidence that the delay in the service of an arrest warrant was intended to prejudice the defendant — or that defendant was, in fact, prejudiced by the six-day postponement of her arrest, but on the other hand, uncontroverted evidence indicates that the delay was caused by the perceived need to protect the identity of an undercover agent in a collateral investigation, the delay in the service of the arrest warrant was not an abuse of process. People v. Nisser, 189 Colo. 471, 542 P.2d 84 (1975).

Where and by whom execution authorized. Arrest warrants are not territorially limited and, therefore, may be executed anywhere in Colorado by an officer with authority to arrest in the particular jurisdiction in which the person named in the warrant is found. People v. Hamilton, 666 P.2d 152 (Colo. 1983).

Arresting officers are not required to have arrest warrants with them at the time of arrest. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

And execution by unauthorized person immaterial if authorized person present. It is immaterial who executes an arrest warrant provided that individuals with lawful authority to make an arrest are actually present at the scene of the arrest and participate in the arrest process. People v. Schultz, 200 Colo. 47, 611 P.2d 977 (1980).

Rule 4.1. County Court Procedure — Misdemeanor and Petty Offense — Warrant or Summons Upon Complaint

Where the offense charged is a misdemeanor or petty offense, the action may be commenced in the county court as provided below in this Rule. This Rule shall have no application to misdemeanors or petty offenses prosecuted in other courts or to felonies.

(a) Definitions.

(1) ''Complaint'' means a written statement charging the commission of a crime by an alleged offender filed in the county court.

(2) Repealed.

(3) ''Summons'' means a written order or notice directing that a person appear before a designated county court at a stated time and place and answer to a charge against him.

(4) ''Summons and complaint'' means a document combining the functions of both a summons and a complaint.

(b) Initiation of the Prosecution.

(1) Prosecution of a misdemeanor or petty offense may be commenced in the county court by:

(I) The issuance of a summons and complaint;

(II) The issuance of a summons following the filing of a complaint;

(III) The filing of a complaint following an arrest;

(IV) The filing of a summons and complaint following arrest; or

(V) In the event that the offense is a class 2 petty offense, by the issuance of a notice of penalty assessment pursuant to statute.

(c) Summons, Summons and Complaint.

(1) **Summons.** A summons issued by the county court in a prosecution for a misdemeanor or a class 1 petty offense may be served by giving a copy to the defendant personally, or by leaving a copy at the defendant's usual place of abode with some person over the age of eighteen years residing therein, or by mailing a copy to the defendant's last known address not less than 14 days prior to the time the defendant is required to appear by registered mail with return receipt requested or certified mail with return receipt requested. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. Personal

service shall be made by a peace officer or any disinterested party over the age of eighteen years.

(2) Repealed.

(3) **Summons and Complaint.** A summons and complaint may be issued by any peace officer for an offense constituting a misdemeanor or a petty offense:

(I) Committed in his presence; or

(II) If not committed in his presence, which he has probable cause to believe was committed and probable cause to believe was committed by the person charged.

Except for penalty assessment notices which shall be handled according to the procedures set forth in section 16-2-201 and subsection (e) of this Rule, a copy of the summons and complaint shall be filed immediately with the county court before which appearance is required and a second copy shall be given to the district attorney or his deputy for such county.

(4) **Content of Summons and Complaint.** A summons and complaint issued by a peace officer shall contain the name of the defendant, shall identify the offense charged, including a citation of the statute alleged to have been violated, shall contain a brief statement or description of the offense charged, including the date and approximate location thereof, and shall direct the defendant to appear before a specified county court at a stated time and place.

(d) Arrest followed by a Complaint. If a peace officer makes an arrest without a warrant of a person for a misdemeanor or a petty offense, the arrested person shall be taken without unnecessary delay before the nearest available county or district judge. Thereafter, a complaint shall be filed immediately in the county court having jurisdiction of the offense and a copy thereof given to the defendant at or before the time he is arraigned. The provisions of this Rule are subject to the right of the arresting authority to release the arrested person pursuant to section 16-3-105.

(e) Penalty Assessment Procedure.

(1) When a person is arrested for a class 2 petty offense, the arresting officer may either give the person a penalty assessment notice and release him upon its terms, or take him before a judge of the county court in the county in which the alleged offense occurred. The choice of procedures shall be based upon circumstances which reasonably persuade the officer that the alleged offender is likely or unlikely to comply with the terms of the penalty assessment notice.

(2) The penalty assessment notice shall be a summons and complaint containing identification of the alleged offender, specification of the offense and applicable fine, a requirement that the alleged offender pay the fine or appear to answer the charge at a specified time and place, that payment of the specified fine without an appearance is an acknowledgment of guilt, and that an appearance must be made or the specified fine paid on or before a certain date or a bench warrant will issue for the offender's arrest. In traffic cases, the penalty assessment notice shall also advise the traffic offender of the immediate consequences of payment of the specified fine without an appearance.

(3) In traffic cases, a duplicate copy of the notice shall be sent by the officer to the Colorado department of revenue, motor vehicle division, Denver, Colorado. In all cases, a duplicate copy shall be sent to the clerk of the county court in the county in which the alleged offense occurred.

(4) If the person given a penalty assessment notice chooses to acknowledge his guilt, he may pay the specified fine in person or by mail at the place and within the time specified in the notice. If he chooses not to acknowledge his guilt, he shall appear as required in the notice. Upon trial, if the alleged offender is found guilty, the fine imposed shall be that specified in the notice for the offense of which he was found guilty, but customary court costs may be assessed against him in addition to such fine.

(f) Failure to Appear. If a person upon whom a summons or summons and complaint has been served pursuant to this Rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for his arrest. In the case of a penalty assessment notice, if the person to whom a penalty assessment notice has been served pursuant to this Rule fails to appear in person or by counsel, or if he fails to pay the specified fine at a specified time and place, a bench warrant may issue for his arrest.

Source: (a) amended March 15, 1985, effective July 1, 1985; (f) amended June 9, 1988, effective January 1, 1989; entire rule amended and adopted May 27, 2004, effective July 1, 2004; (c)(1) amended and adopted October 15, 2009, effective January 1, 2010; (c)(1) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. General Consideration.
II. Summons, Summons and Complaint.

I. GENERAL CONSIDERATION.

Applied in Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); May v. People, 636 P.2d 672 (Colo. 1981); People v. Abbott, 638 P.2d 781 (Colo. 1981).

II. SUMMONS, SUMMONS AND COMPLAINT.

Minimum requirements of a summons and complaint under this rule are: (1) The name of the defendant, (2) the offense charged, (3) a citation of the statute alleged to have been violated, (4) a brief statement or description of the offense charged, including the date and approximate location thereof, and (5) the direction that the defendant appear before a specified county court at a stated date, time, and place. Francis v. County Court, 175 Colo. 308, 487 P.2d 375 (1971). See Stubert v. County Court, 163 Colo. 535, 433 P.2d 97 (1967).

General assembly did not intend that such a summons and complaint be verified. Stubert v. County Court, 163 Colo. 535, 433 P.2d 97 (1967); Francis v. County Court, 175 Colo. 308, 487 P.2d 375 (1971).

Only peace officers may sign. The only persons designated as having the authority to sign such a summons and complaint are peace officers. Francis v. County Court, 175 Colo. 308, 487 P.2d 375 (1971).

It is sufficient that the summons form alleges that complainant "knows or believes", rather than stating more formally that he ''knows or has reason to believe'', that the accused committed the offense charged. Francis v. County Court, 175 Colo. 308, 487 P.2d 375 (1971).

Prosecution for a misdemeanor charge was properly initiated in accordance with subsection (d) of this rule when the defendant posted bail and executed his appearance bond, thereby waiving service of the complaint on him until his appearance date. This procedure also complies with § 16-2-112 and related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time he is arraigned. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

Rule 4.2. Arrest Warrant Without Information, Felony Complaint, or Complaint

If a warrant for arrest is sought prior to the filing of an information, felony complaint, or complaint, such warrant shall issue only on affidavit sworn to or affirmed before the judge, or a notary public and determined by a judge to relate facts sufficient to establish probable cause that an offense has been committed and probable cause that a particular person committed that offense. A warrant may be obtained by facsimile transmission (FAX) or electronic transmission pursuant to procedures set forth in Rule 41, in which event the procedure in Rule 41 shall be followed. The court shall issue a warrant for the arrest of such person commanding any peace officer to arrest the person so named and to take the person without unnecessary delay before the nearest judge of a court of record.

COMMITTEE COMMENT

This rule is intended to facilitate the issuance of warrants by eliminating the need to physically carry the supporting affidavit to the judge (see Section 16-1-106, C.R.S.).

Source: Entire rule amended July 16, 1992, effective November 1, 1992; entire rule amended and effective September 9, 2004; entire rule amended and effective February 10, 2011.

ANNOTATION

This rule is codification of § 7 of art. II, Colo. Const. People v. Kelderman, 44 Colo. App. 487, 618 P.2d 723 (1980).

Applied in People v. Schultz, 200 Colo. 47, 611 P.2d 977 (1980).

Rule 5. Preliminary Proceedings

(a) Felony Proceedings.

(1) **Procedure Following Arrest.** If a peace officer or any other person makes an arrest, either with or without a warrant, the arrested person shall be taken without unnecessary delay before the nearest available county or district court. Thereafter, a felony complaint, information, or indictment shall be filed, if it has not already been filed, without unnecessary delay in the proper court and a copy thereof given to the defendant.

(2) **Appearance Before the Court.** At the first appearance of the defendant in court, it is the duty of the court to inform the defendant and make certain that the defendant understands the following:

(I) The defendant need make no statement and any statement made can and may be used against the defendant;

(II) The right to counsel;

(III) If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held;

(IV) Any plea the defendant makes must be voluntary and not the result of undue influence or coercion;

(V) The right to bail, if the offense is bailable, and the amount of bail that has been set by the court;

(VI) The nature of the charges;

(VII) The right to a jury trial;

(VIII) The right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged was committed by the defendant;

(IX) If currently serving in the United States armed forces or if a veteran of such forces, the defendant may be entitled to receive mental health treatment, substance use disorder treatment, or other services as a veteran.

(3) **Appearance in the Court not Issuing the Warrant.** If the defendant is taken before a court which did not issue the arrest warrant, the court shall inform the defendant of the matters set out in subsection (a)(2) of this Rule and, allowing time for travel, set bail returnable not less than 14 days thereafter before the court which issued the arrest warrant, and shall transmit forthwith all papers in the case to the court which issued the arrest warrant. In the event the defendant does not make bail within forty-eight hours, the sheriff of the county in which the arrest warrant was issued shall return the defendant to the court which issued the warrant.

(4) **Preliminary Hearing — County Court Procedures.** Every person accused of a class 1, 2, or 3 felony or a level 1 or 2 drug felony in a felony complaint has the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony by felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S., shall have the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person

accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony who is not entitled to a preliminary hearing shall, unless otherwise waived, participate in a dispositional hearing for the purposes of case evaluation and potential resolution. The following procedures shall govern the holding of a preliminary hearing:

(I) Within 7 days after the defendant is brought before the county court for or following the filing of the felony complaint in that court, either the prosecutor or the defendant may request a preliminary hearing. Upon such request, the court forthwith shall set the hearing. The hearing shall be held within 35 days of the day of setting, unless good cause for continuing the hearing beyond that time is shown to the court. The clerk of the court shall prepare and give notice of the hearing, or any continuance thereof, to all parties and their counsel.

(II) The preliminary hearing shall be held before a judge of the county court in which the felony complaint has been filed. The defendant shall not be called upon to plead. The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The judge presiding at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(III) If the county court determines such probable cause exists or if the case is not otherwise resolved pursuant to a dispositional hearing if no preliminary hearing was held, it shall order the defendant bound over to the appropriate court of record for trial. In appropriate cases, the defendant may be admitted to or continued on bail by the county court, but bond shall be made returnable in the trial court and at a day and time certain. All county court records, except the reporter's transcript notes, or recording, shall be transferred forthwith by the clerk of the county court to the clerk of the appropriate court of record.

(IV) If from the evidence it appears to the county court that there is not probable cause to believe that any or all of the offenses charged were committed by the defendant, the county court shall dismiss those counts from the complaint and, if all counts are dismissed, discharge the defendant. Upon a finding of no probable cause, the prosecution may appeal pursuant to Rule 5(a)(4)(V), file a direct information pursuant to Rule 5(a)(4)(VI) charging the same offense(s), or submit the matter to a grand jury, but may not file a subsequent felony complaint charging the same offenses.

(V) If the prosecutor believes the court erred in its finding of no probable cause, the prosecutor may appeal the ruling to the district court. The appeal of such final order shall be conducted pursuant to the procedures for interlocutory appeals in Rule 37.1 of these rules. Such error, if any, shall not constitute good cause for refiling.

(VI) Upon a finding of no probable cause as to any one or more of the offenses charged in a felony complaint, the prosecution may file a direct information in the district court pursuant to Rule 7(c)(2) charging the same offense(s). If the prosecutor states an intention to proceed in this manner, the bond executed by the defendant shall be continued and returnable in the district court at a day and time certain. If a bond has not been continued, the defendant shall be summoned into court without the necessity of making a new bond.

(VII) If a felony complaint is dismissed prior to a preliminary hearing being held when one is required or, in other cases, prior to being bound over, the prosecution may thereafter file a direct information in the district court pursuant to Rule 7(c)(4) charging the same offense(s), file a felony complaint in the county court charging the same offense(s), or submit the matter to a grand jury. If the prosecution files a subsequent felony complaint charging the defendant with the same offense(s), the felony complaint shall be accompanied by a written statement from the prosecutor providing good cause for dismissing and refiling the charges. Within 21 days of defendant's first appearance following the filing of the new felony complaint the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(VIII) If the county court has bound over the defendant to the district court and the case is thereafter dismissed in the district court before jeopardy has attached, the prosecution may file a direct information in the district court pursuant to Rule 7(c)(5) charging the same offense(s), file a felony complaint in county court charging the same offense(s), or

submit the matter to a grand jury, and the case shall then proceed as if the previous case had never been filed. The prosecution shall also file with the felony complaint or the direct information a statement showing good cause for dismissing and then refiling the case. Within 21 days of defendant's first appearance following the filing of the new felony complaint or the direct filing of the new information the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(4.5) A dispositional hearing is an opportunity for the parties to report to the court on the status of discussions toward disposition, including presenting any resolution pursuant to C.R.S. 16-7-302. The court shall set the dispositional hearing at a time that will afford the parties an opportunity for case evaluation and potential resolution.

(5) **Procedure Upon Failure to Request Preliminary Hearing.** If the defendant or prosecutor fails to request a preliminary hearing within 7 days after the defendant has come before the court, the county court shall forthwith order the defendant bound over to the appropriate court of record for trial. In no case shall the defendant be bound over for trial to another court until the preliminary hearing has been held, the 7-day period for requesting a preliminary hearing has expired, or the parties have waived their rights to a preliminary hearing. In appropriate cases, the defendant may be admitted to, or continued upon bail by the county court, but bond shall be made returnable in the trial court at a day and time certain. All court records in the case, except the reporter's transcript, notes, or recording shall be transferred forthwith by the clerk to the appropriate court of record.

(b) Bail in Absence of a County Judge. If no county judge is immediately available to set bond in the case of a person in custody for the commission of a bailable felony, any available district judge may set bond, or such person may be admitted to bail pursuant to Rule 46.

(c) Misdemeanor and Petty Offense Proceedings.

(1) **Procedure Following Arrest.** If a peace officer or any other person makes an arrest, either with or without a warrant, the arrested person shall be taken without unnecessary delay before the nearest available county court. Thereafter a complaint or summons and complaint shall be filed, if it has not already been filed, immediately in the proper court and a copy thereof given to the defendant at or before arraignment. Trial may be held forthwith if the court calendar permits, immediate trial appears proper, and the parties do not request a continuance for good cause. Otherwise the case shall be set for trial as soon as possible.

(2) **Appearance Before the Court.** At the first appearance in the county court the defendant shall be advised in accordance with the provisions set forth in subparagraphs (a)(2)(I) through (VII) and (IX) of this Rule.

(3) **Appearance in the County Court Not Issuing the Warrant.** If the defendant is taken before a county court which did not issue the arrest warrant, the court shall inform the defendant of the matters set out in subsection (a)(2)(I through VII and IX) of this Rule and, allowing time for travel, set bail returnable not less than 14 days thereafter before the court which issued the arrest warrant, and shall transmit forthwith a transcript of the proceedings and all papers in the case to the court which issued the arrest warrant. In the event the defendant does not make bail within forty-eight hours, the sheriff of the county in which the arrest warrant was issued shall return the defendant to the court which issued the warrant.

Source: Entire rule amended March 31, 1988, effective January 1, 1989; IP(a)(4) and (a)(4)(III) amended and (a)(4.5) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted September 12, 2000, effective January 1, 2001; (a)(3) amended January 11, 2001, effective July 1, 2001; entire rule amended and adopted June 27, 2002, effective July 1, 2002; (a)(4) amended and effective January 17, 2008; (a)(3), (a)(4)(I), (a)(4)(VII), (a)(4)(VIII), (a)(5), and (c)(3) amended and adopted December 14, 2011, effective July 1, 2012; (a)(4)(I), (a)(4)(II), and (a)(5) amended and effective March 7, 2013; (c)(2) amended and adopted October 31, 2013, effective January 1, 2014; IP(a)(4) amended and effective September 13, 2018; (a)(2)(IX) added and (c)(2) and (c)(3) amended and effective January 24, 2019.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Police Interrogation in Colorado: The Implementation of Miranda'', see 47 Den. L.J. 1 (1970). For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Felony Preliminary Hearings in Colorado'', see 17 Colo. Law. 1085 (1988). For article, ''The Use of 'No Bond' Holds in Colorado'', see 32 Colo. Law. 81 (November 2003). For article, ''The Colorado Counsel Conundrum: Plea Bargaining, Misdemeanors, and the Right to Counsel'', see 89 Denv. U.L. Rev. 327 (2012).

Purpose of this rule is to furnish a prophylaxis against abuses in the detention process and, more importantly, to place the accused in early contact with a judicial officer so that the right to counsel may not only be explained clearly but also be implemented upon the accused's request. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980).

Limited extraterritorial effect of rule. There is limited extraterritorial effect which the procedural rules of this jurisdiction can generally be given, absent denial of constitutional rights. People v. Robinson, 192 Colo. 48, 556 P.2d 466 (1976).

Prosecutor's failure to file a statement of good cause under subsection (a)(4)(VII) is not a jurisdictional defect, but, instead, a procedural defect that defendant waived when defendant pleaded guilty. People v. Garcia, 2013 COA 15, 320 P.3d 360.

Statements were improperly suppressed when there wasn't an arrest. Defendant was held for the purpose of taking blood samples only. A reasonable person would understand he or she was being detained for that limited purpose and not being arrested. People v. Turtura, 921 P.2d 40 (Colo. 1996).

Psychiatric examination of unconsenting party unauthorized. There is no authority in the Rules of Criminal Procedure nor in the statutes for ordering an unconsenting third party to submit to a psychiatric examination. People v. La Plant, 670 P.2d 802 (Colo. App. 1983).

Applied in People v. York, 189 Colo. 16, 537 P.2d 294 (1975); People v. Salazar, 189 Colo. 429, 541 P.2d 676 (1975); People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978); People v. District Court, 199 Colo. 398, 610 P.2d 490 (1980); Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); People v. Boyette, 635 P.2d 552 (Colo. 1981); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

II. PROCEDURE FOLLOWING ARREST.

Purpose of section (a)(1) is to insure that the defendant is adequately informed of his rights. People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

One of the central purposes of restricting unnecessary delay in bringing an arrested person before a judge is to insure that he will be fully informed of the offense involved and of his constitutional rights. People v. Weaver, 179 Colo. 331, 500 P.2d 980 (1972). See People v. Reed, 180 Colo. 16, 502 P.2d 952 (1972).

This rule was not designed to prevent incriminating statements willingly made during an unnecessary delay where there were no abuses in the detention process. People v. Roybal, 55 P.3d 144 (Colo. App. 2001).

Person arrested must be taken before a county judge within a reasonable time and without unnecessary delay. Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966); England v. People, 175 Colo. 236, 486 P.2d 1055 (1971).

"Necessary delay". A ''necessary delay'' is one reasonably related to the administrative process attendant upon the arrest of the accused, viz., delays associated with fingerprinting, photographing, taking inventory of personal belongings, preparation of necessary charging documents and reports, and other legitimate administrative procedures. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980); People v. Raymer, 662 P.2d 1066 (Colo. 1983).

Inadvertent delay unnecessary. Where prolonged inadvertence is the only basis for the delay, that delay is unnecessary. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980).

But where arresting authorities delay the accused's judicial advisement on charges from a foreign jurisdiction until after the local charges are completely resolved, delay is unnecessary. People v. Garcia, 746 P.2d 560 (Colo. 1987).

Failure to comply with this rule does not automatically invalidate a confession. Aragon v. People, 166 Colo. 172, 442 P.2d 397 (1968); People v. Weaver, 179 Colo. 331, 500 P.2d 980 (1972); People v. Reed, 180 Colo. 16, 502 P.2d 952 (1972); People v. Litsey, 192 Colo. 19, 555 P.2d 974 (1976).

Nor require granting motion to dismiss. A violation of sections (a) and (c) does not of itself automatically operate to equire the grant-

ing of a motion to dismiss charges. People v. Wiedemer, 180 Colo. 265, 504 P.2d 667 (1972).

As each case must be considered on its own facts where a defendant argues that he was not taken before a county judge within the time required by this rule. Aragon v. People, 166 Colo. 172, 442 P.2d 397 (1968); Jaggers v. People, 174 Colo. 430, 484 P.2d 796 (1971); People v. Weaver, 179 Colo. 331, 500 P.2d 980 (1972).

Admissibility of confession dependent on compliance with Miranda. If a statement is admissible as being in compliance with ''Miranda'', it should not be invalidated because of noncompliance with this rule if there was no studied attempt to avoid taking the defendant before a county judge. Jaggers v. People, 174 Colo. 430, 484 P.2d 796 (1971); People v. Weaver, 179 Colo. 331, 500 P.2d 980 (1972).

Where defendant was in custody for at least 18 hours before section (a)(1) was complied with, and where during this period he was interrogated on two occasions and made incriminating statements during the interrogations, the 18-hour delay neither unfairly prejudiced the defendant nor denied him any basic constitutional right, since prior to both interrogations the defendant was properly advised as required by the Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) decision, and only thereafter did the defendant choose to give the incriminating statements. People v. Hosier, 186 Colo. 116, 525 P.2d 1161 (1974).

Failure to comply with this rule did not result in prejudice to the defendant, where the defendant was properly advised as required by Miranda, and thereafter chose to make incriminating statements rather than to remain silent. People v. Gilmer, 182 Colo. 96, 511 P.2d 494 (1973).

Where the statement was voluntarily made and the defendant was several times fully advised of his Miranda rights, any violation of this rule constituted harmless error and the trial court correctly refused to suppress the defendant's statement on this ground. People v. Litsey, 192 Colo. 19, 555 P.2d 974 (1976).

And inability of defendant to show prejudice. In the absence of a factual showing of prejudice, the failure to comply with this rule does not require suppression of voluntary statements. People v. Litsey, 192 Colo. 19, 555 P.2d 974 (1976); People v. Robinson, 192 Colo. 48, 556 P.2d 466 (1976).

Defendant must prove both unnecessary delay and prejudice to establish a right to relief for a violation of this rule. People v. Johnson, 653 P.2d 737 (Colo. 1982).

Violation of section (a)(1) does not per se require suppression; rather, the defendant must show prejudice as a result of the delay. People v. La Plant, 670 P.2d 802 (Colo. App. 1983).

Showing of prejudice required on motion to dismiss. And before one may prevail on a motion to dismiss charges, he must show that he would be unfairly prejudiced or would be denied some basic rights at trial because of the Crim. P. 5(a)(1) and 5(c) violation. People v. Wiedemer, 180 Colo. 265, 504 P.2d 667 (1972).

In the absence of a factual showing of prejudice, the failure to comply with section (a)(1) does not require dismissal of a criminal charge. People v. Edwards, 183 Colo. 210, 515 P.2d 1243 (1973).

Before a violation of section (a)(1) may be grounds for reversal, it must be shown that the defendant was unfairly prejudiced or denied some basic constitutional rights by reason of the failure to comply with the rule. People v. Gilmer, 182 Colo. 96, 511 P.2d 494 (1973); People v. Hosier, 186 Colo. 116, 525 P.2d 1161 (1974).

Test for prejudice. In determining the existence of prejudice the proper inquiry is whether the unnecessary delay reasonably contributed to the acquisition of the challenged evidence. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980); People v. Raymer, 626 P.2d 705 (Colo. App. 1980).

To establish prejudice, a defendant must show a nexus between the unnecessary delay and the challenged evidence. In other words, a defendant must establish that the delay induced, caused, or was used to extract a confession. People v. Roybal, 55 P.3d 144 (Colo. App. 2001).

In view of the important role played by this rule in speedily implementing the right to counsel especially for an indigent defendant, some important considerations on the issue of prejudice are: whether an attorney had already been retained by, or had been made available to, the defendant during the period of unnecessary delay; whether that attorney was accessible to the defendant prior to the challenged statement; and whether the defendant freely and knowingly waived the presence of the attorney in making the challenged statement to the police. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980).

In determining the existence of prejudice, the appropriate inquiry is whether unnecessary delay reasonably contributed to the acquisition of any challenged evidence. The relevant time period which must be examined is the time between the arrest and the acquisition of the challenged evidence. People v. Raymer, 662 P.2d 1066 (Colo. 1983).

Sufficiency of evidence showing prejudice and nature of prejudice suffered by defendant should be considered by trial court in fashioning sanction, if any, to be imposed for violation and such drastic sanction as dismissal should be imposed only when violation has rendered ac-

cused unable to fairly defend against the charges. People v. Garcia, 746 P.2d 560 (Colo. 1987).

Prosecution for a misdemeanor charge was properly initiated in accordance with this rule when the defendant posted bail and executed his appearance bond, thereby waiving service of the complaint on him until his appearance date. This procedure also complies with § 16-2-112 and related rules, which do not require that a person charged with a misdemeanor be given a copy of the complaint until at or before the time he is arraigned. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

The statutes and procedural rules do not require that a person charged with a misdemeanor be given a copy of the complaint prior to being released on bail. Weld County Court v. Richards, 812 P.2d 650 (Colo. 1991).

No prejudice held shown by delay in presenting defendant before judge. Gottfried v. People, 158 Colo. 510, 408 P.2d 431 (1965); Hubbard v. Patterson, 374 F.2d 856 (10th Cir.), cert. denied, 389 U.S. 868, 88 S. Ct. 142, 19 L. Ed. 2d 144 (1967).

Delay to conduct custodial interrogation is not "necessary". Where delay is occasioned by the decision of law enforcement officers to conduct a custodial interrogation of the defendant before presenting him to a judicial officer for a proper advisement of rights, then clearly such a delay is not ''necessary''. People v. Raymer, 662 P.2d 1066 (Colo. 1983).

Presumption of regularity of proceedings. Where it is alleged prejudice resulted from noncompliance with this rule, every presumption is indulged in favor of regularity of the proceedings in the trial court, and the burden of showing error is on the party asserting it. Gottfried v. People, 158 Colo. 510, 408 P.2d 431 (1965).

But interview of defendant in sheriff's office over 24 hours after arrest does not fulfill requirements of this rule. People v. Kelley, 172 Colo. 39, 470 P.2d 32 (1970).

Confession during six-day delay inadmissible. Where there was a delay of six days between the time a defendant was first questioned and the time he was finally brought before a judge and advised of his rights, any statements made prior to compliance with this rule were inadmissible. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

Where delay not unreasonable. Where the defendant was taken before a judge on the afternoon following the evening of his arrest, this is not an unreasonable delay. People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

Where most of delay in taking defendant before a judge was necessitated by treatment of defendant's wounds, such a delay was not unreasonable, particularly since the delay did not appear to result in coercion or in contributing to defendant's desire to talk. People v. Valencia, 181 Colo. 36, 506 P.2d 743 (1973).

Noncompliance with rule may be waived by defendant. Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966).

Justifiable excuse needed to bring defendant before out-of-county judge. A justifiable excuse must be shown to warrant the removal of defendant to a county seat, other than the one in which the alleged offense was committed, where a county judge is available in that county. Aragon v. People, 166 Colo. 172, 442 P.2d 397 (1968).

Prosecution's remedies when case dismissed. The prosecution has one of two remedies available to it when a case is dismissed in the county court. If the case is dismissed before a preliminary hearing is held, the prosecution may appeal the order of dismissal to the district court. If the county court dismisses a charge after holding a preliminary hearing under section (a)(4), the exclusive remedy available to the prosecution is to request leave to file a direct information in the district court. People v. Freiman, 657 P.2d 452 (Colo. 1983).

Colorado rule not applicable to defendant arrested in another state by federal agents, and federal rules of criminal procedure control. People v. Porter, 742 P.2d 922 (Colo. 1987).

Posting of officers outside defendant's hospital door for the purpose of effecting an arrest upon his release from medical care not an arrest requiring compliance with this rule. People v. MacCallum, 925 P.2d 758 (Colo. 1996).

III. APPEARANCE BEFORE COURT.

Judges' duties upon first appearance. Section (a)(2) imposes on the judge at the accused's first appearance the duty to inform him of, and to make certain that he understands, those basic rights applicable upon the initiation of formal criminal proceedings, especially his privilege against self-incrimination and his right to the appointment of an attorney at state expense if he is financially unable to retain one. People v. Heintze, 200 Colo. 248, 614 P.2d 367 (1980); Washington v. People, 158 Colo. 115, 405 P.2d 735 (1965), cert. denied, 383 U.S. 953, 86 S. Ct. 1217, 16 L. Ed. 2d 215 (1966); England v. People, 175 Colo. 236, 486 P.2d 1055 (1971).

Right to counsel need not be advised where defendant already represented. When accepting a plea of guilty, the trial court is not necessarily required to advise a defendant of his right to counsel when the defendant is represented by counsel at the providency hearing. People v. Derrerra, 667 P.2d 1363 (Colo. 1983).

Defendant not denied his sixth amendment right to counsel because he lacked counsel at advisement hearing. Although hearing trig-

gered defendant's right to counsel, defendant was not entitled to counsel at the hearing itself. People v. Roberts, 2013 COA 50, 321 P.3d 581.

Even if defendant was entitled to counsel at advisement hearing, any error in not providing counsel was harmless because nothing of any significance in determining defendant's guilt or innocence occurred at the hearing. People v. Roberts, 2013 COA 50, 321 P.3d 581.

Court may properly allow testimony concerning defendant's pre-advisement silence concerning failure to contact authorities to correct discrepancies in documents if defendant testified and the evidence of defendant's pre-advisement silence was elicited in the cross-examination of defendant for credibility purposes. People v. Taylor, 159 P.3d 730 (Colo. App. 2006).

IV. PRELIMINARY HEARING.

Primary purpose of preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. People v. Weaver, 182 Colo. 221, 511 P.2d 908 (1973); People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973); People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

The rules of criminal procedure relating to a preliminary hearing are intended to create a preliminary screening device by affording a defendant an opportunity, at an early stage of the criminal proceedings, to challenge the sufficiency of the prosecution's evidence before an impartial judge. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974); People v. District Court, 652 P.2d 582 (Colo. 1982).

A preliminary hearing provides the accused with an opportunity to challenge the sufficiency of the people's evidence at an early stage in the proceedings. The preliminary hearing is designed to weed out groundless or unsupported charges and to relieve the accused of the degradation and expense of a criminal trial. Holmes v. District Court, 668 P.2d 11 (Colo. 1983).

Level of proof required. It is not necessary to introduce evidence sufficient to prove defendant's guilt beyond a reasonable doubt but evidence sufficient to permit a person of ordinary prudence to reasonably believe in defendant's guilt. People v. Walker, 675 P.2d 304 (Colo. 1984).

Preliminary hearing presents forum for the presentation and assessment of evidence of probable cause and if prosecuting attorney fails to establish probable cause at a preliminary hearing, the county court is empowered to dismiss the complaint. Gallagher v. County Court, 759 P.2d 859 (Colo. App. 1988).

There is no procedure for dismissing a felony complaint without prejudice. Once the filing of a felony complaint in county court is dismissed, the prosecution must either obtain a grand jury indictment or file an information directly in the district court. People v. Williams, 987 P.2d 232 (Colo. 1999).

"The offense charged," within section (a)(4)(IV), encompasses any lesser included offense of the offense charged. Hunter v. District Court, 184 Colo. 238, 519 P.2d 941 (1974).

Defendant's request for preliminary hearing after indictment has been returned is not authorized where such a request, or motion, cannot provide a foundation for the trial court's order for delivery of a requested transcript of the colloquy between the grand jury and the district attorney. People v. District Court, 199 Colo. 398, 610 P.2d 490 (1980).

Demand for hearing to be by written motion. The statutory right to receive a preliminary hearing is not absolute and requires that either the defendant or his attorney, or the prosecuting attorney, file a written motion demanding the preliminary hearing. People v. Moody, 630 P.2d 74 (Colo. 1981).

Although oral request may be treated as written motion. A court may treat a defendant's oral request for a preliminary hearing, as a written motion as required by this rule. People v. Driscoll, 200 Colo. 410, 615 P.2d 696 (1980).

When juvenile entitled to preliminary hearing. Juveniles charged in delinquency proceedings with crimes (felonies and class 1 misdemeanors) subject to this rule and Crim. P. 7 are entitled to a preliminary hearing. Juveniles held on lesser charges are not granted a right to a preliminary hearing by statute or by rule. J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982).

Prosecution not to present all evidences and witnesses. A preliminary hearing does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

It is unnecessary at a preliminary hearing for the prosecution to show beyond a reasonable doubt that the defendant committed the crime, or even the probability of the defendant's conviction. Instead, the trial court is obligated at the preliminary hearing to view the evidence in the light most favorable to the prosecution and the prosecution therefore is accorded latitude at the preliminary hearing to establish probable cause that the defendant committed the crime charged. People v. District Ct., 17th Jud. Dist., 926 P.2d 567 (Colo. 1996); People v. Hall, 999 P.2d 207 (Colo. 2000).

Preliminary hearing is not intended to be a mandatory procedural step in every criminal prosecution. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

And does not alter proposition that accused entitled to trial on merits. Although a

preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Defendant to appear at requested preliminary hearing. When a defendant requests a preliminary hearing, he has not only the constitutional right to be present, but is under an affirmative obligation and duty to appear at the hearing. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Unless court permits defendant to waive his presence. The court may, when a timely request is made, permit the defendant to waive his presence at the preliminary hearing if the ends of justice would not be frustrated, but the tactical ploy of refusing to produce a defendant at the preliminary hearing to frustrate the prosecution's case should not be tolerated. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Refusal to appear may constitute implied waiver of hearing. Where the judge of the county court advised counsel that the failure of the defendant to appear would constitute a waiver, the defendant's subsequent refusal to appear constituted an implied waiver and extinguished the defendant's right to a preliminary hearing in the county court. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974); People v. Abbott, 638 P.2d 781 (Colo. 1981).

Right to counsel at preliminary hearing reaches constitutional proportions. Schwader v. District Court, 172 Colo. 474, 474 P.2d 607 (1970).

Where the case against the defendant is overwhelming, the absence of counsel at the preliminary hearing is harmless error. People v. Gallegos, 680 P.2d 1294 (Colo. App. 1983).

Authority to bind over on lesser included offense. The trial court which holds the preliminary hearing has the authority to bind over the defendant on a lesser included offense. People v. Hrapski, 658 P.2d 1367 (Colo. 1983).

Hearing may be set beyond 30-day period. The absence of open court dates within 30-day period prescribed by this rule constitute good cause for setting a preliminary hearing for a date outside that period. People v. Hogland, 37 Colo. App. 34, 543 P.2d 1298 (1975).

Evidence need not be admissible at trial. Hearsay evidence, and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Preliminary hearing in district court after such hearing in county court. After the filing of a direct information in the district court, either the people or the defendant may demand a preliminary hearing in that court even where there has been a dismissal of a felony complaint by the county court following a preliminary hearing on the same charge. People v. Burggraf, 36 Colo. App. 137, 536 P.2d 48 (1975).

The purpose of a Crim. P. 5 proceeding is to furnish a prophylaxis against abuses in the detention process and, more importantly, to place the accused in early contact with a judicial officer so that the right to counsel may not only be clearly explained but also be implemented upon the accused's request. People v. Heintze, 614 P.2d 367 (Colo. 1980); People v. Vigoa, 841 P.2d 311 (Colo. 1992).

Defendant waived showing of good cause necessary to continue preliminary hearing by failing to object to setting of preliminary hearing beyond statutory time requirement. People v. Thompson, 736 P.2d 423 (Colo. App. 1987).

Court has jurisdiction to dismiss charges pursuant to this rule after denying continuance where prosecution failed to demonstrate adequate, timely efforts to secure witness' attendance and such dismissal was not an abuse of discretion. Gallagher v. County Court, 759 P.2d 859 (Colo. App. 1988).

District court may not review county court's probable cause finding. It is not proper for the district court to review the county court's finding of probable cause. People v. District Court, 652 P.2d 582 (Colo. 1982); People v. Atkin, 680 P.2d 1277 (Colo. App. 1984); White v. MacFarlane, 713 P.2d 366 (Colo. 1986); Blevins v. Tihonovich, 728 P.2d 732 (Colo. 1986).

Direct information not available after discharge for failure to gain hearing within 30 days. Crim. P. 7(c), does not allow the filing of a direct information in the district court if the charges, first filed in county court, are dismissed before a preliminary hearing for failure of the prosecution to comply with the 30-day rule in this rule. Chavez v. District Court, 648 P.2d 658 (Colo. 1982).

Factors considered when direct filing of information requested. While under Crim. P. 7(c)(2) the district attorney, with the consent of the court, may file a direct information in the district court if a preliminary hearing was held on the same charge in the county court and the accused was discharged, before the district court may properly exercise its discretion, there must be a sufficient evidentiary disclosure by the prosecution to apprise the district court of the earlier dismissal of the identical charges in the county court and the reasons for the requested refiling. When exercising its discretion in deciding whether to permit the direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppres-

sion. Holmes v. District Court, 668 P.2d 11 (Colo. 1983).

No probable cause necessary to bind over habitual criminal charges. Inasmuch as habitual criminal counts do not constitute ''offenses'', probable cause need not be established in the preliminary hearing to bind these charges over to the district court. Maestas v. District Court, 189 Colo. 443, 541 P.2d 889 (1975).

Where technical difficulties prevented defendant from obtaining a transcript of the preliminary hearing, the judge abused his discretion in denying defendant's motion for a second preliminary hearing. Such motion should have been granted because the testimony presented at the first preliminary hearing was directly relevant and significant to defendant's trial preparation, the prosecution was expected to rely on testimony presented at the preliminary hearing, and there was no alternative method of reconstructing the testimony from the preliminary hearing. Harris v. District Court, 843 P.2d 1316 (Colo. 1993).

Prosecution may seek a grand jury indictment after dismissal by a county court on a preliminary hearing for lack of probable cause as an alternative to appealing to or filing a direct information in the district court. People v. Noline, 917 P.2d 1256 (Colo. 1996).

Because district court applied a flawed interpretation of the law during the preliminary hearing, assessment of probable cause was in error and review requires the court to determine whether the facts, when viewed in the light most favorable to the prosecution, would induce a reasonably prudent and cautious person to entertain the belief that the defendant committed the crime charged. People v. Hall, 999 P.2d 207 (Colo. 2000).

When court applies an erroneous legal standard or bases its ruling on erroneous conclusions of law at preliminary hearing, the proper standard of review is de novo, not abuse of discretion. Reviewing court must review the evidence in the light most favorable to prosecution to determine if a reasonably prudent and cautious person could entertain the belief that defendant committed the crime charged. People v. Beck, 187 P.3d 1125 (Colo. App. 2008).

Where district court finds that defendant's waiver of right to preliminary hearing is ineffective, the district court has the authority to restore defendant's right to a preliminary hearing. People v. Nichelson, 219 P.3d 1064 (Colo. 2009).

V. FAILURE TO FILE FOR PRELIMINARY HEARING.

Waiver occurs when defendant fails to request preliminary hearing. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974); People ex rel. Farina v. District Court, 185 Colo. 188, 522 P.2d 589 (1974); People v. Moody, 630 P.2d 74 (Colo. 1981).

And affirmative waiver not necessary. Section (a)(4)(I), when construed with section (a)(5), establishes that an affirmative waiver is not necessary to cause a defendant to lose his right to demand a preliminary hearing. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Effect of waiver. If the defendant waives a preliminary hearing in the county court, he must be bound over for trial, and not for a subsequent preliminary hearing in the district court. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974); People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

An express written waiver by a defendant of his right to a preliminary hearing operates identically to a failure to file within the time limit prescribed by this rule; both requiring the defendant's case to be bound over for trial. People v. Abbott, 638 P.2d 781 (Colo. 1981).

Right not restorable by district court after waiver in county court. A defendant is not entitled to a preliminary hearing in the district court if he has previously waived a preliminary hearing in the county court. People ex rel. Farina v. District Court, 185 Colo. 18, 521 P.2d 780 (1974); People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974); People v. Abbott, 638 P.2d 781 (Colo. 1981).

III. INDICTMENT AND INFORMATION

Rule 6. Grand Jury Rules

(a) The chief judge of the district court in each county or a judge designated by him may order a grand jury summoned where authorized by law or required by the public interest.

(b) The grand jury shall hear witnesses as may be determined by the grand jury and may find an indictment on the sworn testimony of one witness only, except in cases of

perjury, when at least two witnesses to the same fact shall be necessary. An indictment may also be found upon the information of two of their own body.

(c) The foreman of the grand jury may swear or affirm all witnesses who may come before the grand jury.

ANNOTATION

Law reviews. For article, ''State Grand Juries in Colorado: Understanding the Process and Attacking Indictments'', see 34 Colo. Law. 63 (Apr. 2005).

Grand jury proceedings have been traditionally free of technical rules. People ex rel. Dunbar v. District Court, 179 Colo. 321, 500 P.2d 819 (1972).

Applied in Thomas v. County Court, 198 Colo. 87, 596 P.2d 768 (1979); People v. District Court, 199 Colo. 398, 610 P.2d 490 (1980).

Rule 6.1. Subpoenas — Issuance and Time Limits

Subpoenas and subpoenas duces tecum shall be issued in accordance with the rules of criminal procedure and these rules and shall be served at least forty-eight hours before any appearance is required before the grand jury, unless waived by the witness. The court, for good cause, may shorten the time limit imposed by this rule.

ANNOTATION

Grand jury dependent on courts for subpoenas. One significant limitation upon the grand jury is that it must rely upon the courts to compel the production of documents or the attendance of witnesses, and, on motion of the witness subpoenaed, the court is given discretion to quash, modify, or order compliance with the subpoena. Losavio v. Robb, 195 Colo. 533, 579 P.2d 1152 (1978).

For in camera examination of subpoenaed bank records, see Pignatiello v. District Court, 659 P.2d 683 (Colo. 1983).

Applied in People ex rel. Gallagher v. District Court, 198 Colo. 468, 601 P.2d 1380 (1979).

Rule 6.2. Secrecy of Proceedings — Witness Privacy — Representation by Counsel

(a) All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. Nothing in this rule shall prevent a disclosure of the general purpose of the grand jury's investigation by the prosecutor.

(b) Any witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to assistance of counsel during any time that such witness is being questioned in the presence of said grand jury. If the witness desires legal assistance during his testimony, counsel must be present in the grand jury room with his client during such questioning. However, counsel for the witness shall be permitted only to counsel with the witness and shall not make objections, arguments, or address the grand jury. Such counsel may be retained by the witness or may, for any person financially unable to obtain adequate assistance, be appointed in the same manner as if that person were eligible for appointed counsel. An attorney present in the grand jury room shall take an oath of secrecy. If the court, at an *in camera* hearing, determines that counsel was disruptive, then the court may order counsel to remain outside the courtroom when advising his client. No attorney shall be permitted to provide counsel in the grand jury room to more than one witness in the same criminal investigation, except with the permission of the grand jury.

Source: (a) amended, effective November 8, 1990.

ANNOTATION

Law reviews. For comment, ''Reporter's Privilege: Pankratz v. District Court'', see 58 Den. L.J. 681 (1981).

Grand jury secrecy remains important to safeguard a number of different interests to preserve its proper functioning. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Justifications for grand jury secrecy are several: (1) To prevent the escape of those whose indictment may be contemplated; (2) to prevent disclosure of derogatory information presented to the grand jury against someone who has not been indicted; (3) to encourage witnesses to come before the grand jury and speak freely with respect to a commission of crimes; (4) to encourage grand jurors in uninhibited investigation of and deliberation on suspected criminal activity. In re P.R. v. District Court, 637 P.2d 346 (Colo. 1981).

Colorado secrecy rules do not violate the first amendment by prohibiting the disclosure of matters a witness learned from her participation in the grand jury process, at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Disclosure of grand jury materials to federal prosecutors without prior approval, in violation of § 16-5-204, did not violate federal constitutional or statutory rights. United States v. Pignatiello, 628 F. Supp. 68 (D. Colo. 1986).

Disclosure that testimony of other grand jury witnesses contradicted current witness' testimony did not violate grand jury secrecy rule where identities of witnesses were not disclosed. People v. Rickard, 761 P.2d 188 (Colo. 1988).

A line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Disclosure of information the witness already had independently of the grand jury process does not violate this rule. Drawing the line here protects the witness's first amendment right to speak while preserving the state's interest in grand jury secrecy. Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003).

Breach of secrecy by prosecution does not warrant dismissal of indictment absent factual findings that defendant is prejudiced. People v. Rickard, 761 P.2d (Colo. 1988).

Jurors and witnesses should be protected vigorously from outside influences. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

Any effort to tamper is reprehensible. Any effort to tamper with or obstruct the due administration of a grand jury's function is reprehensible. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

The jury tampering statute, section 18-8-609, is implemented by this rule. People v. Zupancic, 192 Colo. 231, 557 P.2d 1195 (1976).

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. Petit jury's subsequent guilty verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993), aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Applied in People ex rel. Losavio v. J.L., 195 Colo. 494, 580 P.2d 23 (1978); Pankratz v. District Court, 199 Colo. 411, 609 P.2d 1101 (1980).

Rule 6.3. Oath of Witnesses

The following oath shall be administered to each witness testifying before the grand jury:

> DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

ANNOTATION

Applied in People ex rel. Losavio v. J.L., 195 Colo. 494, 580 P.2d 23 (1978); In re P.R. v. District Court, 637 P.2d 346 (Colo. 1981).

Rule 6.4. Reporting of Proceedings

A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval.

Rule 6.5. Investigator

(a) Appointment. Upon the written motion of the grand jury, the court shall appoint an investigator or investigators to assist the grand jury in its investigative functions. Said investigator may be an existing investigating law enforcement officer who is presently investigating the subject matter before the grand jury.

(b) Presence. Upon written motion of the grand jury, approved by the prosecutor, the court, for good cause, may allow a grand jury investigator to be present during testimony to advise the prosecutor. No grand jury investigator shall question any witness before the grand jury. A grand jury investigator shall not comment to the grand jury by word or gesture on the evidence or concerning the credibility of any witness but may testify under oath the same as other witnesses.

ANNOTATION

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. Petit jury's subsequent guilty verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993), aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Rule 6.6. Indictment — Presentation — Sealing

(a) Presentation of an indictment in open court by a grand jury may be accomplished by the foreman of the grand jury, the full grand jury, or by the prosecutor acting under instructions of the grand jury.

(b) Upon motion by the prosecutor, the court shall order the indictment to be sealed and no person may disclose the existence of the indictment until the defendant is in custody or has been admitted to bail, except when necessary for the issuance of a warrant or summons.

Source: Entire rule amended and adopted December 19, 1996, effective March 1, 1997.

ANNOTATION

It was not essential for all members of a grand jury who issued a true bill to specifically observe the formal charging paper and approve its formal language. People v. Campbell, 194 Colo. 451, 573 P.2d 557 (1978).

Rule 6.7. Reports

A grand jury report may be prepared and released as permitted by § 16-5-205.5, C.R.S.

Source: Entire rule amended and adopted September 10, 1998, effective January 1, 1999.

ANNOTATION

Section 16-5-205, relating to informations and indictments, applies to the extent of any conflict with this rule. de'Sha v. Reed, 194 Colo. 367, 572 P.2d 821 (1977).

Applied in In re 1976 Arapahoe County Statutory Grand Jury, 194 Colo. 308, 572 P.2d 147 (1977); Charnes v. Lilly, 197 Colo. 460, 593 P.2d 967 (1979).

Rule 6.8. Indictment — Amendment

(a) Matters of Form, Time, Place, Names. At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity for the defendant to be heard, order the amendment of an indictment with respect to defects, errors, or variances from the proof relating to matters of form, time, place, and names of persons when such amendment does not change the substance of the charge, and does not prejudice the defendant on the merits. Upon ordering an amendment, the court, for good cause, may grant a continuance to accord the defendant adequate opportunity to prepare his defense.

(b) Prohibition as to Substance. No indictment may be amended as to the substance of the offense charged.

ANNOTATION

The policy underlying this rule is to insure that an indictment reflects the will of the grand jury. People v. Campbell, 194 Colo. 451, 573 P.2d 557 (1978).

It was not essential for all members of a grand jury who issued a true bill to specifically observe the formal charging paper and approve its formal language. People v. Campbell, 194 Colo. 451, 573 P.2d 557 (1978).

Trial court did not violate this rule by allowing the indictment to be amended to add a charge where the defendant entered into an agreement to plead nolo contendere to the added charge in exchange for a dismissal of all other charges in the indictment. People v. Valdez, 928 P.2d 1387 (Colo. App. 1996).

Trial court's addition of habitual criminal counts had no effect on the substance of the indictment or the second degree assault charge and did not violate the provision of this rule prohibiting such amendments under this rule. People v. Martinez, 18 P.3d 831 (Colo. App. 2000).

An indictment may be amended to fix defects, errors, or variances of proof, if the change is not substantial or an element of the crime. The indictment was amended to change dates and the dates were not a material element of any of the offenses, therefore, the defendant was not prejudiced. People v. James, 40 P.3d 36 (Colo. App. 2001).

Applied in People v. Thimmes, 643 P.2d 780 (Colo. App. 1981).

Rule 6.9. Testimony

(a) Release to Prosecutor. Upon application by the prosecutor, the court, for good cause, may enter an order to furnish to the prosecutor transcripts of grand jury testimony, minutes, reports, or exhibits relating to them.

(b) Release to Witness. Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them.

(c) Limitations on Release. An order to furnish transcripts of grand jury testimony, minutes, reports, or exhibits under this rule shall specify the person or persons who may be granted access to such material upon its release. Such order shall also specify any limitations which the court finds should be imposed on the use to be made of such material by any person or persons, after giving due consideration to the provisions of Rule 6.3. Such order shall also provide that release of such material shall not be made by the clerk of the court until the filing of an oath of affirmation of acceptance by the person receiving such material of the restrictions and limitations which are specified by the court under this paragraph.

(d) Indicted Defendant's Discovery Rights. Nothing herein shall limit the right of an indicted defendant to discovery under the rules of criminal procedure.

ANNOTATION

Applied in Charnes v. Lilly, 197 Colo. 460, 593 P.2d 967 (1979).

Rule 7. The Indictment and the Information

(a) The Indictment.

(1) An indictment shall be a written statement presented in open court by a grand jury to the district court which charges the commission of any crime by an alleged offender.

(2) Requisites of the Indictment. Every indictment of the grand jury shall state the crime charged and essential facts which constitute the offense. It also should state:

(I) That it is presented by a grand jury;

(II) That the defendant is identified therein, either by name or by the defendant's patterned chemical structure of genetic information, or described as a person whose name is unknown to the grand jury;

(III) That the offense was committed within the jurisdiction of the court, or is triable therein;

(IV) That it is signed by the foreman of the grand jury, and the prosecutor.

(b) The Information.

(1) An information shall be a written statement, signed by the prosecutor and filed in the court having jurisdiction over the offense charged, alleging that a person committed the criminal offense described therein.

(2) **Requisites of the Information.** The information shall be deemed technically sufficient and correct if it can be understood therefrom:

(I) That it is presented by the person authorized by law to prosecute the offense;

(II) That the defendant is identified therein, either by name or by the defendant's patterned chemical structure of genetic information, or described as a person whose name is unknown to the informant;

(III) That the offense was committed within the jurisdiction of the court, or is triable therein;

(IV) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction.

(3) **Information After Preliminary Hearing Waiver or Dispositional Hearing.** An information may be filed, without consent of the trial court having jurisdiction, for any offense against anyone who has either:

(I) Failed to request a preliminary hearing in the county pursuant to Rule 5;

(II) Had a preliminary hearing or dispositional hearing and has been bound over by the county court to appear in the court having trial jurisdiction.

(4) When a defendant has been bound over to the trial court pursuant to Rule 5 (a)(4)(III), the felony complaint when transferred to the trial court shall be deemed to be an information if it contains the requirements of an information.

(c) Direct Information. The prosecutor may file a direct information if:

(1) The prosecutor obtains the consent of the court having trial jurisdiction and no complaint was filed against the accused person in the county court pursuant to Rule 5; or

(2) A preliminary hearing was held either in the county court or in the district court and the court found probable cause did not exist as to one or more counts. If the prosecutor states an intention to proceed in this manner, the bond executed by the defendant shall be continued and returnable in the district court at a day and time certain. If a bond has not been continued, the defendant shall be summoned into court without the necessity of making a new bond. The information shall be accompanied by a written statement from the prosecutor alleging facts which establish that evidence exists which for good cause was not presented by the prosecutor at the preliminary hearing. Within 21 days of defendant's first appearance following the direct filing the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause; or

(3) The prosecutor obtains the consent of the court having trial jurisdiction and the complaint upon which the preliminary hearing was held and the other records in the case have not been delivered to the clerk of the proper trial court.

(4) The case was dismissed before a preliminary hearing was held in the county court or in the district court, when one is required, or, in other cases, before the defendant was bound over to the trial court or otherwise set for arraignment or trial. The information shall be accompanied by a written statement from the prosecutor stating good cause for dismissing and then refiling the case. Within 21 days after defendant's first appearance following the direct filing the defendant may request a hearing at which the prosecutor shall establish the existence of such good cause. The prosecution may also submit the matter to a grand jury.

(5) The case was dismissed after the district or county court found probable cause at the preliminary hearing if one was required or, in other cases, after the defendant was bound over to the trial court or otherwise set for arraignment or trial, and before jeopardy has attached. If such case was originally filed by direct information in the district court, the prosecution may not file the same offense(s) by a felony complaint in the county court, but the prosecution may charge the same offense(s) by filing a direct information in the district court or may submit the matter to a grand jury, and the case shall then proceed as if the previous case had never been filed. The prosecution shall also file with the direct information or with the felony complaint a statement showing good cause for dismissing and then refiling the case. Within 21 days of defendant's first appearance following the filing of the new felony complaint or the direct filing of the new information the defendant may request an evidentiary hearing at which the prosecutor shall establish the existence of such good cause.

(d) Repealed.

(e) Amendment of Information. The court may permit an information to be amended as to form or substance at any time prior to trial; the court may permit it to be amended as to form at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Surplusage. The court, on motion of the defendant or the prosecutor, may strike surplusage from the information or indictment.

(g) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within 14 days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(h) Preliminary Hearing - District Court Procedures.

(1) In cases in which a direct information was filed pursuant to Rule 7(c), charging: (1) a class 1, 2, or 3 felony; (2) a level 1 or 2 drug felony; or (3) a class 4, 5, or 6 felony or a level 3 or 4 drug felony if such felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S., a preliminary hearing is authorized. Either the defendant or the prosecutor may request a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony who may not request a preliminary hearing shall participate in a dispositional hearing unless otherwise waived for the purposes of case evaluation and potential resolution. Except upon a finding of good cause, the request for a preliminary hearing must be made within 7 days after the defendant is brought before the court for or following the filing of the information in that court and prior to a plea. No request for a preliminary hearing may be filed in a case which is to be tried upon indictment.

(2) Upon the making of such a request, or if a dispositional hearing is required, the district court shall set the hearing which shall be held within 35 days of the day of the

setting, unless good cause for continuing the hearing beyond that period is shown to the court. The clerk of the court shall prepare and give notice of the hearing, or any continuance thereof, to all parties and their counsel.

(3) The defendant shall not be called upon to plead at the preliminary hearing. The defendant may cross-examine the prosecutor's witnesses and may introduce evidence. The prosecutor shall have the burden of establishing probable cause. The presiding judge at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.

(4) If, from the evidence, it appears to the district court that no probable cause exists to believe that any or all of the offenses charged were committed by the defendant, the court shall dismiss those counts from the information and, if the court dismisses all counts, discharge the defendant; otherwise, or subsequent to a dispositional hearing, it shall set the case for arraignment or trial. If the prosecutor believes the court erred in its finding of no probable cause, this ruling may be appealed pursuant to Colorado Appellate Rules. Such a ruling shall not constitute good cause for refiling.

(4.5) A dispositional hearing is an opportunity for the parties to report to the court on the status of discussions toward disposition, including presenting any resolution pursuant to C.R.S. 16-7-302. The court shall set the dispositional hearing at a time that will afford the parties an opportunity for case evaluation and potential resolution.

(5) If a request for preliminary hearing has not been filed within the time limitations of subsection (h)(1) of this Rule, such a request shall not thereafter be heard by the court, nor shall the court entertain successive requests for preliminary hearing. The order denying a dismissal of any or all of the counts in the information after a preliminary hearing shall be final and not subject to review on appeal. The granting of such a dismissal or any or all of the counts in an information shall not be a bar to further prosecution of the accused person for the same offenses. Upon a finding of no probable cause, the prosecution may appeal pursuant to Rule 7(h)(4), may file another direct information in the district court pursuant to Rule 7(c)(2) charging the same offense(s) or may submit the matter to a grand jury, but in such cases originally filed by direct information in the district court, the prosecution may not refile the same offense(s) by a felony complaint in the county court.

(i) Motion for Reverse-Transfer Hearing Upon Indictment. In cases commenced by indictment, any motion under section 19-2-517 (3)(a), C.R.S., to transfer the case to juvenile court must be filed within 7 days after the defendant is brought before the court for or following the filing of the indictment in that court and prior to a plea, except upon a showing of good cause.

Source: Entire rule amended March 31, 1988, effective January 1, 1989; (d) repealed September 4, 1997, effective January 1, 1998; (b)(3), (h)(1), (h)(2), and (h)(4) amended and (h)(4.5) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted September 12, 2000, effective January 1, 2001; (c) and (h) amended and effective January 17, 2008; (c)(2), (c)(4), (c)(5), (g), and (h)(2) amended and adopted December 14, 2011, effective July 1, 2012; (h)(1) amended and (i) added and effective March 7, 2013; (h)(1) amended and effective September 13, 2018.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For note, ''Preliminary Hearings — The Case for Revival'', see U. Colo. L. Rev. 580 (1967).

Means by which charges brought by district attorney. A district attorney may bring charges either by filing a complaint or direct information or by presenting a grand jury indictment in open court. Dresner v. County Court, 189 Colo. 374, 540 P.2d 1085 (1975).

Applied in Bustos v. People, 158 Colo. 451, 408 P.2d 64 (1965); Lorenz v. People, 159 Colo.

494, 412 P.2d 895 (1966); Tyler v. Russel, 410 F.2d 490 (10th Cir. 1969); Rowse v. District Court, 180 Colo. 44, 502 P.2d 422 (1972); People v. Bergstrom, 190 Colo. 105, 544 P.2d 396 (1975); People v. Shortt, 192 Colo. 183, 557 P.2d 388 (1976); People v. Denn, 192 Colo. 276, 557 P.2d 1200 (1976); People v. Albo, 195 Colo. 102, 575 P.2d 427 (1978); People v. Rice, 40 Colo. App. 374, 579 P.2d 647 (1978); People v. Kreiser, 41 Colo. App. 210, 585 P.2d 301 (1978); People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979); People v. Driscoll, 200 Colo. 410, 615 P.2d 696 (Colo. 1980); Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); People v. Moody, 630 P.2d 74 (Colo. 1981); People v. Stoppel, 637 P.2d 384 (Colo. 1981); People v. Abbott, 638 P.2d 781 (Colo. 1981); J.T. v. O'Rourke ex rel. Tenth Judicial Dist., 651 P.2d 407 (Colo. 1982); People v. District Court, 652 P.2d 582 (Colo. 1982); People v. Anderson, 659 P.2d 1385 (Colo. 1983); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

II. INDICTMENT.

It is defendant's right to be informed with reasonable certainty of nature of charges against him by requiring that an indictment answer the questions of ''who, what, wheres, and how'' in cases where the acts constituting the offense are not adequately described by the statute. People v. Donachy, 196 Colo. 289, 586 P.2d 14 (1978); People v. Gable, 647 P.2d 246 (Colo. App. 1982).

Indictment must clearly state essential facts which constitute the offense: Fundamental fairness requires no less. People v. Tucker, 631 P.2d 162 (Colo. 1981).

Test of sufficiency of indictment is whether it is sufficiently definite to inform the defendant of the charges against him so as to enable him to prepare a defense and to plead the judgment in bar of any further prosecutions for the same offense. People v. Westendorf, 37 Col. App. 111, 542 P. 2d 1300 (1975); People v. Gable, 647 P.2d 246 (Colo. App. 1982).

An indictment is sufficient so long as it is not so indefinite in its statement of a particular charge that it fails to afford defendant a fair opportunity to procure witnesses and prepare for trial. People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Orderly sequence of statement of elements of offense should characterize indictment. Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943).

The requirements of a criminal indictment by a grand jury are essentially twofold: First, it must give the defendant sufficient notice of the crime that has allegedly been committed so that a defense may be prepared; second, it must define the acts which constitute the crime with sufficient definiteness so that the defendant may plead the resolution of the indictment as a bar to subsequent proceedings. People v. Tucker, 631 P.2d 162 (Colo. 1981).

Insufficient indictment does not legally charge crime or subject defendant to the jurisdiction of the court. People v. Westendorf, 37 Colo. App. 111, 542 P. 2d 1300 (1975).

And jeopardy does not attach to indictment defective in substance. An indictment which is defective in substance merely prevents prosecution on the basis of that particular pleading. No jeopardy attaches, and the defendant may be charged be any appropriate and sufficient pleading. People v. Thimmes, 643 P.2d 780 (Colo. App. 1981).

Recitation of statute may be insufficient. Where acts constituting an offense are not described by the statute, any indictment merely reciting the statutory words is insufficient. People v. Tucker, 631 P.2d 162 (Colo. 1981).

Defendant may raise insufficiency for first time on appeal. Although defendant did not raise the insufficienty of the indictment at trial or in his motion for new trial, he is not thereby precluded from asserting that defect on appeal. People v. Westendorf, 37 Colo. App. 111, 542 P.2d 1300 (1975).

Date of offense is material allegation. Allegations specifying the date on which an accused allegedly committed an offense are always material when the offense charged is one which may be barred by an applicable statute of limitations. People v. Thimmes, 643 P.2d 780 (Colo. App. 1981).

Because of the veil of secrecy surrounding most conspiracies, considerable latitude is allowed in drafting conspiracy indictment. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

A state grand jury indictment need not be presented in open court to the district court designated as the county of venue for the purposes of trial. The requirement that the indictment be presented in open court applies to the court supervising the state grand jury. People v. Tee, 2018 COA 84, __ P.3d __.

When an indictment is procured by or with the assistance of a prosecuting attorney who is disqualified to conduct the prosecution, it is invalid. Once the disqualification of a district attorney is entered and the appointment of a special prosecutor becomes effective, the special prosecutor, and only the special prosecutor, is the authorized prosecuting attorney on the case. People v. Hastings, 903 P.2d 23 (Colo. App. 1994).

III. INFORMATION.

A. In General.

District attorney has the authority to file a complaint or information in derogation of

grand jury's true bill. Dresner v. County Court, 189 Colo. 374, 540 P.2d 1085 (1975).

Practice of effecting charge through information is not unconstitutionally void as not affording the protection of a grand jury. Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

But if information fails to charge crime, court acquires no jurisdiction. People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980).

If the information is not presented by a person authorized by law to prosecute the offense, it is technically insufficient and incorrect and if it is signed by an unauthorized person, it is invalid. People v. Hastings, 903 P.2d 23 (Colo. App. 1994).

When an information is presented by a disqualified prosecuting attorney, it is invalid. Once the disqualification of a district attorney is entered and the appointment of a special prosecutor becomes effective, the special prosecutor, and only the special prosecutor, is the authorized prosecuting attorney on the case. People v. Hastings, 903 P.2d 23 (Colo. App. 1994).

Count charged both the crime of sexual assault on a child and the sentence enhancer by clearly identifying each of the elements of both with sufficient particularity. People v. Melillo, 25 P.3d 769 (Colo. 2001).

Amendment of information on date of trial was proper since the amendment went to the dates of the offenses and did not prejudice defendant. The date change was not substantive and there was no prejudice to defendant because previous informations had included the dates in the amendment, so defendant was on notice the charges could include those dates. People v. Walker, 321 P.3d 528 (Colo. App. 2011), aff'd on other grounds, 2014 CO 6, 318 P.3d 479, cert. denied, __ U.S. __, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

Failure to include intent to seek discretionary indeterminate sentencing in information is not plain error. Defendant was aware he was charged with a crime in which indeterminate sentencing was a possibility. People v. Walker, 321 P.3d 528 (Colo. App. 2011), aff'd on other grounds, 2014 CO 6, 318 P.3d 479, cert. denied, __ U.S. __, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

B. Affidavits.

Law reviews. For article, ''Confidential Informants To Disclose or Not to Disclose'', see 19 Colo. Law. 225 (1990).

Verification of an information is required under this rule. Scott v. People, 176 Colo. 289, 490 P.2d 1295 (1971).

Technical defects in the form of an information do not require reversal unless substantial rights of the defendant are prejudiced. Information which omitted the words ''against the peace and dignity of the {People of the State of Colorado}'', did not prejudice defendant's substantial rights. People v. Higgins, 874 P.2d 479 (Colo. App. 1994).

Affiant's competency presumed. It is unnecessary for the affidavit to recite that affiant is ''a competent witness to testify in the case'', as his competency will be presumed until the contrary appears. Walt v. People, 46 Colo. 136, 104 P.2d 89 (1909), appeal dismissed, 223 U.S. 748, 32 S. Ct. 534, 56 L. Ed. 640 (1912); Hubbard v. People, 153 Colo. 252, 385 P.2d 419 (1963).

As is credibility. An affiant's credibility as a witness is presumed until the contrary appears. Hubbard v. People, 153 Colo. 252, 385 P.2d 419 (1963).

Signing affidavit before reading does not nullify affiant's credibility. Although it is extremely poor practice to sign without reading, such does not make affiant an uncredible, where he signed the affidavit as prepared and explained to him, believing he knew what it said. Williams v. People, 157 Colo. 443, 403 P.2d 436 (1965).

Nor does minor factual discrepancy. A discrepancy in the amount of money taken and charged in the affidavit does not render affiant incompetent as a witness. Williams v. People, 157 Colo. 443, 403 P.2d 436 (1965).

Affidavit complies with rule despite technical error. Where a defendant is charged with more than one crime, an affidavit which uses the word ''offense'' rather than ''offenses'' substantially complies with this rule. Martinez v. People, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed. 2d 104 (1965).

And evidence adduced at preliminary hearing may cure defect in affidavit. Where defendants exercised their rights to a preliminary hearing and had the issue of probable cause determined against them by direct evidence, which would be sufficient to satisfy the requirements of this rule, the evidence adduced at the preliminary hearing cured a defect in the affidavit and rendered the issue of personal knowledge of the affiant on the information moot. People v. Weaver, 182 Colo. 221, 511 P.2d 908 (1973).

Affidavit sufficient to meet requirements of this rule. Williams v. People, 157 Colo. 443, 403 P.2d 436 (1965); Coy v. People, 158 Colo. 437, 407 P.2d 345 (1965); Andrews v. People, 161 Colo. 516, 423 P.2d 322 (1967).

Not denial of right of conformation where affiant does not testify at trial. A defendant is not denied his constitutional right of confrontation because an individual who verified the information and who was indorsed as a witness does not testify at the time of trial. Scott v. People, 176 Colo. 289, 490 P.2d 1295 (1971).

IV. DIRECT INFORMATION.

Prosecution's remedies upon dismissal in county court. The prosecution has one of two remedies available to it when a case is dismissed in the county court. If the case is dismissed before a preliminary hearing is held, the prosecution may appeal the order of dismissal to the district court. If the county court dismisses a charge after holding a preliminary hearing under Crim. P. 5(a)(4), the exclusive remedy available to the prosecution is to request leave to file a direct information in the district court. People v. Freiman, 657 P.2d 452 (Colo. 1983).

There is no procedure for dismissing a felony complaint without prejudice. Once the filing of a felony complaint in county court is dismissed, the prosecution must either obtain a grand jury indictment or file an information directly in the district court. People v. Williams, 987 P.2d 232 (Colo. 1999).

The purpose to be achieved by the district court consent requirement of section (c)(2) is to insure that the accused is not subject to oppressive and malicious prosecutions. People v. Elmore, 652 P.2d 571 (Colo. 1982).

Consent of court cannot be perfunctory. People v. Swazo, 191 Colo. 425, 553 P.2d 782 (1976).

As informed consent required. The logical application of section (c), requires informed consent. Otherwise, any real distinction between section (b)(3), and section (c) would be illusory. People v. Swazo, 191 Colo. 425, 553 P.2d 782 (1976).

And exercise of discretion. The requirement of court consent implies a real application of discretion. People v. Swazo, 191 Colo. 425, 553 P.2d 782 (1976); People v. Elmore, 652 P.2d 571 (Colo. 1982); People v. Sabell, 708 P.2d 463 (Colo. 1985).

In exercising its discretion in deciding whether to permit a direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression. People v. Freiman, 657 P.2d 452 (Colo. 1983).

There is no constitutional right to a preliminary hearing when a direct information is filed. Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969); Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972); People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973).

As bringing charge by direct information is not in violation of either state or federal constitution. Habbord v. People, 175 Colo. 417, 488 P.2d 554 (1971).

And whether a preliminary hearing shall be had is a procedural matter. De Baca v. Trujillo, 167 Colo. 311, 447 P.2d 533 (1968).

Purpose behind requiring personal knowledge of affiant in direct information is to assure that there is probable cause to initiate the criminal proceeding, so as to safeguard the rights of innocent citizens. People v. Weaver, 182 Colo. 221, 511 P.2d 908 (1973).

Authority to file direct information charging differently than true bill. Where a true bill was never filed in district court, the district attorney had the power and authority to file a complaint or direct information that included charges which were different than those allegedly set forth in the true bill returned by a grand jury. Dresner v. County Court, 189 Colo. 374, 540 P.2d 1085 (1975).

No requirement of new evidence to support direct filing. There is no requirement that the district attorney establish that there exists new or additional evidence to support the direct filing of an information. The existence of such evidence is only one factor the district court may consider in exercising its discretion to determine whether to allow the direct filing. Holmes v. District Court, 668 P.2d 11 (Colo. 1983).

Incompetent evidence acceptable at hearing. Hearsay evidence, and other evidence, which would be incompetent if offered at the time of trial, may be the bulk of evidence at a preliminary hearing. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Prosecutor must apprise judge of prior dismissal of charges. For consent to be valid, there must be a sufficient evidentiary disclosure by the prosecutor to at least apprise the judge of a prior dismissal of the identical charges in county court and the reasons for the direct filing. People v. Swazo, 191 Colo. 425, 553 P.2d 782 (1976).

And hearing in district court may be demanded even though such hearing was held in county court. After the filing of a direct information in the district court either the people or the defendant may demand a preliminary hearing in that court even where there has been a dismissal of a felony complaing by the county court following a preliminary hearing on the same charge. People v. Burggraf, 36 Colo. App. 137, 536 P.2d 48 (1975).

Direct information not available after dismissal for failure to prosecute. Section (c) does not allow filing of a direct information in the district court if the charges, first filed in county court, are dismissed before a preliminary hearing for failure of the prosecution to comply with the 30-day rule in Crim. P. 5(a)(4)(I). Chavez v. District Court, 648 P.2d 658 (Colo. 1982).

Court's discretion in filing direct information following dismissal. While under section (c)(2), the district attorney, with the consent of the court, may file a direct information in the district court if a preliminary hearing was held

on the same charge in the county court and the accused was discharged, before the district court may properly exercise its discretion, there must be a sufficient evidentiary disclosure by the prosecution to apprise the district court of the earlier dismissal of the identical charges in the county court and the reasons for the requested refiling. When exercising its discretion in deciding whether to permit the direct filing of an information, the district court is required to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression. Holmes v. District Court, 668 P.2d 11 (Colo. 1983); People v. Sabell, 708 P.2d 463 (Colo. 1985).

When the motion under section (c)(2) did not identify the county court's error and did not describe testimony at the preliminary hearing in detail, there was not sufficient evidentiary disclosure to allow refiling. Borg v. District Court, 686 P.2d 781 (Colo. 1984).

Requirement of district court's consent for filing of direct information implies an exercise of court's discretion which will not be overturned unless there exists abuse of such discretion. People v. Stokes, 812 P.2d 712 (Colo. App. 1991).

Trial court's denial of defendant's motion to dismiss, despite failure of prosecution to advise trial court of prior dismissal, was not error where consent by the court was obtained and the dismissed case involved separate and distinct charges. People v. Higgins, 874 P.2d 479 (Colo. App. 1994).

Belief that county court erred in finding no probable cause existed for sexual assault charge does not constitute good cause for refiling charges by direct information as issue of adequacy of evidence may be addressed only upon appellate review. People v. Stokes, 812 P.2d 712 (Colo. App. 1991).

District court's denial of consent for filing of direct information did not constitute abuse of discretion when prosecution did not present testimony of victim in county court proceedings for tactical reasons. People v. Stokes, 812 P.2d 712 (Colo. App. 1991).

District attorney allowed to join offenses arising from criminal episode. This rule allows the district attorney, with the consent of the trial court, to file a direct information joining any or all offenses arising from a criminal episode. People v. District Court, 183 Colo. 101, 515 P.2d 101 (1973).

V. NAMES OF WITNESSES.

Compliance with this rule is mandatory for district attorney. People v. Bailey, 191 Colo. 366, 552 P.2d 1014 (1976).

Purpose of supplying names of witnesses with the indictment or information is to advise defendants of the identity of those who might testify against them and to afford counsel an opportunity, where deemed advisable, to interview such witnesses. Reed v. People, 171 Colo. 421, 467 P.2d 809 (1970); People v. Bailey, 191 Colo. 336, 552 P.2d 1014 (1976).

Allowance of late endorsements of prosecution witnesses is within discretion of trial court. People v. Muniz, 622 P.2d 100 (Colo. App. 1980); Corbett v. People, 153 Colo. 457, 387 P.2d 409 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1346, 12 L. Ed. 2d 302 (1964); People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972); People v. Wandel, 713 P.2d 398 (Colo. App. 1985).

And no error unless defendant prejudiced. In order to constitute reversible error where there is a late endorsement of a witness, the defendant must show that he was prejudiced because the appearance of the witness surprised him and because he did not have adequate opportunity to interview the witness prior to trial. People v. Bailey, 191 Colo. 366, 552 P.2d 1014 (1976).

Trial court did not abuse its discretion in allowing prosecution to endorse four witnesses on the day of the trial where defendant was familiar with testimony of three of the witnesses and did not request a continuance for the purpose of interviewing them, and where endorsement of the fourth witness was conditioned upon defendant having access prior to the witness' testimony. People v. Castango, 674 P.2d 978 (Colo. App. 1983).

When failure to notify defendant of witness's change of address not reversible error. Failure to notify defendant of a change of address of a witness is not grounds for reversal where no surprise is shown when he testifies at the trial, no continuance has been sought on the grounds that there was no opportunity to interview him prior to trial, and no attempt has been made to ascertain his current address if defendant had sought to locate him for the purpose of interview. Reed v. People, 171 Colo. 421, 467 P.2d 809 (1970).

Defense counsel's refusal to request continuance may be waiver of claim of prejudicial error due to late endorsement. People v. Bailey, 191 Colo. 366, 552 P.2d 1014 (1976).

VI. NATURE AND CONTENTS OF INFORMATION.

A specific crime must be alleged in the information. Gomez v. People, 162 Colo. 77, 424 P.2d 387 (1967); Henson v. People, 166 Colo. 428, 444 P.2d 275 (1968).

But the name of the crime need not be mentioned in an information, if the crime is adequately described therein. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968).

Rather, information is sufficient if it advises a defendant of the offense with which he is charged. Edwards v. People, 176 Colo. 478, 491 P.2d 566 (1971); People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973); People v. Flanders, 183 Colo. 268, 516 P.2d 418 (1973); People v. Gnout, 183 Colo. 366, 517 P.2d 394 (1973); People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980).

And can be understood by the jury. An information is sufficient if the charge is in language from which the nature of the offense may be readily understood by the accused and jury. Tracy v. People, 65 Colo. 226, 176 P. 280 (1918); Sarno v. People, 74 Colo. 528, 223 P. 41 (1924); Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932); Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943); Wright v. People, 116 Colo. 306, 181 P.2d 447 (1947); Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961); Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); Olguin v. People, 179 Colo. 26, 497 P.2d 1254 (1972).

So that defendant can defend against it. An information is sufficient if it advises the accused of the charge he is facing so that he can adequately defend against it. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968); Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971); Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); People v. Flanders, 183 Colo. 268, 516 P.2d 418 (1973); People v. Gnout, 183 Colo. 366, 517 P.2d 394 (1973); People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980); People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

And be protected from further prosecution for the same offense. An information is sufficient if it advises the defendant of the charges he is facing so that he can adequately defend himself and be protected from further prosecution for the same offense. People v. Warner, 112 Colo. 565, 151 P.2d 975 (1944); Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961); People v. Allen, 167 Colo. 158, 446 P.2d 223 (1968); Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); Olguin v. People, 179 Colo. 26, 497 P.2d 1254 (1972); People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973). People v. Flanders, 183 Colo. 268, 516 P.2d 418 (1973); People v. Gnout, 183 Colo. 366, 517 P.2d 394 (1973); People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980); People v. Palmer, 87 P.3d 137 (Colo. App. 2003).

Although great detail not needed as judgment, not information, constitutes bar. An information need not plead an offense in such detail as to be self-sufficient as a bar to further prosecution for the same offense; for the judgment constitutes a bar, and the extent of the judgment may be determined from an examination of the record as a whole. Mora v. People, 172 Colo. 261, 472 P.2d 142 (1970); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Jeopardy does not attach if information is insufficient to sustain conviction. People v. Garner, 187 Colo. 294, 530 P.2d 496 (1975).

Dimissal if defendant not fairly and reasonably informed of accusations. There must be a variance between the information and the proof to be offered constituting such an imperfection or inaccuracy that the defendant was not fairly and reasonably informed of the nature and cause of the accusations against him in order that a motion of dismissal be granted. People v. Allen, 167 Colo. 158, 446 P.2d 223 (1968).

Each count of information must be independent. Absent a clear and specific incorporation by reference, each count of an information to be valid must be independent of the others, and in itself charge the defendant with a distinct and different offense. People v. Moore, 200 Colo. 481, 615 P.2d 726 (1980); People v. Steiner, 640 P.2d 250 (Colo. App. 1981).

But clear and specific incorporation by reference permitted. Any count in an information may, by proper reference, incorporate the allegations more fully set forth in another count, such reference must be clear, specific, and leave no doubt as to what provision is intended to be incorporated and this same rule is applicable to incorporating the caption. People v. Steiner, 640 P.2d 250 (Colo. App. 1981).

Information is sufficient if it charges crime in the words of the statute. Williams v. People, 26 Colo. 272, 57 P. 701 (1899); Wright v. People, 116 Colo. 306, 181 P.2d 447 (1947); Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971); Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971); Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); Olguin v. People, 179 Colo. 26, 497 P.2d 1254 (1972); People v. Palmer, 87 P.3d 137 (Colo. App. 2003).

However, an information need not follow the exact wording of the statute. Sarno v. People, 74 Colo. 528, 223 P. 41 (1924); Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932); Helser v. People, 100 Colo. 371, 68 P.2d 543 (1937); Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961); Cortez v. People, 155 Colo. 317, 394 P.2d 346 (1964); Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968); Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971); Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); People v. Russell, 36 P.3d 92 (Colo. App. 2001).

The charging of a defendant in the conjunctive where a statute defines a crime as being capable of being committed in diverse ways is proper. Rowe v. People, 26 Colo. 542, 59 P. 57 (1899); Hernandez v. People, 156 Colo. 23, 396 P.2d 952 (1964).

And statutory reference is not material part of information, and, in the absence of any showing that the defendant is actually misled to his prejudice by such an inaccuracy, no error arises therefrom. Lucero v. People, 164 Colo. 247, 434 P.2d 128 (1967); People v. Marion, 182 Colo. 435, 514 P.2d 327 (1973); People v. Johnson, 644 P.2d 34 (Colo. App. 1980); People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Information need not specify lesser included offenses which may have been committed in commission of the described act. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

No information is deemed insufficient by any defect which does not tend to prejudice the substantial rights of the defendant on the merits. Albert v. People, 90 Colo. 219, 7 P.2d 822 (1932); Martinez v. People, 156 Colo. 380, 399 P.2d 415, cert. denied, 382 U.S. 866, 86 S. Ct. 134, 15 L. Ed. 2d 104 (1965).

Date of offense is not material allegation of information. Marn v. People, 175 Colo. 242, 486 P.2d 424 (1971).

Where the defendant made no showing that he was impaired in his defense to the charge at trial or in his ability to plead the judgment as a bar to a subsequent proceeding, a variance between the specific date of the offense as alleged in the information and the date as proved at trial is not fatal. People v. Adler, 629 P.2d 569 (Colo. 1981).

The prosecution is not required to specify a precise date of an alleged offense unless that date is a material element of the offense. People v. Salyer, 80 P.3d 831 (Colo. App. 2003).

But failure to allege where offense committed makes information insufficient. When an information fails to allege where the offense was committed, and thus, that it occurred within the jurisdiction of the court, it fails to state facts sufficient to confer jurisdiction upon the district court of the county in which it is filed to try the defendant. People v. Steiner, 640 P.2d 250 (Colo. App. 1981).

Separate allegation of place where offense was committed, which specifically referred to all previously alleged offenses, clearly advised defendant of claimed location of offenses, and was sufficient. People v. Brinson, 739 P.2d 897 (Colo. App. 1987).

If the information is signed by an unauthorized person, it is invalid. People v. Hastings, 903 P.2d 23 (Colo. App. 1994).

Information charging offense beyond statute of limitations. The trial court has jurisdiction to entertain a motion to amend an information which charges an offense committed outside of the statute of limitations. People v. Bowen, 658 P.2d 269 (Colo. 1983).

When general statement of offense not error. Charging theft of ''miscellaneous personal property'' in information is sufficient where itemized list is furnished defense. Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

And poor writing style not error where nature of charge clear. Where an information could have been written in far better style, but there can be no doubt that its meaning is clear, then defendants are adequately advised of the nature of the crime charged against them, and this is all section (c) requires. Covington v. People, 36 Colo. 183, 85 P. 832 (1906); Petty v. People, 156 Colo. 549, 400 P.2d 666 (1965).

Sufficiency of information is matter of jurisdiction. People v. Garner, 187 Colo. 294, 530 P.2d 946 (1975).

And such matter may be raised after trial by a motion in arrest of judgment. People v. Garner, 187 Colo. 294, 530 P.2d 496 (1975).

VII. AMENDMENT OF INFORMATION.

The purposes served by a criminal information are to advise the defendant of the nature of the charges against him, to enable him to prepare a defense, and to protect him from further prosecution for the same offense, and it is within the discretion of the trial court to allow the information to be amended as to form or substance any time prior to trial. People v. Thomas, 832 P.2d 990 (Colo. App. 1991).

When the defendant had actual notice before trial that he was being charged with having committed three prior felonies under § 16-13-101 (2) rather than two prior felonies under § 16-13-101 (1), an amendment to the information to reflect that state of affairs was a matter of form and not of substance. People v. Butler, 929 P.2d 36 (Colo. App. 1996).

Substance should prevail over form and cases generally should not be dismissed for technical irregularities that can be cured through amendment. People v. Hertz, 196 Colo. 259, 586 P.2d 5 (1978); People v. Cervantes, 677 P.2d 403 (Colo. App. 1983), aff'd, 715 P.2d 783 (Colo. 1986); People v. Washam, 2018 CO 19, __ P.3d __.

An amended complaint that merely remedies an insufficient list of victims in the original complaint relates back to the date of the original and is not time-barred. People v. Higgins, 868 P.2d 371 (Colo. 1994).

Where late amendment of information allowed. Where the court allowed the prosecution to amend the information one week before trial and then denied defendants' motions for continuance, there was no abuse of discretion where defendants' counsel knew of the amendment two weeks before trial, where the trial was reset so as to grant an additional week's continuance, where the amendment added nothing substantial to the original charge, and where there was no showing in the record that defen-

dants were prejudiced by the denial. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972).

Defendant must request continuance to claim prejudice or surprise. Defendant who did not request continuance when amendments and deletions to information were made has no basis for claiming prejudice or surprise. People v. Marion, 182 Colo. 435, 514 P.2d 327 (1973); People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979); People v. Cervantes, 677 P.2d 403 (Colo. App. 1983), aff'd, 715 P.2d 783 (Colo. 1986).

No amendment of substance after prosecution presents evidence. An accused person is entitled to be tried on the specific charge contained in the information, and after a plea of not guilty has been entered and the state has submitted all the evidence which the prosecutor desires to present to sustain that charge, no amendment can be made thereto which changes entirely the substance of the crime which defendant is alleged to have committed. Skidmore v. People, 154 Colo. 363, 390 P.2d 944 (1964); People v. Jefferson, 934 P.2d 870 (Colo. App. 1996).

A constructive amendment after completion of the evidence is per se reversible error. People v. Madden, 87 P.3d 153 (Colo. App. 2003), rev'd on other grounds, 111 P.3d 452 (Colo. 2005).

Prosecution's theory that defendant concealed information to illegally obtain a controlled substance did not effect a constructive amendment to charge involving fraud, deceit, and misrepresentation. People v. Harte, 131 P.3d 1180 (Colo. App. 2005).

And no substitution of statute prosecution conducted under. Where an information identifies with particularity the exact section of a statute upon which prosecution is based, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution. Casadas v. People, 134 Colo. 244, 304 P.2d 626 (1956); Skidmore v. People, 154 Colo. 363, 390 P.2d 944 (1964).

Nor amendment to charge more serious offense. Where the amended information would charge a different and more serious offense than that which was originally charged, the amendment should not be permitted. People v. Johnson, 644 P.2d 34 (Colo. App. 1980).

Amending a charge within the same offense from a charge that did not require mandatory sentencing to one requiring mandatory sentencing for a crime of violence is impermissible after trial begins. People v. Manyik, 2016 COA 42, 383 P.3d 77.

Language of information is controlling factor. The language of an information charging an offense is the controlling factor in determining whether the amendment was permissible after trial. People v. Johnson, 644 P.2d 34 (Colo. App. 1980).

Section (e) is to be liberally construed to allow amendment of an information ''as to form or substance at any time prior to trial'', and it is within the trial court's discretion to permit the information to be amended. People v. Wright, 678 P.2d 1072 (Colo. App. 1984).

Amendment that does not affect charge permitted prior to verdict. An amendment that does not charge an additional or different offense and does not go to the essence of the charge is one of form rather than substance, and it may be permitted at any time prior to verdict. Collins v. People, 69 Colo. 353, 195 P. 525 (1920); Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971); People v. Washam, 2018 CO 19, __ P.3d __.

Where an information contains specific language of the offense underlying an habitual criminal count, a defendant is not prejudiced by amendment of the statutory reference thereto. People v. Ybarra, 652 P.2d 182 (Colo. App. 1982); People v. Stephens, 689 P.2d 666 (Colo. App. 1984).

No amendment was necessary where the information was sufficient to provide the defendant notice of the charge and defendant's defense was applicable to the offense as stated in the jury instructions. The jury instruction stated that the victim was an at-risk adult, but the count did not specifically refer to § 18-6.5-101, which proscribes crimes against at-risk adults, and the information did not specifically identify the victim as an at-risk adult. However, no amendment was necessary because throughout the trial the prosecution demonstrated its intent to prosecute under the at-risk adult statute and defendant's theory of defense was applicable regardless of how the information stated the elements of the offense. People v. Valdez, 946 P.2d 491 (Colo. App. 1997), aff'd on other grounds, 966 P.2d 587 (Colo. 1998).

It was not error to allow amendment of habitual criminal count prior to presentation of evidence but after jury was sworn in. People v. Wandel, 713 P.2d 398 (Colo. App. 1985).

No abuse of discretion when court permitted district attorney to amend robbery count to add items taken from victim. The amendment did not result in new charges so there was no prejudice to defendant. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

No error committed by allowing the information to be amended on a matter of form. The amendment reduced the number of victims, thereby reducing the likelihood of criminal liability and benefitting the defendant. People v. Manzanares, 942 P.2d 1235 (Colo. App. 1996).

An amendment to an information narrowing the date range after the trial began did not prejudice defendant's substantial rights. Defendant was always informed of the time frame in the case against him, and so the trial court did not abuse its discretion. To the extent that de-

fendant's defense changed at all, it was to his benefit. People v. Washam, 2018 CO 19, __ P.3d __.

Amendments of form. Changing name of owner of premises in information charging burglary is an amendment of form rather than substance. Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971).

In prosecutions for larceny, amendments to an information changing the name or description of the owner of the property are of form, not substance, and are allowable during the trial. Collins v. People, 69 Colo. 353, 195 P. 525 (1920); Diebold v. People, 175 Colo. 96, 485 P.2d 900 (1971).

An amendment of an information transposing the victim's first and last names is not prejudicial to the defendant, and is one of form rather than substance within the meaning of section (e). McKee v. People, 175 Colo. 410, 487 P.2d 1332 (1971).

Amendment of information to add missing words so that defendant could be charged with second degree assault was one of form and was properly allowed by the court. People v. Cervantes, 677 P.2d 403 (Colo. App. 1983), aff'd, 715 P.2d 783 (Colo. 1986).

And correction of immaterial errors does not require rearraignment. The mere correction of a clerical or other immaterial error in an indictment does not require a second arraignment and plea. Albritton v. People, 157 Colo. 518, 403 P.2d 772 (1965).

Allegations of time are substantive in prosecutions under § 18-4-402 (1)(b). Section 18-4-402 (1)(b) (theft of rental property) proscribes only conduct which occurs after the expiration of the rental period specified in a rental agreement. In prosecutions commenced under § 18-4-402 (1)(b), allegations of time are, therefore, substantive allegations — not mere matters of form which may be altered by amendment at any time prior to the rendering of a verdict in the absence of prejudice to the defendant. People v. Moody, 674 P.2d 366 (Colo. 1984).

No abuse of discretion in granting motion to amend information where defendant was served with a copy of the written motion four days before trial, he understood the allegations of the amendment, he failed to request a continuance, and he made no showing of prejudice, misunderstanding, or surprise by reason of the time at which the amendment was made. People v. Thomas, 832 P.2d 990 (Colo. App. 1991).

Amendment of information at close of evidence was permissible where amendment related to acts occurring within the statutory limitation period, date of offense was neither a material element nor an issue at trial, and the amendment did not involve an altered accusation or require a different defense strategy from the one defendant had chosen under the initial information. People v. Metcalf, 926 P.2d 133 (Colo. App. 1996).

The people's failure actually to file an amended information after filing a written motion containing all of the allegations that would have been contained in any formal amendment to the information did not result in a lack of jurisdiction, nor was it an error so grave as to require a vacation of the conviction. People v. Thomas, 832 P.2d 990 (Colo. App. 1991).

Court's decision to submit to the jury a burglary charge based on unlawful sexual contact instead of the underlying offense of sexual assault was not in error. In this case unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. People v. Loyas, 259 P.3d 505 (Colo. App. 2010).

New charges may not be filed after a defendant's successful appeal unless new evidence supports their filing. The fourteen new counts added by the prosecution were based on new evidence; specifically, new witness disclosures and new evidence obtained by new technological methods not available at the first trial. People v. Cook, 2014 COA 33, 342 P.3d 539.

Because the prosecution's amended information required proof of an additional element and carried a harsher minimum and maximum sentence, the amendment changed the essence of the charge and was, therefore, substantive. People v. Palmer, 2018 COA 38, 433 P.3d 107.

VIII. SURPLUSAGE.

Averments which are not necessary to a sufficient description of the offense may be stricken as surplusage. Specht v. People, 156 Colo. 12, 396 P.2d 838 (1964).

IX. BILL OF PARTICULARS.

Bill not to disclose prosecution's evidence in detail. The purpose of a bill of particulars is not to disclose in detail the evidence upon which the prosecution expects to rely. Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965); People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979).

Rather, purpose of a bill of particulars is to define more specifically offense charged. Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965).

A bill of particulars calls for an exposition of the facts that the prosecution intends to prove and limits the proof at trial to those areas described in the bill. People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979).

The purpose of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the indictment, although sufficient to advise the defendant of the charges

raised against him, is nonetheless so indefinite in its statement of a particular charge that it does not afford the defendant a fair opportunity to procure witnesses and prepare for trial. People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979).

A bill of particulars must provide such information requested by defendant as is necessary for the defendant to prepare his defense and to avoid prejudicial surprise. However, a defendant is not necessarily entitled to receive all the information requested for a bill of particulars. The prosecution need not disclose in detail all evidence upon which it intends to rely. People v. Lewis, 671 P.2d 985 (Colo. App. 1983).

It is within the trial court's discretion to grant or deny motions for bills of particulars, and its action will not be disturbed on writ of error in the absence of an abuse of discretion. Stewart v. People, 86 Colo. 456, 283 P. 47 (1929); Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943); Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965); Self v. People, 167 Colo. 292, 448 P.2d 619 (1968); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972); People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979); People v. Pineda, 40 P.3d 60 (Colo. App. 2001).

Considerations in addressing motion for bill. When addressing motions requesting bills of particulars, the trial judge should consider whether the requested information is necessary for the defendant to prepare his defense and to avoid prejudicial surprise. People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979).

Bill mandatory where crime charged in words of statute. Where the crime of theft is charged in the words of the statute, an order for a bill of particulars is mandatory upon the defendant's request. People v. District Court, 198 Colo. 501, 603 P.2d 127 (1979).

Bill may be denied where information sufficiently advises defendant. There is no abuse of discretion in denying a motion for a bill of particulars where the information sufficiently advises the defendant of the charge he is to meet. Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943); Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965); Self v. People, 167 Colo. 292, 448 P.2d 619 (1968); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Bill properly denied where, at the time defendant requested a bill of particulars, several preliminary hearings had already been conducted, and the prosecution had provided the defendant with much of the evidence that was later presented at trial. People v. Pineda, 40 P.3d 60 (Colo. App. 2001).

Bill cannot aid fundamentally bad indictment. Although the purpose of a bill of particulars is to define more specifically the offense charged, a bill of particulars is not a part of an indictment nor an amendment thereto; it cannot in any way aid an indictment fundamentally bad. People v. Westendorf, 37 Colo. App. 111, 542 P.2d 1300 (1975).

A bill of particulars under section (g) cannot save an insufficient indictment. People v. Tucker, 631 P.2d 162 (Colo. 1981).

Bill of particulars was sufficient where the defendant was given the specific incidents the prosecution would rely on and the general time frame when the sexual assaults occurred. People v. Graham, 876 P.2d 68 (Colo. App. 1994).

X. PRELIMINARY HEARING.

Law reviews. For article, ''Felony Preliminary Hearings in Colorado'', see 17 Colo. Law. 1085 (1988).

Trial court does not lose its authority to conduct a preliminary hearing after a defendant enters a not guilty plea. People v. Simpson, 2012 COA 156, 292 P.3d 1153.

Primary purpose of the preliminary hearing is to determine whether probable cause exists to support the prosecution's charge that the accused committed a specific crime. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973); People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974); People v. District Court, 186 Colo. 136, 526 P.2d 289 (1974); McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978); People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

Preliminary hearing is a screening device to determine whether probable cause exists. People v. Weaver, 182 Colo. 221, 511 P.2d 908 (1973); People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973); Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975); People v. Buhrle, 744 P.2d 747 (Colo. 1987).

The preliminary hearing is a screening device, designed to determine whether probable cause exists to support charges that an accused person committed a particular crime or crimes. People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977); People v. Johnson, 618 P.2d 262 (Colo. 1980); Miller v. District Court, 641 P.2d 966 (Colo. 1982).

The purpose of a preliminary hearing is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant. Rex v. Sullivan, 194 Colo. 568, 575 P.2d 408 (1978); People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Evidence to support a conviction is not necessary at a preliminary hearing. People v. District Court, 186 Colo. 136, 526 P.2d 289 (1974); People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977); People v. Johnson, 618 P.2d 262

(Colo. 1980); Miller v. District Court, 641 P.2d 966 (Colo. 1982).

Result of finding probable cause. A finding by the district court that there is probable cause can only have the result that the court shall set the case for arraignment or trial. People v. District Court, 186 Colo. 136, 526 P.2d 289 (1974).

This rule sets forth specific requirements which must be met by a defendant in order to obtain a preliminary hearing. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

And opening sentence of section (h) limits applicability of that section to those cases which are instituted in the district court by direct information filed under section (c). People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Proceeding with a preliminary hearing for the sole purpose of preserving the possibility of a direct filing is not good cause for such filing. People v. Stanchieff, 862 P.2d 988 (Colo. App. 1993).

The preliminary hearing is not minitrial, but rather is limited to the purpose of determining whether there is probable cause to believe that a crime was committed and that the defendant committed it. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975); Johns v. District Court, 192 Colo. 462, 561 P.2d 1 (1977); People v. Cisneros, 193 Colo. 380, 566 P.2d 703 (1977); McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978); Flores v. People, 196 Colo. 565, 593 P.2d 316 (1978); People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

The preliminary hearing is not intended to be a minitrial or to afford the defendant an opportunity to effect discovery. Rex v. Sullivan, 194 Colo. 568, 575 P.2d 408 (1978); McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978).

And judge not trier of fact. In Colorado, the preliminary hearing is not a ''minitrial'', and the judge is not a trier of fact; rather, his function is solely to determine the existence or absence of probable cause. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

No consideration of probability of conviction. A preliminary hearing focuses upon a probable cause determination, rather than a consideration of the probability of conviction at the ensuing trial. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

Nor require examination of all prosecution witnesses and evidence. Preliminary hearing does not require that the prosecution lay out for inspection and for full examination all witnesses and evidence. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Merely quantum necessary to establish probable cause. The prosecution need not produce all of its evidence against the defendant at the preliminary hearing, but only that quantum necessary to establish probable cause. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

The probable cause standard requires evidence sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crimes charged. People v. Johnson, 618 P.2d 262 (Colo. 1980); People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977); Miller v. District Court, 641 P.2d 966 (Colo. 1982); People in Interest of M.V., 742 P.2d, 326 (Colo. 1987).

The prosecution is not required to produce at a preliminary hearing evidence that is sufficient to support a conviction. People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

It is not necessary that the prosecution show beyond a reasonable doubt that the defendant committed the crime; nor is it even necessary to show the probability of the defendant's conviction. People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

Prosecution may seek a grand jury indictment after dismissal by a county court on a preliminary hearing for lack of probable cause as an alternative to appealing to or filing a direct information in the district court. People v. Noline, 917 P.2d 1256 (Colo. 1996).

Under section (h)(3), the burden of proof is on the prosecution, and the defendant need not testify, although he has the right to cross-examine the witnesses called by the People. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

Although trial judge may curtail the right to cross-examine and to introduce evidence in the preliminary hearing, he may not completely prevent inquiry into matters relevant to the determination of probable cause or disregard the testimony of a witness favorable to the prosecution unless such testimony is implausible or incredible as a matter of law. People v. Buhrle, 744 P.2d 747 (Colo. 1987).

District court may not review county court's probable cause finding. It is not proper for the district court to review the county court's finding of probable cause. Blevins v. Tihonovich, 728 P.2d 732 (Colo. 1986).

Rules of evidence and procedure relaxed. In light of its limited purpose, evidentiary and procedural rules in the preliminary hearing in Colorado are relaxed. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

Since the preliminary hearing is not a minitrial, greater evidentiary and procedural latitude is granted to the prosecution to establish probable cause than would be permqtted at trial to prove the defendant committed the crime. People v. Buhrle, 744 P.2d 747 (Colo. 1987).

But may not rely solely on hearsay. While the bulk of testimony at a preliminary hearing may be hearsay, the prosecution may not totally rely on hearsay to establish probable cause

where competent evidence is readily available. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975); McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978).

Consideration of credibility of witnesses limited. A judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975); Johns v. District Court, 192 Colo. 462, 561 P.2d 1 (1977); People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

Inferences to be made in favor of prosecution. When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge in a preliminary hearing must draw the inference favorable to the prosecution. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975); Johns v. District Court, 192 Colo. 461, 561 P.2d 1 (1977); People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977); People v. Johnson, 618 P.2d 262 (Colo. 1980); Miller v. District Court, 641 P.2d 966 (Colo. 1982); People in Interest of M.V., 742 P.2d 326 (Colo. 1987).

The right to cross-examine and to introduce evidence may be curtailed by the presiding judge consistent with the screening purpose of the preliminary hearing. Rex v. Sullivan, 194 Colo. 568, 575 P.2d 408 (1978).

But judge may not completely curtail inquiry into matters relevant to the determination of probable cause. Rex v. Sullivan, 194 Colo. 568, 575 P.2d 408 (1978).

When prohibiting defense from calling witness deemed abuse of discretion. Where an eyewitness is available in court during a preliminary hearing and where the prosecution is relying almost completely on hearsay testimony, it is an abuse of discretion to prohibit the defense from calling the witness. McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978).

And witness' testimony may be used at trial. Where a defendant cross-examined an adverse witness during a preliminary hearing, that witness' recorded testimony might be used as evidence at trial, although the hearing merely determined the existence of probable cause and witness' credibility was not in issue. People v. Flores, 39 Colo. App. 556, 575 P.2d 11 (1977), rev'd on other grounds, 196 Colo. 565, 593 P.2d 316 (1978).

Right to hearing founded in statutes, rules, and constitutions. Defendant in requesting and obtaining a preliminary hearing was exercising a right that was not only guaranteed him by statute and rule of court, but also one that has a constitutional foundation. Lucero v. District Court, 188 Colo. 67, 532 P.2d 955 (1975).

Protects accused and benefits judiciary. A preliminary hearing protects the accused by avoiding an embarrassing, costly, and unnecessary trial, and it benefits the interests of judicial economy and efficiency. Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

But does not alter proposition that accused entitled to trial on merits. Although a preliminary hearing provides the defendant with an early opportunity to question the government's case, it is not designed to alter the basic proposition that an accused is entitled to one trial on the merits of the charge. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

And deemed to be critical stage. A preliminary hearing is a critical stage in the prosecution of a defendant and should not be conducted in a ''perfunctory fashion''. McDonald v. District Court, 195 Colo. 159, 576 P.2d 169 (1978).

Preliminary hearing is not intended to be mandatory procedural step in every prosecution. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

When waiver occurs. If a defendant does not request a preliminary hearing, he is deemed to have waived the preliminary hearing and must be bound over for trial. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Effect of waiver. If the defendant elects to waive the preliminary hearing and to proceed to trial, the waiver operates as an admission by the defendant that sufficient evidence does exist to establish probable cause that the defendant committed the crimes charged. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

A defendant requesting preliminary hearing must appear. When a defendant requests a preliminary hearing, he has not only the constitutional right to be present, but is under an affirmative obligation and duty to appear at the hearing. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Unless the court permits defendant to waive his presence. The court may, when a timely request is made, permit the defendant to waive his presence at the preliminary hearing if the ends of justice would not be frustrated, but the tactical ploy of refusing to produce a defendant at the preliminary hearing to frustrate the prosecution's case should not be tolerated. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Refusal to appear constitutes implied waiver. Where the judge of the county court advised counsel that the failure of the defendant to appear would constitute a waiver, the defendant's subsequent refusal to appear constituted an implied waiver and extinguished the defendant's right to a preliminary hearing in the county court. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

But application for deferred sentencing does not constitute waiver of the right to a

preliminary hearing. Celestine v. District Court, 199 Colo. 514 610 P.2d 1342 (1980).

Restoration of right once waived in county court. Under the Colorado Rules of Criminal Procedure and the statutes of this state, a district court is not vested with the power to restore a defendant's statutory right to a preliminary hearing once the defendant had waived that right in county court bind-over proceedings. People ex rel. Farina v. District Court, 184 Colo. 406, 521 P.2d 778 (1974).

Once a defendant knowingly waives his right to a preliminary hearing in the county court, the right is extinguished and may not be restored in the subsequent district court proceedings. People ex rel. Farina v. District Court, 185 Colo. 118, 522 P.2d 589 (1974).

Authority to bind over on lesser included offense. The trial court which holds the preliminary hearing has the authority to bind over the defendant on a lesser included offense. People v. Hrapski, 658 P.2d 1367 (Colo. 1983).

When juvenile not entitled to preliminary hearing in district court. A juvenile who was transferred to the district from the juvenile court, after a transfer hearing where probable cause as to the offenses charged was determined, was not entitled in the district court to another determination of probable cause in the form of a preliminary hearing. People v. Flanigan, 189 Colo. 43, 536 P.2d 41 (1975).

Defendant cannot complain if he is committed to a state institution until he is competent to have a preliminary hearing, pursuant to a sanity proceeding, since section (h)(2), provides that the preliminary hearing ''shall be held within 30 days of the day of the setting, unless good cause for continuing the hearing beyond that time be shown to the court'', and the matter of the defendant's sanity is good cause. Schwader v. District Court, 172 Colo. 474, 474 P.2d 607 (1970).

The bulk of evidence in a preliminary hearing may consist of hearsay evidence which would be inadmissible at the trial. People v. Buhrle, 744 P.2d 747 (Colo. 1987).

Rehearing not provided. There is no provision in this rule for rehearing on, or reconsideration of, a ruling on completion of a preliminary hearing. People v. District Court, 186 Colo. 136, 526 P.2d 289 (1974).

Where technical difficulties prevented defendant from obtaining a transcript of the preliminary hearing, the judge abused his discretion in denying defendant's motion for a second preliminary hearing. Such motion should have been granted because the testimony presented at the first preliminary hearing was directly relevant and significant to defendant's trial preparation, the prosecution was expected to rely on testimony presented at the preliminary hearing, and there was no alternative method of reconstructing the testimony from the preliminary hearing. Harris v. District Court, 843 P.2d 1316 (Colo. 1993).

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses.

(1) **Mandatory Joinder.** If several offenses are actually known to the prosecuting attorney at the time of commencing the prosecution and were committed within his judicial district, all such offenses upon which the prosecuting attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any such offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution; except that, if at the time jeopardy attaches with respect to the first prosecution against the defendant, the defendant or counsel for the defendant actually knows of additional pending prosecutions that this subsection (a)(1) requires the prosecuting attorney to charge and the defendant or counsel for the defendant fails to object to the prosecution's failure to join the charges, the defendant waives any claim pursuant to this subsection (a)(1) that a subsequent prosecution is prohibited.

(2) **Permissive Joinder.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment, information, or felony complaint if they are alleged to have participated in the same act or series of acts arising from the same criminal episode. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Source: (a) amended December 6, 1990, and effective March 1, 1991; entire rule amended and adopted September 12, 2002, effective January 1, 2003.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Colorado Felony Sentencing'', see 11 Colo. Law. 1478 (1982).

Applied in People v. Mendoza, 190 Colo. 519, 549 P.2d 766 (1976); People v. McCrary, 190 Colo. 538, 549 P.2d 1320 (1976); Brutcher v. District Court, 195 Colo. 579, 580 P.2d 396 (1978); Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); People v. Holder, 632 P.2d 607 (Colo. App. 1981).

II. JOINDER OF OFFENSES.

When joinder of offenses permitted. This rule provides that two or more offenses may be charged in the same information, in a separate count for each offense, if the offenses charged are based upon the same act or transaction, or on two or more acts or transactions connected together and that they were properly charged in separate counts for each offense. Ruark v. People, 158 Colo. 287, 406 P.2d 91 (1965).

Where the acts involved were committed at the same time or in immediate succession and at the same place, they arose out of the same criminal episode; therefore, it is appropriate to include the separate counts in a single information. People v. McGregor, 635 P.2d 912 (Colo. App. 1981).

Purpose of joinder is to prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the same criminal episode. Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

"Single prosecution" is a proceeding from the commencement of the criminal action until further prosecution is barred. Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

Section 8(a) applies only where prosecution aware of other offenses. Section (a) of this rule and § 18-1-408 (2) apply only where the prosecution is aware of other offenses at the time the original action is commenced. People v. Scott, 615 P.2d 680 (Colo. 1980).

Jeopardy must attach before there is "subsequent prosecution". The proscription contained in section (a) is against bringing a ''subsequent prosecution'' based on charges known to the prosecutor at the time he commenced the initial prosecution, and there is no ''subsequent prosecution'' until jeopardy attaches to the initial prosecution. People v. Freeman, 196 Colo. 238, 583 P.2d 921 (1978).

Guilty plea to related charge bars subsequent prosecution. Section (a) and § 18-1-408 (2), bar the prosecution of a defendant for two pending charges arising out of the same criminal episode when the defendant has pleaded guilty and has been sentenced for a third related charge. Ruth v. County Court, 198 Colo. 6, 595 P.2d 237 (1979).

Effect of dismissal on attachment of jeopardy. Where dismissal of a count occurred prior to trial and the dismissal had nothing to do with the defendant's criminal liability, jeopardy does not attach. People v. Freeman, 196 Colo. 238, 583 P.2d 921 (1978).

In joinder of offenses of similar character, prejudice may develop because defendant's statements concerning his involvement in one count would not ordinarily be admissible at a separate trial of the second count, since it is related to the other count only as a crime of a similar nature. People v. McCrary, 190 Colo. 538, 549 P.2d 1320 (1976).

Nearness in time, proximity of place and unity of scheme are not indispensable prerequisites to joinder under the ''same criminal episode'' standard, although multiple offenses characterized by all three components would certainly qualify for joinder under section (a). Corr v. District Court, 661 P.2d 668 (Colo. 1983).

Law of joinder and severance dependent on facts in each case. The law relating to joinder and severance and that which permits consolidation of charges depends on the facts in each particular case. Hunter v. District Court, 193 Colo. 308, 565 P.2d 942 (1977).

Where joinder permitted in sanity trial. Joinder of a charge of forcible rape with an unrelated deviate sexual intercourse charge committed on a different female on a different date for purposes of trial on the sanity issue was not error. People v. Renfrow, 193 Colo. 131, 564 P.2d 411 (1977).

But accessory charge barred if not included in first information. The prosecution is precluded from pursuing a second prosecution where the accessory charge could have been included in the first information. People v. Riddick, 626 P.2d 641 (Colo. 1981).

Joinder of offenses permitted. People v. Trujillo, 181 Colo. 350, 509 P.2d 794 (1973).

Where two assault counts arose out of the same continuous sequence of events closely related in time and distance, the two counts were ''based on two acts connected together'', and the trial judge was not obligated to sever them at trial. People v. Walker, 189 Colo. 545, 542 P.2d 1283 (1975).

Joinder not sanctioned. Where the alleged victims of the crimes are the same, but the same persons are not charged in each offense and material differences exist as to the date of each offense and the factual transactions specified in

each count, joinder under such circumstances is not sanctioned by Crim. P. 8(a). Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

To be duplicitous, information must join two or more distinct and separate offenses in the same count of an indictment or information. Marrs v. People, 135 Colo. 458, 312 P.2d 505 (1957); Leyba v. People, 174 Colo. 1, 481 P.2d 417 (1971).

Count is not bad for duplicity where it sets forth several overt acts in pursuance of the principal act charged, or where it alleges several acts done by the same person which are only successive stages in the progress of a criminal enterprise, constituting as a whole only one offense, although either, when done alone, might be an offense. Marrs v. People, 135 Colo. 458, 312 P.2d 505 (1957).

Rule authorizes the joinder of offenses based on a series of acts arising from the same criminal episode. Joinder of offenses committed at different times and places is permissible provided they are part of a schematic whole. People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Sexual assault offenses may be joined if the evidence of each offense would be admissible in separate trials. People v. Williams, 899 P.2d 306 (Colo. App. 1995).

Regardless of whether two shoplifting incidents were part of a common scheme or design, they were "of the same or similar character" under section (a)(2). People v. Buell, 2017 COA 148, 442 P.3d 961.

An analysis under C.R.E. 404(b) is not required by the "same or similar character" criterion of section (a)(2). People v. Buell, 2017 COA 148, 442 P.3d 961.

Separate offenses may be joined that are committed at different times and places if they constitute part of a schematic whole. The incident at the grocery store and subsequent shopping spree were a continuous criminal episode and there was no prejudice to the defendant in trying the counts together. People v. Smith, 121 P.3d 243 (Colo. App. 2005).

Trial court did not abuse discretion by denying motion to sever when the attempted manslaughter charge (having unprotected intercourse while HIV positive) arose from the same act as the sexual assault charges. People v. Dembry, 91 P.3d 431 (Colo. App. 2003).

A defendant does not impliedly waive his right to rely upon the statute and rule by entering a plea of guilty in a county court case with knowledge that the district court case is pending. People v. Robinson, 774 P.2d 884 (Colo. 1989).

But the right to compulsory joinder may be waived by raising the issue after jeopardy attaches in the second prosecution. People v. Wilson, 819 P.2d 510 (Colo. App. 1991); People v. Carey, 198 P.3d 1223 (Colo. App. 2008).

A defendant may not oppose a prosecution's failed motion to join two cases and then later move to dismiss the second case because the court did not join the cases originally. A defendant waives his or her joinder rights when he or she objects to a joinder motion and the court denies the motion. People v. Marshall, 2014 COA 42, 348 P.3d 462.

III. JOINDER OF DEFENDANTS.

Law reviews. For article, "Pronouncements of the U. S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to misjoinder of defendants, see 15 Colo. Law. 1615 (1986).

By consenting to a joint trial defendant waives any right to urge a later objection thereto based solely on the joinder. Pineda v. People, 152 Colo. 545, 383 P.2d 793 (1963).

Considerations in granting motion for severance. When deciding whether to grant a motion for severance, the trial court should consider whether evidence inadmissible against one defendant will be considered against the other defendant, despite the issuance by the trial court of the proper admonitory instructions. An additional consideration is whether the defendants plan to offer antagonistic defenses. People v. Gonzales, 198 Colo. 450, 601 P.2d 1366 (1979).

Severance required if joinder prevents fair trial. When joint prosecution would prevent a fair trial of one or more of the defendants, the trial court must grant a motion for severance. People v. Magoon, 645 P.2d 286 (Colo. App. 1982).

Motion for severance is addressed to the sound discretion of trial court. People v. Magoon, 645 P.2d 286 (Colo. App. 1982).

And not disturbed on appeal absent prejudice. A ruling on a motion for severance will not be disturbed on appeal in the absence of a showing that the denial of such motion prejudiced a defendant. People v. Magoon, 645 P.2d 286 (Colo. App. 1982).

Court did not err in joining two cases because evidence from each case would be admissible in the other case as common plan or scheme evidence. People v. George, 2017 COA 75, __ P.3d __.

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

(1) **Request by Prosecution.** Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall request that the court issue either a

warrant for the arrest of the defendant or a summons to be served on the defendant.

(2) **Affidavits or Sworn Testimony.** If a warrant is requested upon an information, the information must contain or be accompanied by a sworn written statement of facts establishing probable cause to believe that a criminal offense has been committed and that the offense was committed by the person for whom the warrant is sought. In lieu of such sworn statement, the information may be supplemented by sworn testimony of such facts. Such testimony must be transcribed and then signed under oath or affirmation by the witness giving the testimony.

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, whenever an indictment is returned or an information has been filed prior to the arrest of the person named as defendant therein, the court shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

(4) **Standards Relating to Issuance of Summons.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

(I) The defendant's residence;

(II) The defendant's employment;

(III) The defendant's family relationships;

(IV) The defendant's past history of response to legal process; and

(V) The defendant's past criminal record.

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the arrest of that person.

(6) **Corporations.** When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) Form.

(1) **Warrant.** The form of the warrant shall be as provided in Rule 4(b)(1), except that it shall be signed by the clerk, it shall identify the nature of the offense charged in the indictment or information, and it shall command that the defendant be arrested and brought before the court unless he shall be admitted to bail as otherwise provided in these Rules.

(2) **Summons.** The summons shall be in the same form as provided in Rule 4(b)(2).

(c) Execution or Service and Return.

(1) **Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(c). The officer executing the warrant shall bring the arrested person before the court without unnecessary delay, or for the purposes of admission to bail, before the clerk of the court, the sheriff of the county where the arrest occurs, or any other officer authorized to admit to bail.

(2) **Return.** The peace officer executing a warrant shall make a return thereof to the court. At the request of the prosecuting attorney, any unexecuted warrant shall be returned and cancelled. At least one day prior to the return day, the person to whom a summons was delivered for service shall make return thereof. At the request of the prosecuting attorney made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved, or a duplicate thereof may be delivered by the clerk to any peace officer or other authorized person for execution or service.

Source: (a)(1), (a)(3), (a)(4) amended, and (a)(5) and (a)(6) added, effective September 11, 2017.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

Following preliminary proceedings pursuant to the provisions of Rules 5, 7, and 12, the arraignment shall be conducted in open court, informing the defendant of the offense with which he is charged, and requiring him to enter a plea to the charge. The defendant shall be arraigned in the court having trial jurisdiction in which the indictment, information, or complaint is filed, unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court.

(a) If the offense charged is a felony or a class 1 misdemeanor, or if the maximum penalty for the offense charged is more than one year's imprisonment, the defendant must be personally present for arraignment, except that the court for good cause shown may accept a plea of not guilty made by an attorney representing the defendant without requiring the defendant to be personally present.

(b) In all other cases the court may permit arraignment without the presence of the defendant. If a plea of guilty or nolo contendere is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(c) Upon arraignment, the defendant or his counsel shall be furnished with a copy of the indictment or information, complaint, or summons and complaint if one has not been previously served.

(d) A record shall be made of the proceedings at every arraignment.

(e) If the defendant appears without counsel at an arraignment, the information, indictment, or complaint shall be read to him by the court or the clerk thereof. If the defendant appears with counsel, the information or indictment need not be read and no waiver of said reading is necessary.

(f) As soon as the jury panel is drawn which will try the case, a list of the names and addresses of the jurors on the panel shall be made available by the clerk of the court to defendant's counsel, and if the defendant has no counsel, the list shall be served on him personally or by certified mail. It shall not be necessary to serve a list of jurors upon the defendant at the time of arraignment.

ANNOTATION

No arraignment required in certain criminal contempts. In criminal contempt cases, no arraignment is required, at least with respect to those criminal contempts which are analogous to petty offenses. Robran v. People ex rel. Smith, 173 Colo. 378, 479 P.2d 976 (1971).

Correction of immaterial error in indictment does not require rearraignment. The mere correction of a clerical or other immaterial error in an indictment does not require a second arraignment and plea. Albritton v. People, 157 Colo. 518, 403 P.2d 772 (1965).

The denial of a motion to dismiss for failure to rearraign on an amended information is not error where the amendment is not one of substance, and where, when counsel calls the court's attention to it during the course of the trial, the trial court follows the provision of Rule 11(d), C.R. Crim. P., and enters a plea of not guilty and, thereupon, the trial proceeds. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972).

It is essential that the record show affirmatively an arraignment. Wright v. People, 22 Colo. 143, 43 P. 1021 (1896).

Rule 11. Pleas

(a) Generally. A defendant personally or by counsel may plead guilty, not guilty, not guilty by reason of insanity (in which event a not guilty plea may also be entered), or with the consent of the court, nolo contendere.

(b) Pleas of Guilty and Nolo Contendere. The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all the rights set forth in Rule 5(a)(2) and also determining:

(1) That the defendant understands the nature of the charge and the elements of the offense to which he is pleading and the effect of his plea;

(2) That the plea is voluntary on defendant's part and is not the result of undue influence or coercion on the part of anyone;

(3) That he understands the right to trial by jury and that he waives his right to trial by jury on all issues;

(4) That he understands the possible penalty or penalties;

(5) That the defendant understands that the court will not be bound by any representations made to the defendant by anyone concerning the penalty to be imposed or the granting or the denial of probation, unless such representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report, if any;

(6) That there is a factual basis for the plea. If the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement, and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads;

(7) That in class 1 felonies, or where the plea of guilty is to a lesser included offense, a written consent shall have been filed with the court by the district attorney.

(c) Misdemeanor Cases. In all misdemeanor cases except class 1, the court may accept, in the absence of the defendant, any plea entered in writing by the defendant or orally made by his counsel.

(d) Failure or Refusal to Plead. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty, or a plea of nolo contendere, or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason the arraignment here provided for has not been had, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

(e) Defense of Insanity.

(1) The defense of insanity must be pleaded at the time of arraignment, except that the court for good cause shown may permit such plea to be entered at any time before trial. It must be pleaded orally, either by the defendant or by his counsel, in the form, ''not guilty by reason of insanity''. A defendant who does not thus plead not guilty by reason of insanity shall not be permitted to rely on insanity as a defense as to any accusation of any crime; provided, however, that evidence of mental condition may be offered in a proper case as bearing upon the capacity of the accused to form specific intent essential to the commission of a crime. The plea of not guilty by reason of insanity includes the plea of not guilty.

(2) If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant, but the defendant refuses to permit the entry of such plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter such plea on behalf of the defendant, and the plea so entered shall have the same effect as though it had been voluntarily entered by the defendant himself.

(3) If there has been no grand jury indictment or preliminary hearing prior to the entry of the plea of not guilty by reason of insanity, the court shall hold a preliminary hearing prior to the trial of the insanity issue. If probable cause is not established the case shall be dismissed, but the court may order the district attorney to institute civil commitment proceedings if it appears that the protection of the public or the accused requires it.

(f) Plea Discussions and Plea Agreements.

(1) Where it appears that the effective administration of criminal justice will thereby be served, the district attorney may engage in plea discussions for the purpose of reaching

a plea agreement. He should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for or refuses appointment of counsel and has not retained counsel.

(2) The district attorney may agree to one of the following depending upon the circumstances of the individual case:

(I) To make or not to oppose favorable recommendations concerning the sentence to be imposed if the defendant enters a plea of guilty or nolo contendere;

(II) To seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to the defendant's conduct;

(III) To seek or not to oppose the dismissal of other charges or not to prosecute other potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(3) Defendants whose situations are similar should be afforded similar opportunities for plea agreement.

(4) The trial judge shall not participate in plea discussions.

(5) Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel or defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions.

(6) Except as to proceedings resulting from a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his defense counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceeding.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike'', see 11 Colo. Law. 1225 (1982).

Prosecutor should discuss pleas with defense counsel. A prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by pleas. Dabbs v. People, 175 Colo. 273, 486 P.2d 1053 (1971).

And court should allow changes of, and additions to, pleas. Where good cause is shown, it is incumbent upon the trial court to allow changes of plea or additional pleas to accomplish the fair and just determination of criminal charges. Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971).

Through a plea agreement accepted by the trial court, a defendant may preserve the right to appeal a suppression ruling while entering a conditional plea of guilty. People v. Bachofer, 85 P.3d 615 (Colo. App. 2003).

It is essential that the record show a plea. Wright v. People, 22 Colo. 143, 43 P. 1021 (1896).

The decision to enter a guilty plea or withdraw a guilty plea is one of the few fundamental choices that must be decided by the defendant alone. People v. Davis, 2012 COA 1, 412 P.3d 376, rev'd on other grounds, 2015 CO 36M, 352 P.3d 950.

Applied in McClendon v. People, 175 Colo. 451, 488 P.2d 556 (1971); Romero v. District Court, 178 Colo. 200, 496 P.2d 1049 (1972); People v. Baca, 179 Colo. 156, 499 P.2d 317 (1972); Hyde v. Hinton, 180 Colo. 324, 505 P.2d 376 (1973); People v. Kelly, 189 Colo. 31, 536, P.2d 39 (1975); People v. Taylor, 190 Colo. 144, 544 P.2d 392 (1975); People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975); People v. Arnold, 190 Colo. 193, 544 P.2d 968 (1976); People v. Banks, 190 Colo. 295, 545 P.2d 1356 (1976); People v. Smith, 190 Colo. 449, 548 P.2d 603 (1976); People v. Worsley, 191 Colo. 351, 553 P.2d 73 (1976); People v. Carino, 193 Colo. 412, 566 P.2d 1061 (1977); People v. Cole, 39 Colo. App. 323, 570 P.2d 8 (1977); People v. Smith, 195 Colo. 404, 579 P.2d 1129 (1978); Gelfand v. People, 196 Colo. 487, 586 P.2d 1331 (1978); People v. Palmer, 42 Colo. App. 460, 595 P.2d 1060 (1979); People v. Weber, 199 Colo. 25, 604 P.2d 30 (1979); People v. Baca, 44 Colo. App. 167, 610 P.2d 1083 (1980); People v. Adargo, 622 P.2d 593 (Colo. App. 1980); People v. Horton, 628 P.2d 117 (Colo. App. 1980); People v. Shaver, 630 P.2d 600 (Colo. 1981); State v. Laughlin, 634 P.2d 49 (Colo. 1981); People v. Marquez, 644

P.2d 59 (Colo. App. 1981); People v. Velasquez, 641 P.2d 943 (Colo. 1982); Crocker v. Colo. Dept. of Rev., 652 P.2d 1067 (Colo. 1982); People v. Vollentine, 643 P.2d 800 (Colo. App. 1982); People v. M.A.W., 651 P.2d 433 (Colo. App. 1982); People v. Ramirez, 652 P.2d 1077 (Colo. App. 1982); People in Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982); Flower v. People, 658 P.2d 266 (Colo. 1983); People v. Akins, 662 P.2d 486 (Colo. 1983).

II. PLEAS OF GUILTY AND NOLO CONTENDERE.

Law reviews. For article, ''Collateral Effects of a Criminal Conviction in Colorado'', see 35 Colo. Law. 39 (June 2006). For comment, ''Ineffective Assistance of Counsel Under People v. Pozo: Advising Non-Citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements'', see 80 Colo. L. Rev. 793 (2009).

Constitutional due process requirements regarding advisement of possible penalties do not apply to section (b) in a hearing to revoke a deferred judgment. Defendant's admission that he violated the terms of the deferred judgment was valid. Due process does not require that defendant be readvised of the potential penalties after defendant was advised of the possible penalties when entering into the deferred judgment. People v. Finney, 2012 COA 38, 328 P.3d 205, aff'd, 2014 CO 38, 325 P.3d 1044.

Defendant's guilty plea was unconstitutional since he was illiterate, was told by the interpreter to sign the plea advisement form without having it read to him, had difficulty hearing the interpreter during the plea hearing, was pro se, and lacked the knowledge or understanding of the criminal justice system and process. The guilty plea was not made based on a voluntary and intelligent choice among alternative courses of action. Sanchez-Martinez v. People, 250 P.3d 1248 (Colo. 2011).

This rule sets forth required guidelines for the entry of a plea upon arraignment. People v. Marsh, 183 Colo. 258, 516 P.2d 431 (1973).

This rule itemizes certain requirements which must be followed by a court before it may accept a plea of guilty or one of nolo contendere. People v. Van Hook, 36 Colo. App. 226, 539 P.2d 507 (1975).

Purpose of section (b). Section (b) contemplates that the transcribed colloquy between the court and the defendant will eliminate the need to resort to a subsequent fact-finding proceeding in order to determine whether a guilty plea was voluntarily and understandingly made. People v. Quintana, 634 P.2d 413 (Colo. 1981), overruled on other grounds in People v. Porter, 2015 CO 34, 348 P.3d 922.

Judge to determine fulfillment of certain conditions before accepting plea. Section 16-7-207 and section (b) of this rule require that a trial court must make certain determinations before it accepts a plea of guilty or a plea of nolo contendere. People v. Lambert, 189 Colo. 264, 539 P.2d 1238 (1975); People v. Gleason, 180 Colo. 71, 502 P.2d 69 (1972); Laughlin v. State, 44 Colo. App. 341, 618 P.2d 689 (1980), rev'd on other grounds, 634 P.2d 49 (Colo. 1981).

Trial courts must adhere strictly to the requirements of this rule when pleas of guilty are being considered. People v. Sandoval, 188 Colo. 431, 535 P.2d 1120 (1975).

As a valid plea of guilty waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial by jury. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972).

But compliance not shown by use of printed form. Compliance with this rule cannot be demonstrated solely by reliance upon a printed form. People v. Van Hook, 36 Colo. App. 226, 539 P.2d 507 (1975).

And formal ritual is not required by this rule. People v. Duran, 183 Colo. 180, 515 P.2d 1117 (1973); People v. Marsh, 183 Colo. 258, 516 P.2d 431 (1973).

Satisfaction of this rule does not require that a prescribed ritual or wording be employed, but rather the substance of the circumstances surrounding the plea should prevail over form. People v. Edwards, 186 Colo. 129, 526 P.2d 144 (1974); People v. Cushon, 650 P.2d 527 (Colo. 1982).

The overriding consideration in analyzing a record pertaining to a guilty plea or a plea of nolo contendere is that a set ritual is not required. People v. Lambert, 189 Colo. 264, 539 P.2d 1238 (1975).

A trial court is not required to follow any particular formula for advising a defendant at a preliminary hearing. People v. Thimmes, 643 P.2d 778 (Colo. App. 1981).

So that reading charge may be sufficient. Where the language of a charge is not highly technical, the reading of the charge is sufficient explanation. People v. Wright, 662 P.2d 489 (Colo. App. 1982), aff'd, 690 P.2d 1257 (Colo. 1984); People v. Muniz, 667 P.2d 1377(Colo. 1983); People v. Cabral, 698 P.2d 234 (Colo. 1985); People v. Wilson, 708 P.2d 792 (Colo. 1985) (term ''feloniously'' sufficiently informed defendant of mens rea element of the offense of rape); People v. Trujillo, 731 P.2d 649 (Colo. 1986).

Effect of noncompliance with rule. Where rule is not complied with, the defendant's conviction will be reversed and the cause will be remanded to the trial court to set aside the plea

and to rearraign the defendant. People v. Golden, 184 Colo. 311, 520 P.2d 127 (1974); People v. Baca, 186 Colo. 95, 525 P.2d 1146 (1974).

Failure of trial court to advise or to make a proper inquiry precludes treating the defendant's plea of guilty as a voluntary and intelligent waiver of his constitutional rights, so defendant may withdraw his plea of guilty and be permitted to plea anew. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972); People v. Gleason, 180 Colo. 71, 502 P.2d 69 (1972).

Failure of the trial court to comply with each requirement of this rule affords defendants the opportunity to later challenge the trial court's refusal to permit a withdrawal of a guilty plea. People v. Sandoval, 188 Colo. 431, 535 P.2d 1120 (1975).

Without showing of compliance, guilty plea not acceptable. Without an affirmative showing of compliance with the mandatory provisions of this rule, a plea of guilty cannot be accepted, and any judgment and sentence which is entered following the plea is void. Martinez v. People, 152 Colo. 521, 382 P.2d 990 (1963); Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971); People v. Randolph, 175 Colo. 454, 488 P.2d 203 (1971).

Thus, conduct of proceedings to appear in record. The conduct of proceedings under this rule must affirmatively appear in the record, since an appellate court cannot presume a waiver of constitutional rights from a silent record. People v. Brewer, 648 P.2d 167 (Colo. App. 1982).

But lack of precise language not grounds for reversal. If the record reflects that the trial court had assured itself that defendant's plea was voluntary and intelligently entered with full knowledge of the nature and elements of the offense and of the waiver of his rights as an accused person, then lack of precise language in the record expressing these things is not of itself a valid reason to reverse acceptance of a plea of nolo contendere. People v. Lambert, 189 Colo. 264, 539 P.2d 1238 (1975).

Test for proper plea advisement. In deciding if a plea advisement was proper, the dispositive issue is whether the constitutional requirements of voluntariness then in effect were met. People v. Wright, 662 P.2d 489 (Colo. App. 1982), aff'd, 690 P.2d 1257 (Colo. 1984).

Record must show factual basis for plea. A guilty plea cannot be accepted if the record lacks an affirmative showing of a factual basis. People v. Cushon, 631 P.2d 1164 (Colo. App. 1981), rev'd on other grounds, 650 P.2d 527 (Colo. 1982).

As guilty plea cannot stand if it lacks a factual basis and is not voluntary and accurate. People v. Alvarez, 181 Colo. 213, 508 P.2d 1267 (1973); People v. Hutton, 183 Colo. 388, 517 P.2d 392 (1973).

Nor may nolo contendere plea. Nolo contendere plea that is voluntarily and understandingly made, with a factual basis that appears in the record, should be upheld. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973).

Although court not required to ascertain factual basis for nolo contendere plea. There is no requirement that a court ascertain that there is a factual basis for a plea of nolo contendere when such a plea is permitted. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973).

Entering of guilty plea to lesser charge does not automatically waive factual basis requirement of section (b)(6). People v. Cushon, 631 P.2d 1164 (Colo. App. 1981), rev'd on other grounds, 650 P.2d 527 (Colo. 1982).

Record must affirmatively show that accused understandingly and voluntarily waived his constitutional rights. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972).

Compliance with this rule requires that there be an adequate basis in the record to support a determination by the court that the defendant understands the nature of the charge to which he is pleading guilty. People v. Montoya, 667 P.2d 1377 (Colo. 1983).

Compliance with this rule creates an adequate record to support a determination by both the arraigning court and a reviewing court of the defendant's understanding of the crime to which a plea is tendered. People v. Leonard, 673 P.2d 37 (Colo. 1983).

Even when the defendant or his attorney waives the formal reading of the information, such waiver does not serve to dispense with the express mandate of this rule that the court not accept the plea of guilty without first determining that the defendant understands the nature of the charge. People v. Montoya, 667 P.2d 1377 (Colo. 1983).

Silent record insufficient. Where there are no facts in the record to establish the defendant's complete understanding of the nature of the offense with which he is charged, then, when the state attempts to prove waiver of such knowledge, it bears a heavy burden, and a silent record will not suffice. People v. Colosacco, 177 Colo. 219, 493 P.2d 650 (1972).

Application of Boykin v. Alabama. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), holding that waiver of the privilege against self-incrimination, of the right to trial by jury, and of the right to confrontation cannot be presumed by a silent record, is given only prospective application. People v. Crater, 182 Colo. 248, 512 P.2d 623 (1973); People v. Edwards, 186 Colo. 129, 526 P.2d 144 (1974);

People v. Malouff, 721 P.2d 159 (Colo. App. 1986).

Record held to show defendant's knowing and intelligent waiver of rights. People v. Chavez, 650 P.2d 1310 (Colo. App. 1982); People v. Chavez, 730 P.2d 321 (Colo. 1986); People v. Campbell, 174 P.3d 860 (Colo. App. 2007).

Trial court's failure to explain elements of second degree burglary was cured by evidence in record showing defendant understood and had knowledge of elements of second degree burglary. Wieder v. People, 722 P.2d 396 (Colo. 1986).

While the court gave a proper advisement under this rule, it did not specifically evaluate the totality of the circumstances surrounding juvenile defendant's waiver of critical constitutional rights. After applying the totality of circumstances standard, defendant did not knowingly and voluntarily waive his constitutional rights when he entered a guilty plea. People v. Simpson, 51 P.3d 1022 (Colo. App. 2001), rev'd on other grounds, 69 P.3d 79 (Colo. 2003).

Guilty plea must be voluntarily and intelligently given. In order for a court to accept a plea of guilty, there must be an affirmative showing that it was given voluntarily and intelligently. Martinez v. Ricketts, 498 F. Supp. 893 (D. Colo. 1980); People v. Drake, 785 P.2d 1257 (1990).

A plea of guilty, to be valid, must be intelligently made. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

For a waiver of such the fundamental rights which results from the acceptance of a guilty plea, a defendant must voluntarily, knowingly, and intentionally relinquish those rights. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972).

A plea of guilty must be entered voluntarily and with full understanding of the essential elements of the offense to withstand constitutional scrutiny. People v. Cisneros, 665 P.2d 145 (Colo. App. 1983).

Defendant who is subject to sentencing act must be informed of the penalties under such act prior to acceptance of guilty plea or else the plea cannot be voluntarily and understandingly entered. People v. Sutka, 713 P.2d 1326 (Colo. App. 1985).

Defendant entered a guilty plea without being informed that he could receive an aggravated range sentence. Consequently, defendant's plea was not given voluntarily and intelligently and did not satisfy due process. People v. Corral, 179 P.3d 837 (Colo. App. 2007).

Due process of law mandates that a guilty plea must be voluntary and understandingly made before a valid judgment can be entered thereon. People v. Chavez, 730 P.2d 321 (Colo. 1986).

Test whether plea intelligently and voluntarily made. When determining whether pleas of guilty were intelligently and voluntarily entered, the test to be applied is that a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). Ward v. People, 172 Colo. 244, 472 P.2d 673 (1970); England v. People, 175 Colo. 236, 486 P.2d 1055 (1971); Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971); People v. Mason, 176 Colo. 544, 491 P.2d 1383 (1971); People v. Cumby, 178 Colo. 31, 495 P.2d 223 (1972); Bresnahan v. Patterson, 352 F. Supp. 1180 (D. Colo. 1973); People v. Musser, 187 Colo. 198, 529 P.2d 626 (1974).

However, every relevant factor need not be correctly assessed. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. Simms v. People, 175 Colo. 191, 486 P.2d 22 (1971).

Defendant must understand elements of offense and his rights. Rather than any ritualistic formalism, this rule requires only that a defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt after being made aware of his various rights. People v. Marsh, 183 Colo. 258, 516 P.2d 431 (1973).

The constitution requires that the defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt when pleading guilty, but a formalistic recitation by the trial judge at a providency hearing is not a constitutional requisite. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973); People v. Duran, 183 Colo. 180, 515 P.2d 1117 (1973); People v. Keenan, 185 Colo. 317, 524 P.2d 604 (1974).

No guilty plea can be deemed valid unless a defendant understands the nature and elements of the crime with which he stands charged. People v. Colosacco, 177 Colo. 219, 493 P.2d 650 (1972); People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974); People v. Keenan, 185 Colo. 317, 524 P.2d 604 (1974); People v. Sanders, 185 Colo. 356, 524 P.2d 299 (1974); People v. Brown, 187 Colo. 244, 529 P.2d 1338 (1974); People v. Murdock, 187 Colo. 418, 532 P.2d 43 (1975); Harshfield v. People, 697 P.2d 391 (Colo. 1985); People v. Wade, 708 P.2d 1366

(Colo. 1985); People v. Cisneros, 824 P.2d 16 (Colo. App. 1991).

A guilty plea cannot stand as voluntarily and knowingly entered unless the defendant understands the nature of the crime charged, and this requirement is not met unless the critical elements of the crime charged are explained in terms which are understandable to the defendant. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979).

As well as consequences of guilty plea. Every defendant that stands at the bar of justice charged with a crime must be advised and must know what the possible consequences are of his tendered plea of guilty. People v. Jones, 176 Colo. 61, 489 P.2d 596 (1971).

A plea of guilty must be a genuine one by a defendant who is guilty and who understands his situation, his rights, and the consequences of his plea, and is neither deceived nor coerced. Westendorf v. People, 171 Colo. 123, 464 P.2d 866 (1970).

A defendant must be advised of the pertinent fundamental constitutional rights and must understand the consequences of a guilty plea for him to voluntarily and understandingly enter such a plea and waive the right to a jury trial. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

And trial judge must determine that defendant understands nature of offense with which he stands charged. People v. Riney, 176 Colo. 221, 489 P.2d 1304 (1971); People v. Colosacco, 177 Colo. 219, 493 P.2d 650 (1972); People v. Keenan, 185 Colo. 317, 524 P.2d 604 (1974); People v. Sanders, 185 Colo. 356, 524 P.2d 299 (1974).

And consequences of act. Prior to the acceptance of a guilty plea the trial court must be assured that the defendant is fully aware of the consequences of his act. People v. Brown, 187 Colo. 244, 529 P.2d 1338 (1974).

Colorado law does not contemplate an increase in the statutory maximum sentence to which a defendant has subjected himself by pleading guilty, based on subsequent jury findings, which are the functional equivalent of elements of a greater offense than the one to which he pled. People v. Lopez, 148 P.3d 121 (Colo. 2006).

Violation of requirement that defendant understand the effects of his plea occurs if consideration of subsequent jury findings is allowed to increase defendant's maximum sentence. People v. Lopez, 148 P.3d 121 (Colo. 2006).

Court's determination may be implied. Where the trial judge advises the defendant that his plea has to be voluntary and that any promises which have been made are not binding on the court, but judge fails to ask the defendant whether any such promises or coercion were involved in his decision to plead guilty, implicit in the court's acceptance of the guilty plea is its determination that the plea was intelligently and voluntarily entered. People v. Derrerra, 667 P.2d 1363 (Colo. 1983).

Mere assertion of understanding of charge does not satisfy rule. The mere assertion of understanding of a charge by the defendant does not satisfy either the letter or spirit of this rule, but it must be clear, in fact, that the defendant understands the elements of the charge. People v. Sanders, 185 Colo. 356, 524 P.2d 299 (1974).

Court to explain elements of crime and meaning of guilty plea. The requirement of understanding is not met unless critical elements of crime charged are explained in terms understandable to the defendant and unless meaning of guilty plea is explained in relation to each of such elements. People v. Gleason, 180 Colo. 71, 502 P.2d 69 (1972); People v. Brown, 187 Colo. 244, 529 P.2d 1338 (1974); People v. Van Hook, 36 Colo. App. 226, 539 P.2d 507 (1975); People v. Steelman, 200 Colo. 177, 613 P.2d 334 (1980); People v. Wieghard, 709 P.2d 81 (Colo. App. 1985); Waits v. People, 724 P.2d 1329 (Colo. 1986).

And reading simply worded information may suffice. By reading an information, which is couched in language which is easily understandable to a person with ordinary intelligence and by inquiring into the defendant's understanding of the charge before a plea of guilty was accepted, the trial judge satisfied the requirements of this rule. People v. Lottie, 183 Colo. 308, 516 P.2d 430 (1973).

In explaining the critical elements of the charge to the defendant, unless the language of the charge is highly technical, no more full explanation of the substantive crime could be given than the charge itself. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979); People v. Moore, 636 P.2d 1290 (Colo. App. 1981); People v. Wieghard, 709 P.2d 81 (Colo. App. 1985).

Where language was readily understandable by person of average intelligence and defendant affirmatively acknowledged he understood nature of charge, reading of information was sufficient. Wilson v. People, 708 P.2d 792 (Colo. 1985).

The court is not required to advise a non-English speaking defendant that an official interpreter may be utilized for communication with the defendant's attorney. People v. Ochoa-Magana, 36 P.3d 141 (Colo. App. 2001).

If defendant enters guilty plea under mistaken assurance that defendant's immigration status would not be affected by guilty plea, then plea may not have been made knowingly, voluntarily, and intelligently. People v. Nguyen, 80 P.3d 903 (Colo. App. 2003).

Explanation of "unlawful act" more properly described burglary than the trespass with which the defendant was charged but

the court concluded that it adequately apprised the defendant of the necessary elements of first degree criminal trespass. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Court must also explain attendant waiver of rights. In accordance with this rule, the trial court must make certain, by inquiry of the defendant, that he understands that the guilty plea stands as a waiver of nearly all of his rights as guaranteed by the fifth and sixth amendments to the United States Constitution. People v. Sandoval, 188 Colo. 431, 535 P.2d 1120 (1975).

However, trial court is not required to advise defendant, before accepting his guilty plea, of the right to testify on his own behalf. People v. Malouff, 721 P.2d 159 (Colo. App. 1986).

And definite, immediate, and automatic consequences of plea. The judge who accepts a plea of guilty is required to inform the defendant only of those consequences which have a definite, immediate and largely automatic effect on the range of a defendant's punishment. People v. Heinz, 197 Colo. 102, 589 P.2d 931 (1979).

Where consequence of guilty plea to a crime of moral turpitude subjected defendant to mandatory deportation proceeding, defendant was denied effective assistance of counsel since counsel was unaware of deportation consequence and therefore defendant was entitled to withdraw plea and plead anew. People v. Pozo, 712 P.2d 1044 (Colo. App. 1985), rev'd on other grounds, 746 P.2d 523 (Colo. 1987).

A mandatory parole term is such a consequence because parole imposes a significant limitation on a defendant's freedom during the term of parole. People v. Tyus, 776 P.2d 1143 (Colo. App. 1989); People v. Sandoval, 809 P.2d 1058 (Colo. App. 1990), overruled in Craig v. People, 986 P.2d 951 (Colo. 1999).

Trial court, therefore, must advise the defendant of mandatory parole even if a plea agreement contemplates a sentence to probation or community corrections. The only exception is if the parties stipulate to a sentence to probation or to community corrections, the judge explicitly accepts and agrees to be bound by the stipulation, and the judge so advises the defendant. Dawson v. People, 30 P.3d 213 (Colo. 2001).

Mandatory sentencing of defendant on parole status under § 18-1-105 is a definite, immediate, and automatic consequence of plea which defendant must understand. People v. Chippewa, 713 P.2d 1311 (Colo. App. 1985).

A proper advisement on the subject of mandatory parole requires that a defendant be informed that he or she is subject to a period of mandatory parole, the maximum possible length of that period, and the fact that mandatory parole is a consequence distinct from imprisonment. People v. Laurson, 70 P.3d 564 (Colo. App. 2002).

The proper inquiry is whether the record as a whole demonstrates that a defendant was given sufficient notice of the issue. When a defendant indicates at the providency hearing that he or she understood the matters contained in a written guilty plea advisement form, the burden of proof is on the defendant to show that the apparent waiver was not effective. People v. Laurson, 70 P.3d 564 (Colo. App. 2002).

Failure to properly advise of the term of mandatory parole is harmless if the length of parole and imprisonment together does not exceed the total term of imprisonment to which the defendant was advised. Craig v. People, 986 P.2d 951 (Colo. 1999) (overruling People v. Sandoval, 809 P.2d 1058 (Colo. App. 1990)).

Thus, it was harmless error where the defendant received an inadequate mandatory advisement but was sentenced to a total sentence of 11 years, plus three years of mandatory parole, when he could have been sentenced to a maximum of 24 years. Dawson v. People, 30 P.3d 213 (Colo. 2001).

No script or formula is required so long as the advisement adequately informs defendant of the mandatory parole requirement. People v. Flagg, 18 P.3d 792 (Colo. App. 2000).

Where defendant was advised that his sentence would include a term of parole in addition to a stipulated maximum term of incarceration, it is not reasonable to hold that the full range of penalties that the defendant risked receiving is limited to the term of incarceration specified in the plea agreement or the Crim. P. 11 advisement. If defendant was advised of mandatory parole but not its duration, his sentence cannot be modified and the only available remedy under the facts is withdrawal of the guilty plea. Clark v. People, 7 P.3d 163 (Colo. 2000).

An agreement that is silent as to parole should not be construed as containing a promise to eliminate or reduce the mandatory period of parole. A plea agreement to reduce or modify the statutorily mandated period of parole calls for an illegal sentence. Craig v. People, 986 P.2d 951 (Colo. 1999) (overruling People v. Sandoval, 809 P.2d 1058 (Colo. App. 1990)).

Defendant's understanding of the mandatory parole requirement and the lack of indication in the record that the parties' negotiations included the issue of mandatory parole supported trial court's conclusion that the parties' agreement to a "ten year cap" pertained only to the imprisonment component and did not include the five-year mandatory parole period. People v. Wright, 53 P.3d 730 (Colo. App. 2002).

A mittimus that does not specify the mandatory parole period should be read as including the appropriate mandatory parole period and must be corrected. Craig v. People, 986 P.2d 951 (Colo. 1999) (overruling People v. Sandoval, 809 P.2d 1058 (Colo. App. 1990)).

A trial court is not generally required to inform a defendant of the collateral consequences of his guilty plea. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

To satisfy due process, a defendant must be informed only of the direct consequences of his guilty plea, which include those which have a definite, immediate, and largely automatic effect on the range of possible punishment. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

Accordingly, a guilty plea is not invalid for failure of a trial court to warn a defendant of its possible effect on future criminal liability. People v. Heinz, 589 P.2d 931 (Colo. 1979); People v. Moore, 841 P.2d 320 (Colo. App. 1992).

Although the defendant's sentence to imprisonment and mandatory parole was not inevitable at the time of his pleas and, in fact, could not have been lawfully imposed prior to his subsequent breach of the terms of his deferred sentencing agreement, it was a direct consequence of his plea to burglary and, therefore, the defendant should have been advised of the mandatory parole. People v. Marez, 39 P.3d 1190 (Colo. 2002).

Defendant cannot be lawfully sentenced for a crime to which he has pled guilty to a term longer than that of which he was advised when it was still within his power to reject the plea. People v. Marez, 39 P.3d 1190 (Colo. 2002).

Case must be remanded to allow defendant the opportunity to affirm or withdraw his guilty plea where the trial court's rejection of the sentence recommendation contained in the plea agreement calls into question the voluntariness of that plea and the defendant had no opportunity to affirm or withdraw that plea. People v. Walker, 46 P.3d 495 (Colo. App. 2002).

Case must be remanded to allow defendant to reaffirm or withdraw guilty plea after advisement of the proper sentencing range, including the possibility of sentencing in the aggravated range. Because defendant's plea was not induced by prosecutor's promise, the proper remedy was not to resentence defendant based upon the providency hearing advisement, but to allow defendant to reaffirm or withdraw the plea after advisement of the proper sentencing range. People v. Corral, 179 P.3d 837 (Colo. App. 2007).

Possibility that required counseling cannot be completed if the defendant does not admit guilt and that probation may therefore be revoked is a collateral consequence of a guilty plea. Person who entered an Alford plea and could not complete required counseling because of failure to admit guilt could have his or her probation revoked. People v. Birdsong, 958 P.2d 1124 (Colo. 1998).

Interest on unpaid restitution is a collateral consequence. Application of the statutory interest rate is contingent on whether a defendant pays his or her restitution obligation within a year. This contingency is a future action beyond the control of the sentencing court, therefore, neither the court nor defense counsel has a duty to advise a defendant of it. People v. Joslin, 2018 COA 24, 415 P.3d 881.

Due process requires compliance only with the mandatory provisions of this rule which inform an accused of the constitutional protection and the critical elements of the charge he faces, and not the factual basis of the plea or the possible defenses to the charge. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

However, the appropriate remedy is not to allow withdrawal of the plea, but reduce the sentence to the maximum that the defendant could receive under the plea agreement. People v. Sandoval, 809 P.2d 1058 (Colo. App. 1990).

And waiver of previously raised defenses. Where the defendant previously filed a notice of alibi defense, the trial court, in accepting a later guilty plea, should have assiduously adhered to the requirements of this rule and should have even made a more detailed inquiry of the defendant to make certain that he was fully aware that by pleading guilty, he was, in effect, making a judicial statement that he was guilty of the offense charged and that his alibi defense was in fact baseless. People v. Sandoval, 188 Colo. 431, 535 P.2d 1120 (1975), overruled in Craig v. People, 986 P.2d 951 (Colo. 1999).

But judge not required to point out available affirmative defenses. Absent from the provisions of section (b) is any requirement that the trial judge in accepting a guilty plea explain to the defendant possible affirmative defenses to the crime charged; the rationale is that such advice is properly the role of counsel. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979); People v. Nieto, 715 P.2d 1262 (Colo. App. 1985).

And need not be informed of possible future operation of habitual criminal statutes. It is not required that an adult, before he enters an otherwise uncoerced guilty plea, be informed of the operation of the habitual criminal statutes in the event he should in the future be convicted of illegal acts. People v. District Court, 191 Colo. 298, 552 P.2d 297 (1976).

Trial court's oversight may be cured. An oversight on the part of the trial court in a providency hearing may be cured if the record, as a whole, discloses evidence of understanding and knowledge. People v. Moore, 636 P.2d 1290 (Colo. App. 1981).

The degree of explanation that a court is required to provide a defendant at a providency hearing is dependent upon the nature and complexity of the crime. People v. Muniz, 667 P.2d 1377 (Colo. 1983); Ramirez v.

People, 682 P.2d 1181 (Colo. 1984); People v. Cabral, 698 P.2d 234 (Colo. 1985); People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994).

And mere reading of a charge may be sufficient if the charge itself is readily understandable to persons of ordinary intelligence. People v. Muniz, 667 P.2d 1377 (Colo. 1983); People v. Cabral, 698 P.2d 234 (Colo. 1985).

By reading the charges, which were couched in language easily understandable to a person of ordinary intelligence, by briefly explaining the mens rea necessary, and by inquiring into the defendant's understanding of the charges, the trial judge adequately advised the defendant and provided a fully sufficient basis for the court's determination that the pleas were freely, voluntarily, and intelligently given. People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994).

Defining "attempt" as conduct constituting a substantial step toward the commission of the crime is sufficient for the purpose of providing a defendant with the necessary understanding of the crime charged. People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994).

A defendant need not be advised of the right to appeal before a guilty plea may be said to be knowingly and voluntarily given. People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994).

Court need not advise defendant of the prosecution's burden to prove his guilt beyond a reasonable doubt as long as defendant is advised that the prosecution has the burden of proof. People v. Wells, 734 P.2d 655 (Colo. App. 1986).

Guilty plea of defendant who was not aware of possibility of consecutive sentencing when he entered plea is constitutionally deficient. People v. Peters, 738 P.2d 395 (Colo. App. 1987).

Defendant adequately advised regarding the special offender sentence enhancer where the sentences defendant received were within the range of sentences he or she was advised of and were on the low end of the range required by the special offender statute. Thus, defendant was not prejudiced by the erroneous advisements, and the fact that they understated the maximum allowable sentence did not undermine the validity of his or her guilty plea. People v. Zuniga, 80 P.3d 965 (Colo. App. 2003).

Failure to advise defendant of a mandatory parole obligation did not invalidate his guilty plea since defendant was correctly advised that he could be incarcerated for a term of from six months to four years and defendant's sentence of one year plus one year parole fell below the four-year maximum. People v. Coleman, 844 P.2d 1215 (Colo. App. 1992).

To understand the "possible penalty or penalties", the court must advise the defendant of mandatory parole for all class 2 through class 6 felony convictions that involve a sentence of imprisonment. Young v. People, 30 P.3d 202 (Colo. 2001).

Record of providency hearing helpful in satisfying rule. A record of a providency hearing demonstrating compliance with this rule should be deemed supportive of the conclusion that the defendant did enter his or her guilty plea voluntarily and understandingly. People v. Wade, 708 P.2d 1366 (Colo. 1985).

The proper basis for analyzing the constitutional validity of a guilty plea should include not only the statements made during the providency hearing but also those statements made by both defendant and defendant's attorney in the petition to plead guilty. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

Evidence in record that defendant understood nature and elements of crime. People v. Marsh, 183 Colo. 258, 516 P.2d 431 (1973); People v. Waits, 695 P.2d 1176 (Colo. App. 1984), aff'd in part and rev'd in part on other grounds, 724 P.2d 1329 (Colo. 1986).

Validity of guilty plea should not be based solely on the colloquy during the providency hearing. The proper basis for determining the validity of a guilty plea should include not only the statements made during a providency hearing but also the statements made by the defendant and the defendant's attorney in the petition to plead guilty. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

Upon entry of a guilty plea, suppression issues become moot. People v. Waits, 695 P.2d 1176 (Colo. App. 1984), aff'd in part and rev'd in part on other grounds, 724 P.2d 1329 (Colo. 1986).

Trial court to determine defendant's capacity to plead, where appropriate. If there is any question, the trial court has the duty to determine the defendant's mental capacity to understand the nature and effect of such a plea before accepting it. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

Where the trial court was aware of the possible mental infirmities of the defendant, it should have made sure he clearly, voluntarily, and knowingly entered his guilty plea. People v. Brown, 187 Colo. 244, 529 P.2d 1338 (1974).

And if a defendant is insane, plea of guilty should be stricken, and the sentence vacated. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968); Simms v. People, 175 Colo. 191, 486 P.2d 22 (1971); Moneyhun v. People, 175 Colo. 220, 486 P.2d 434 (1971).

As guilty plea not acceptable from legally insane. As a plea of guilty cannot be accepted where the evidence before the judge suggests that the accused may be legally insane, until his

sanity is finally determined; if the plea is accepted prior to such a determination, the judgment is potentially void, depending on whether the accused had the capacity to enter a plea. Martinez v. Tinsley, 241 F. Supp. 730 (D. Colo. 1965).

Sixteen-year old competent to enter guilty plea. Although a trial court should act with great caution in accepting a guilty plea from a 16-year-old, such a defendant is competent. Bresnahan v. Patterson, 352 F. Supp. 1180 (D. Colo. 1973).

Although restraints may be one circumstance that affects defendant's decision to plead guilty, the constitutionality of a defendant's restraints at the time of entry of his pleas is not relevant to determine whether he entered the plea voluntarily. People v. Kyler, 991 P.2d 810 (Colo. 2000).

When bargain upon which plea based not honored. If plea of guilty results from plea bargaining and bargain is not honored, the judgment must be vacated. People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973).

Effect of invalid plea upon bargain. When an invalid guilty plea is a result of plea bargaining, vacation of the plea results in an abrogation of the bargain, and there is no impediment to the reinstatement of the charges dismissed as a result of the bargain. People v. Mason, 176 Colo. 544, 491 P.2d 1383 (1971); People v. Keenan, 185 Colo. 317, 524 P.2d 604 (1974).

Plea bargaining per se does not invalidate a guilty plea. Smith v. People, 162 Colo. 558, 428 P.2d 69 (1967); Lucero v. People, 164 Colo. 247, 434 P.2d 128 (1967); Maes v. People, 164 Colo. 481, 435 P.2d 893 (1968); Brewer v. People, 168 Colo. 505, 452 P.2d 370 (1969).

Purpose of section (b)(5). Section (b)(5) is specifically designed to insure that a criminal defendant voluntarily pleads to a charge unfettered by promises of a light sentence or of probation, and is in addition to the inquiry concerning coercion or threats. People v. Golden, 184 Colo. 311, 520 P.2d 127 (1974).

Section (b)(5) applies to representations and promises by defendant's own counsel. People v. Golden, 184 Colo. 311, 520 P.2d 127 (1974).

Pleas of guilty induced by threats or promises are not valid. Normand v. People, 165 Colo. 509, 440 P.2d 282 (1968).

As such pleas involuntary. A plea of guilty is clearly involuntary if it is induced by threats or by a promise of lenient sentence. People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973).

And involuntary guilty plea violates due process. A guilty plea which is not entered voluntarily and knowingly is obtained in violation of due process guarantees. People v. Moore, 636 P.2d 1290 (Colo. App. 1981).

Defendant's burden to set aside plea. Upon postconviction procedures to set aside an involuntary plea, it becomes the burden of the defendant to establish that the plea was entered because of coercion. Normand v. People, 165 Colo. 509, 440 P.2d 282 (1968).

With evidence to overcome presumption of valid plea. The burden is upon the defendant to produce sufficient evidence to overcome the presumption of validity and regularity surrounding entry of his plea of guilty. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

And every reasonable presumption against waiver must be indulged. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972).

Withdrawal of guilty plea generally should not be denied. The withdrawal of a plea of guilty should not be denied in any case where it is the least evident that the ends of justice would be subserved by permitting not guilty to be pleaded in its place. Burman v. People, 172 Colo. 247, 472 P.2d 121 (1970).

Denial of motion to withdraw guilty pleas was not an abuse of discretion by the trial court where the pleas were entered in accordance with due process of law and this rule. People v. Chavez, 730 P.2d 321 (Colo. 1986).

Defendant was properly advised of his right to a jury trial and knowingly and voluntarily waived that right where the record shows that he executed a five-page ''Petition to Enter Plea of Guilty'', the trial court held a providency hearing and ascertained that the defendant had read and discussed the petition with his attorney and understood the petition, and the petition was signed by the defense attorney who certified that he had fully discussed the matter with the defendant, the attorney considered the defendant to be competent to understand the effect of the guilty plea, and the attorney recommended the court accept the plea. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

Requirement that defendant understand the possible penalty when pleading guilty met where defendant signed a ''Petition to Enter Plea of Guilty'' that recited the possible years of incarceration in both the presumptive and extraordinary ranges in addition to the possible fines to which the defendant would be subject, the possibility of consecutive sentencing, mandatory sentencing in the aggravated range, the factors precluding grant of probation, and incarceration as a condition of probation, the plea was entered with an express stipulation that defendant receive a three-year sentence, the trial court at the providency hearing advised the defendant of the stipulation and further advised him that, if at the sentencing hearing, the court rejected the stipulation, defendant would be allowed to withdraw the plea, and defendant re-

sponded that he understood. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

Denial of motion to withdraw guilty plea was not an abuse of discretion where the court held a fact hearing before denying defendant's motion, the judge had also conducted the advisement, the court found that defendant's plea had been voluntarily entered, and justice would not be subverted by denying defendant's request. People v. Weed, 830 P.2d 1095 (Colo. App. 1991).

Valid guilty plea requires that defendant understand the possible penalty or penalties which could be imposed. People v. Chavez, 902 P.2d 891 (Colo. App. 1995).

Section (b)(4) requires that defendant be advised, prior to the entry of a guilty plea, of the maximum possible sentence to which that plea will subject him or her, including the maximum that may result if the sentences are ordered to be served consecutively. People v. Peters, 738 P.2d 395 (Colo. App. 1987); People v. Phillips, 964 P.2d 628 (Colo. App. 1998).

Court not required to advise defendant of the possibility of consecutive sentences that might result from crimes not yet committed or sentences or charges not pending. People v. Phillips, 964 P.2d 628 (Colo. App. 1998).

Fact that defense counsel may not have advised client of maximum penalty defendant might be sentenced to does not form the basis for vacating a guilty plea where court gave defendant a complete advisement with respect to the possible penalties, including presumptive and aggravated range penalties for each conviction and the difference between concurrent and consecutive sentences. People v. Chavez, 902 P.2d 891 (Colo. App. 1995).

And showing of reason for plea change within discretion of court. Whether a showing of ''fair and just reason'' for a change of plea was made is a matter within the discretion of the trial court, and the Colorado supreme court will intervene only if the court has abused its discretion. People v. Gutierrez, 622 P.2d 547 (Colo. 1981).

In determining whether defendant received a proper advisement under the rule, the court looks to whether the record as a whole shows defendant received sufficient information as to be fairly placed on notice of the matter in question. Young v. People, 30 P.3d 202 (Colo. 2001).

If an advisement indicates an affirmative waiver, the defendant has the burden to prove, by a preponderance of the evidence, the ineffectiveness of his apparent waiver. Young v. People, 30 P.3d 202 (Colo. 2001).

Defendant was entitled to a hearing on motion to withdraw guilty plea where court understated minimum sentence that could be imposed and defendant's plea agreement was not in evidence. On remand, defendant must establish that his asserted belief that he would receive a sentence below the minimum sentence stated by the court was objectively reasonable. People v. Hodge, 205 P.3d 481 (Colo. App. 2008).

Burden on defendant. The burden of demonstrating a ''fair and just reason'' for a change of plea rests on the defendant. People v. Gutierrez, 622 P.2d 547 (Colo. 1981).

If the advisement is infirm, the court determines if it can correct the error. If the error cannot be corrected, the defendant can withdraw his plea. Young v. People, 30 P.3d 202 (Colo. 2001).

The trial court is not bound by the plea agreement, and has an independent duty to examine the appropriate sentence prior to issuance of that sentence. On review, the court looks at the maximum statutory exposure recited by the trial court or included in the documentation. Young v. People, 30 P.3d 202 (Colo. 2001).

Except when the trial court explicitly states at the providency hearing that it will accept and agree to be bound by the plea agreement, and so advises the defendant. Young v. People, 30 P.3d 202 (Colo. 2001).

Who must show that denial would subvert justice. To warrant a change of plea before entry of a sentence, there must be some showing that denial of the request will subvert justice. People v. Gutierrez, 622 P.2d 547 (Colo. 1981).

Gutierrez distinguished where the defendant acknowledged his own guilt rather than an independent trier of fact that determined defendant's guilt based on sworn trial testimony. People v. Schneider, 25 P.3d 755 (Colo. 2001).

Use of statements made in conjunction with withdrawn or rejected guilty plea. A defendant who challenges the voluntariness or reliability of statements made in the course of tendering a guilty plea which is subsequently withdrawn or rejected and is later sought to be used against him at trial for impeachment purposes is entitled to a hearing which provides the safeguards set forth in Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), before those statements may be used against him. People v. Cole, 195 Colo. 483, 584 P.2d 71 (1978).

The prosecution has the right to cure a deficient record by offering evidence at a rule 35(c) hearing which establishes that the defendant's plea was constitutionally obtained. People v. Lesh, 668 P.2d 1362 (Colo. 1983).

Jurisdictional defects not waived by plea. Jurisdictional defects, such as insufficiency of a charging instrument, are not waived by a plea of nolo contendere. People v. Roberts, 668 P.2d 977 (Colo. App. 1983).

Limitation on use of plea accepted in violation of rule. Conviction based on plea ac-

cepted in violation of this rule cannot be used in a later proceeding to support the imposition of statutory liabilities. People v. Heinz, 197 Colo. 102, 589 P.2d 931 (1979).

Conditional guilty pleas are not authorized in Colorado by statute or court rule. People v. Neuhaus, 240 P.3d 391 (Colo. App. 2009), aff'd, 2012 CO 65, 289 P.3d 19; People v. Hoffman, 2012 CO 66, 289 P.3d 24; Escobedo v. People, 2012 CO 67, 289 P.3d 25.

A plea accepted in violation of this rule may not be used to support a conviction for purposes of the habitual traffic offender statute. People v. Roybal, 618 P.2d 1121 (Colo. 1980).

Substantial compliance with section (b)(7). District attorney's oral consent to entry of a guilty plea, made on the record at the providency hearing, substantially complies with the requirements of section (b)(7). People v. Mascarenas, 643 P.2d 786 (Colo. App. 1981).

Evidence that requirements of rules not complied with. People v. Van Hook, 36 Colo. App. 226, 539 P.2d 507 (1975).

III. MISDEMEANOR CASES.

Law reviews. For article, ''The Colorado Counsel Conundrum: Plea Bargaining, Misdemeanors, and the Right to Counsel'', see 89 Denv. U.L. Rev. 327 (2012).

More simplified procedures can properly be used for minor offenses than those required to be followed in receiving a plea of guilty in serious criminal cases. Cave v. Colo. Dept. of Rev., 31 Colo. App. 185, 501 P.2d 479 (1972).

Procedure for plea to misdemeanor or traffic offense. Before accepting a plea of guilty or nolo contendere to a misdemeanor or traffic offense, the trial court must be satisfied that the defendant's decision to acknowledge guilt has been made knowingly and understandingly. People v. Lesh, 668 P.2d 1362 (Colo. 1983).

IV. FAILURE OR REFUSAL TO PLEAD.

When court may enter plea. Where a trial court denies a motion to dismiss for failure to rearraign on an amended information because the amendment is not one of substance, when counsel calls the court's attention to the amended information during the course of the trial, the court may follow the provisions of Crim. P. 11(d) and enter a plea of not guilty, allowing the trial to proceed. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972).

V. DEFENSE OF INSANITY.

Fact that defendant is insane does not conclusively render him incompetent to proceed or enter a plea of guilty. People v. Blehm, 791 P.2d 1177 (Colo. App. 1989), aff'd in part and rev'd in part, 817 P.2d 988 (Colo. 1991).

Plea of not guilty by reason of insanity includes a not guilty plea. Sanchez v. District Court, 200 Colo. 33, 612 P.2d 519 (1980).

Section (e) is to be liberally construed in favor of defendants. Martinez v. People, 179 Colo. 197, 499 P.2d 611 (1972); Ellis v. District Court, 189 Colo. 123, 538 P.2d 107 (1975); Labor v. Gibson, 195 Colo. 416, 578 P.2d 1059 (1978).

Common-law bar on pleading and trial of mentally ill. It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense, and he cannot be adjudged to punishment or executed while he is so disordered as to be incapable of stating any reasons that may exist why judgment should not be pronounced or executed. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

Plea at arraignment or before trial upon good cause showing. Section (e) sets forth in unequivocal terms that the insanity defense must be interposed at the time of arraignment, except when the court, for good cause shown, permits the plea to be interposed prior to trial. Ellis v. District Court, 189 Colo. 123, 538 P.2d 107 (1975).

Determination of good cause in discretion of trial court. Whether good cause is shown to permit a plea of insanity rests within discretion of trial court. Taylor v. District Court, 182 Colo. 406, 514 P.2d 309 (1973).

Not disturbed on appeal absent clear abuse. The question of good cause is one addressed to the sound discretion of the trial judge and, absent a clear abuse of discretion, the trial judge's ruling will not be disturbed on appeal. Martinez v. People, 179 Colo. 197, 499 P.2d 611 (1972); Taylor v. District Court, 182 Colo. 406, 514 P.2d 309 (1973); Garza v. People, 200 Colo. 62, 612 P.2d 85 (1980).

Showing required to prove good cause. Good cause in section (e) of this rule is shown when it is demonstrated that fairness and justice are best subserved by permitting the additional plea. Ellis v. District Court, 189 Colo. 123, 538 P.2d 107 (1975).

Good cause in section (e) is satisfied if the accused establishes that the plea was not entered at the time of arraignment due to mistake, ignorance, or inadvertence. Ellis v. District Court, 189 Colo. 123, 538 P.2d 107 (1975).

Good cause not established. Garza v. People, 200 Colo. 62, 612 P.2d 85 (1980).

Abuse of discretion in not allowing insanity plea. Taylor v. District Court, 182 Colo. 406, 514 P.2d 309 (1973); Ellis v. District Court, 189 Colo. 123, 538 P.2d 107 (1975).

Right to have jury solve dispute as to sanity. Where there is a disputed question as to the defendant's sanity, he is entitled to have a jury pass on it. Abad v. People, 168 Colo. 202, 450 P.2d 327 (1969).

Choice of entering plea is defendant's. The tactical choice of whether to enter a plea of not guilty by reason of insanity by a defendant found ''mentally competent'' is left to the defendant and his counsel. People v. Lopez, 640 P.2d 275 (Colo. App. 1982).

And court not authorized to enter insanity plea unless defendant requests. Neither section (e) nor § 16-8-103, gives a trial court the authority to enter a plea of not guilty by reason of insanity when it has not been requested by the defendant or his counsel. Labor v. Gibson, 195 Colo. 416, 578 P.2d 1059 (1978); People v. Lopez, 640 P.2d 275 (Colo. App. 1982).

Insanity inquiry at any time during trial. If a court, at any of the stages of a trial, has a reasonable doubt whether a defendant is mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

Otherwise due process is violated. It is fundamental that a proceeding against an insane person in a criminal matter is a violation of his rights under the due process clause of the fourteenth amendment. Hampton v. Tinsley, 240 F. Supp. 213 (D. Colo. 1965), rev'd on other grounds, 355 F.2d 470 (10th Cir. 1966).

VI. PLEA BARGAINING.

Law reviews. For article, ''Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process'', see 66 Den. U. L. Rev. 243 (1989).

Plea agreements, or plea bargainings, are approved. Dabbs v. People, 175 Colo. 273, 486 P.2d 1053 (1971); People v. White, 182 Colo. 417, 514 P.2d 69 (1973).

But it may not be utilized to subvert truth or as means of forcing plea to an uncommitted crime. People v. White, 182 Colo. 417, 514 P.2d 69 (1973).

Plea bargain may not be hidden and must be brought to the surface for scrutiny. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

And defense lawyer must first obtain permission and the consent of his client before plea bargaining. Dabbs v. People, 175 Colo. 273, 486 P.2d 1053 (1971).

Coercion. Negotiation regarding charges against a loved one does not necessarily render a plea bargain the product of coercion, because such a plea can be voluntary. People v. Duran, 179 Colo. 129, 498 P.2d 937 (1972).

Judge not to participate in bargaining. Participation by trial judge in the plea bargaining process must be condemned. People v. Clark, 183 Colo. 201, 515 P.2d 1242 (1973).

Court may involve itself in plea discussions if such involvement merely involves observations regarding the evolving legal posture of the case or inquiries as to whether the parties still wish to consummate the agreement. People v. Venzor, 121 P.3d 260 (Colo. App. 2005).

Section (f)(4) makes it clear that a trial judge shall not participate in plea discussions. This prohibition is designed to prevent coercion by the court in shaping a bargain. People v. Roy, 109 P.3d 993 (Colo. App. 2004).

When rejecting a plea agreement, a trial court must demonstrate on the record that it has actually exercised its discretion. A court's failure to make such showing is an abuse of discretion. People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000).

Court has discretion to reject a plea agreement, separately from the merits, on the basis that the parties tendered it in an untimely fashion. The trial court must provide adequate notice to the parties of the plea bargain cutoff date and must permit an exception to the rule for good cause. If a court rejects a plea for failure to conform to plea deadline, court need not necessarily consider the terms of the plea agreement proffered by the parties. People v. Jasper, 17 P.3d 807 (Colo. 2001).

Court is not bound by a recommendation; in its discretion it may refuse to grant the district attorney's sentence concession. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978); People v. McGhee, 677 P.2d 419 (Colo. App. 1983); People v. Smith, 827 P.2d 577 (Colo. App. 1991).

A prosecutor can only make sentence recommendations, not promises, and sentencing determinations remain within the discretion of the trial court regardless of plea agreements between the prosecution and the defense. People v. Smith, 827 P.2d 577 (Colo. App. 1991).

Section (f)(2)(I) clearly contemplates that a defendant should be permitted to withdraw his guilty plea where the trial court chooses not to follow the prosecutor's sentence recommendation, regardless of whether the prosecution has promised that the court will follow the recommendation. People v. Wright, 194 Colo. 448. 573 P.2d 551 (1978); People v. Smith, 827 P.2d 577 (Colo. App. 1991).

But court must comply with rule 32(e). The provision in section (b)(5) of this rule and § 16-7-207 (2)(e), that the court will not be bound by representations made to the defendant ''unless [the] representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report . . .'', does not free the court from complying with Crim. P. 32(e), which states, that if the

court decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge must so advise the defendant and call upon the defendant to affirm or withdraw his plea of guilty or nolo contendere. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Although district judges are barred from the plea negotiation process by this rule, once they have given unqualified approval to a plea agreement they, like the parties, become bound by the terms of that agreement. Were courts free to re-examine the wisdom of plea bargains with the benefit of hindsight, the agreements themselves would lack finality, and the benefits that encourage the government and defendants to enter into pleas might prove illusory. People v. Roy, 109 P.3d 993 (Colo. App. 2004).

Application of C.R.E. 410, when read in light of this rule and § 16-7-303, requires the exclusion of evidence of statements made by defendant during plea bargaining process only in regard to plea discussions with the attorney for the government. People v. Rollins, 759 P.2d 816 (Colo. App. 1988).

Sentence recommendation is a sentence concession whether or not the court approves or concurs. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Offers of identical concessions for similarly situated defendants not required. Section 16-7-301 (3) and section (f)(3) of this rule do not require that similarly situated defendants must be offered identical concessions. People v. Lewis, 671 P.2d 985 (Colo. App. 1983).

District attorneys have the power to refuse to recommend sentence or probation. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Failure to object at time of acceptance of bargain bars later appeal of sentence. Where the trial court repeatedly reminded the defendant of what the sentence would be when it advised him at the time of the acceptance of his plea of guilty, pursuant to this rule, and where at no time did the defendant or his counsel protest the sentence nor raise an objection that the trial court was not properly exercising its discretion in imposing the sentence, the defendant could not, after benefiting from the plea bargain, claim on appeal that he has been unjustly sentenced. People v. Cunningham, 200 Colo. 303, 614 P.2d 886 (1980); People v. Campbell, 174 P.3d 860 (Colo. App. 2007).

The proper standard for evaluating whether a prosecution remains bound by its obligations under a plea agreement is whether a defendant has materially and substantially breached his obligation to perform under the plea agreement. People v. McCormick, 859 P.2d 946 (Colo. 1993).

A plea agreement is more than merely a contract between two parties and must be attended by constitutional safeguards to ensure that a defendant receives the performance that he is due. People v. McCormick, 856 P.2d 846 (Colo. 1993).

Once the court chose to engage in the bargaining process and agreed to terms, it became obligated to comply with those terms, just as any other party to the agreement. The court's faithful observance of the terms of the bargain was just as vital to the fairness and efficiency of the process as was the prosecutor's compliance. Once the court committed to the plea agreement, it became bound by the terms of the agreement and could not, absent proof of fraud or breach of the plea bargain, set the agreement aside. People v. Roy, 109 P.3d 993 (Colo. App. 2004).

Partial performance not enough. A defendant who materially and substantially breaches a plea agreement cannot enforce the agreement, regardless of whether the defendant has partially performed some of his obligations under it. People v. McCormick, 859 P.2d 846 (Colo. 1993).

Rule 12. Pleadings, Motions Before Trial, Defenses, and Objections

(a) Pleadings and Motions. Pleadings shall consist of the indictment or information or complaint, or summons and complaint, and the pleas of guilty, not guilty, not guilty by reason of insanity, and nolo contendere. All other pleas, demurrers, and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

(b) The Motion Raising Defenses and Objections.

(1) **Defenses and Objections Which May Be Raised.** Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(2) **Defenses and Objections Which Must Be Raised.** Defenses and objections based on defects in the institution of the prosecution or in the indictment or information or

complaint, or summons and complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceeding. When a motion challenging the constitutionality of the statute upon which the charge is based or asserting lack of jurisdiction is made after the commencement of the trial, the court shall reserve its ruling on that motion until the conclusion of the trial.

(3) **Time of Making Motion.** The motion shall be made within 21 days following arraignment.

(4) **Hearing on Motion.** A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue except as provided in Rule 41. An issue of fact shall be tried by a jury if a jury trial is required by the Constitution or by statute. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) **Effect of Determination.** If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand.

Source: (b)(3) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Technical noncompliance with Crim. P. 16 that does not cause prejudice to defendant will not constitute reversible error. People v. Hernandez, 695 P.2d 308 (Colo. App. 1984).

Applied in Stapleton v. District Court, 179 Colo. 187, 499 P.2d 310 (1972); People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975); People v. Davis, 194 Colo. 466, 573 P.2d 543 (1978); People v. Dickinson, 197 Colo. 338, 592 P.2d 807 (1979); People v. Velasquez, 641 P.2d 943 (Colo. 1982); People v. Peterson, 656 P.2d 1301 (Colo. 1983).

II. PLEADING AND MOTIONS.

Legal effect of present nomenclature for old procedures is the same. Although the granting of motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, and the declarations of a statute unconstitutional have been abolished by section (a) and Crim. P. 29(a) the legal effect of the present nomenclature for those procedures is the same, that is, a ruling adverse to the state effectively terminates its prosecution of the defendant and results in a ''final judgment''. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971).

III. MOTION RAISING DEFENSES AND OBJECTIONS.

A. Defenses and Objections That May Be Raised.

Motion to suppress a lineup identification is within the scope of this subsection (b)(1). People v. Renfrow, 172 Colo. 399, 473 P.2d 957 (1970).

B. Defenses and Objections That Must Be Raised.

Waiver of defenses and objections by failure to raise. Failure to raise defenses and objections referred to in subsection (b)(2) by motion constitutes waiver of the defenses and objections. Mora v. People, 172 Colo. 261, 472 P.2d 142 (1970).

Subsection (b)(2) does not require a defendant to either raise a double jeopardy claim at trial or waive such claim. People v. Zadra, 2017 CO 18, 389 P.3d 885.

Nothing in this rule requires a defendant to file a motion regarding any error that might later flow from the charging document, including a double jeopardy error.

Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816; Zubiate v. People, 2017 CO 17, 390 P.3d 394.

Motions not within scope of subsection (b)(2). A motion for the return of property and to suppress evidence is not a defense or objection based on defects in the institution of the prosecution or in the indictment, information, or complaint, and, thus, does not fall within the scope of subsection (b)(2). Adargo v. People, 173 Colo. 323, 478 P.2d 308 (1970).

A motion to suppress is not a ''defense or objection'' based on defects listed in this section. People v. Robertson, 40 Colo. App. 386, 577 P.2d 314 (1978).

Trial court should entertain motion to dismiss for lack of jurisdiction at whatever stage of the proceedings the question is raised. Maddox v. People, 178 Colo. 366, 497 P.2d 1263 (1972).

Absence of verification on information is not jurisdictional. Quintana v. People, 168 Colo. 308, 451 P.2d 286 (1969).

Rather, it is for benefit of defendant and is waived unless timely objection is made thereto. Quintana v. People, 168 Colo. 308, 451 P.2d 286 (1969); Bergdahl v. People, 27 Colo. 302, 61 P. 228 (1900); Curl v. People, 53 Colo. 578, 127 P. 951 (1912); Harris v. Municipal Court, 123 Colo. 539, 234 P.2d 1055 (1951); Bustamante v. People, 136 Colo. 362, 317 P.2d 885 (1957); Mora v. People, 172 Colo. 261, 472 P.2d 142 (1970); Workman v. People, 174 Colo. 194, 483 P.2d 213 (1971); Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971); Scott v. People, 176 Colo. 289, 490 P.2d 1295 (1971).

C. Time of Making Motion.

Defects raisable in motion in arrest of judgment or for new trial. When objections to the want of a verifying affidavit and to the competency and credibility of the affiant are raised by the defendant for the first time in a motion in arrest of judgment or in the alternative for a new trial, and the record does not reveal that any objections were raised prior to that time, although the opportunity existed, then the objections come too late. Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971).

Insufficiency of indictment assertable on appeal. Although defendant did not raise the insufficiency of the indictment at trial or in his motion for new trial, he is not thereby precluded from asserting that defect on appeal. People v. Westendorf, 37 Colo. App. 111, 542 P.2d 1300 (1975).

Selective prosecution claim must be raised prior to trial. A selective prosecution claim is an objection based upon a defect in the institution of the prosecution, and, therefore, a defendant's failure to raise the objection in a timely motion constitutes a waiver of the objection. People v. Gallegos, 226 P.3d 1112 (Colo. App. 2009).

Motion made after trial but before sentencing. A motion challenging the constitutionality of a statute preserves the issue on appeal where the motion is made after oral argument on motion for judgment of acquittal or for new trial, but before sentencing. People v. Cagle, 751 P.2d 614 (Colo. 1988).

A substantive defect in an information may be raised at any time during the proceedings. People v. Williams, 961 P.2d 533 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 56 (Colo. 1999).

Exceptions to duplicitous count must be made before trial. A duplicitous count in a criminal information is only a matter of form, and exceptions which go merely to form must be made before trial. Russell v. People, 155 Colo. 422, 395 P.2d 16 (1964); Specht v. People, 156 Colo. 12, 396 P.2d 838 (1964).

Colorado law is clear that subsection (b) does not require a defendant to object within the time limit under that subsection when the error flows from circumstances that are not apparent from the charging document. People v. Wester-Gravelle, 2018 COA 89M, __ P.3d __.

A unanimity issue arose only after the prosecution decided to introduce at trial three different written instruments under a single charge of forgery of ''a written instrument''. People v. Wester- Gravelle, 2018 COA 89M, __ P.3d __.

Compulsory joinder defense not waived. Where compulsory joinder defense was not available when prosecution of felony charge was instituted because second charge had not been filed, defendant did not waive compulsory joinder claim when he failed to raise issue within twenty days after his arraignment on felony charge and, therefore, claim was not based on a defect in institution of prosecution and, thus, this rule did not prevent defendant from moving to dismiss. People v. Rogers, 742 P.2d 912 (Colo. 1987).

Waiver of objection to legality of arrest. A defendant who fails to object to his arrest before trial waives his right to challenge the legality of his arrest. Massey v. People, 179 Colo. 167, 498 P.2d 953 (1972); People v. Hernandez, 695 P.2d 308 (Colo. App. 1984).

Admissibility of alibi evidence. While a showing by a defendant of good cause for noncompliance with this rule is a proper factor to be considered by a trial court in deciding whether alibi evidence should be admitted, justification for noncompliance is not the sole determinant of admissibility. People v. Moore, 36 Colo. App. 328, 539 P.2d 489 (1975).

The critical consideration for admissibility of alibi evidence is whether the proffered alibi evidence should be admitted in order to assure

the defendant a fair trial. People v. Moore, 36 Colo. App. 328, 539 P.2d 489 (1975).

D. Hearing.

Defendant's burden on motion to dismiss for want of due prosecution. A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused; he has the burden of showing that he was not afforded a speedy trial. Jordan v. People, 155 Colo. 224, 393 P.2d 745 (1964).

Rule 12.1. Notice of Alibi

Repealed March 15, 1985, effective July 1, 1985.

Cross references: For present provisions on notice of alibi, see Crim. P. 16 part II(d).

Rule 13. Trial Together of Indictments, Informations, Complaints, Summons and Complaints

Subject to the provisions of Rule 14, the court may order two or more indictments, informations, complaints, or summons and complaints to be tried together if the offenses, and the defendants, if there are more than one, could have been joined in a single indictment, information, complaint, or summons and complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, complaint, or summons and complaint.

ANNOTATION

Law dependent on facts of each case. The law relating to joinder and severance, and that which permits consolidation of charges, depends on the facts in each particular case. Hunter v. District Court, 193 Colo. 308, 565 P.2d 942 (1977).

Evidence sufficient to justify consolidation of informations. Brown v. District Court, 197 Colo. 219, 591 P.2d 99 (1979).

When defendant uses a common scheme to commit highly similar crimes, consolidation is not an abuse of discretion. People v. Gross, 39 P.3d 1279 (Colo. App. 2001); People v. Gregg, 298 P.3d 983 (Colo. App. 2011); People v. Bondsteel, 2015 COA 165, 442 P.3d 880.

Sexual assault offenses may be joined if the evidence of each offense would be admissible in separate trials. People v. Williams, 899 P.2d 306 (Colo. App. 1995).

Joint trial of defendants permitted. People v. Trujillo, 181 Colo. 350, 509 P.2d 794 (1973).

Joinder of unrelated charges allowed for trial on sanity issue. Joinder of a charge of forcible rape with an unrelated deviate sexual intercourse charge committed on a different female on a different date for purposes of trial on the sanity issue was not error. People v. Renfrow, 193 Colo. 131, 564 P.2d 411 (1977).

There was no abuse of discretion in joining two sexual-assault-on-a-minor cases because evidence of each offense would have been admissible in separate trials. Even though the court admitted explicit photographs of the defendant with one of the victims while there were no photos of the other victim, the photos were properly admitted to corroborate the testimony of the victim and the photos were not unduly prejudicial. People v. Raehal, 2017 COA 18, 401 P.3d 117.

Applied in People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974); People v. Gonzales, 198 Colo. 450, 601 P.2d 1366 (1979); Jeffrey v. District Court, 626 P.2d 631 (Colo. App. 1981); Gimmy v. People, 645 P.2d 262 (Colo. 1982); Corr v. District Court, 661 P.2d 668 (Colo. 1983).

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in any indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. However, upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible. In ruling on a

motion by a defendant for severance, the court may order the prosecuting attorney to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

ANNOTATION

Duty of trial judge. The trial judge has a duty to safeguard the rights of the accused and to ensure the fair conduct of the trial, and, in furtherance of that duty, he has broad discretion to order a separate trial of counts when their joinder would result in prejudice. People v. Fullerton, 186 Colo. 97, 525 P.2d 1166 (1974).

Consolidation of trials, when the defendant uses a common scheme to commit highly similar crimes, is not an abuse of discretion. People v. Gross, 39 P.3d 1279 (Colo. App. 2001); People v. Bondsteel, 2015 COA 165, 442 P.3d 880.

Purpose of severance is to promote a fair determination of guilt or innocence of one or more defendants. People v. Horne, 619 P.2d 53 (Colo. 1980).

Matter of election is within the sound discretion of trial court. People v. Mayfield, 184 Colo. 399, 520 P.2d 748 (1974).

And motion for separate trial is addressed to sound discretion of trial court. People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973); Ruark v. People, 158 Colo. 287, 406 P.2d 91 (1965); Small v. People, 173 Colo. 304, 479 P.2d 386 (1970); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); People v. Trujillo, 181 Colo. 350, 509 P.2d 794 (1973); People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973); People v. Walker, 189 Colo. 545, 542 P.2d 1283 (1975); People v. Martinez, 190 Colo. 507, 549 P.2d 758 (1976); People v. McCrary, 190 Colo. 538, 549 P.2d 1320 (1976); People v. Pickett, 194 Colo. 178, 571 P.2d 1078 (1977); People v. Horne, 619 P.2d 53 (Colo. 1980); People v. Wortham, 690 P.2d 876 (Colo. App. 1984).

A motion for severance is directed to the sound discretion of the trial court, and, absent an abuse of that discretion resulting in prejudice to the moving defendant, denial of the motion will not be disturbed on appeal. People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Allen, 42 Colo. App. 345, 599 P.2d 264 (1979); People v. Horne, 619 P.2d 53 (Colo. 1980); People v. Martinez, 652 P.2d 174 (Colo. App. 1981); People v. Early, 692 P.2d 1116 (Colo. App. 1984); People v. Hoefer, 961 P.2d 563 (Colo. App. 1998).

And what constitutes abuse of discretion depends upon facts of each particular case. People v. Trujillo, 181 Colo. 350, 509 P.2d 794 (1973); Hunter v. District Court, 193 Colo. 308, 565 P.2d 942 (1977).

To show abuse of discretion with respect to the denial of a motion to sever counts, a defendant must demonstrate that joinder caused actual prejudice and that trier of fact was unable to separate the facts and legal principles applicable to each offense. People v. Knight, 167 P.3d 141 (Colo. App. 2006); People v. Cousins, 181 P.3d 365 (Colo. App. 2007); People v. Garcia, 2012 COA 79, 296 P.3d 285.

And court granted discretion in determining prejudicial circumstances. Although this rule specifies one situation in which separate trials of joint defendants are mandatory, it leaves to the trial court's discretion the determination of what circumstances may prejudice a sole defendant if multiple counts against him are joined in a single trial. People v. Gallagher, 194 Colo. 121, 570 P.2d 236 (1977).

There must be actual prejudice to the defendant and not just differences that are inherent in any trial of different offenses. People v. Pickett, 194 Colo. 178, 571 P.2d 1078 (1977); People v. Early, 692 P.2d 1116 (Colo. App. 1984): People v. Guffie, 749 P.2d 976 (Colo. App. 1987).

Joinder requiring disclosure of prior conviction denies fair trial. Joinder of counts, one of which requires the disclosure of the defendant's prior conviction to the jury panel at the inception of a case, so taints the trial with the defendant's prior criminality that a fair trial on the other counts is impossible. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

And unfairness to deny defendant favorable inferences of codefendant's silence. There is a distinct element of unfairness, albeit not always prejudicial, in denying one codefendant any favorable inference to be drawn from the other's silence, for it prohibits him from urging upon the jury every point favorable to his case. People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978).

When denial of severance disturbed on appeal. Absent an abuse of discretion resulting in prejudice to the moving defendant, a denial of a motion for severance will not be disturbed on appeal. People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973).

And inartfully raised motion to sever is sufficient to preserve issue for appeal. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

Factors to be considered on motion for severance. Motion for severance will be granted when grounded on the presence of four factors: (1) The defenses of the defendants were antagonistic; (2) one defendant took the stand and his attorney could not comment on the other defendant's silence; (3) one defendant, if tried first, could conceivably testify on behalf of

the other at the later trial; (4) the evidence was largely circumstantial and stronger against one defendant. People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973).

Necessity of severance is tested by the standard that it must be ''deemed appropriate to promote a fair determination of the guilt or innocence of a defendant'', and that standard, in turn, is tested by the following: (1) Whether the number of defendants or the complexity of the evidence is such that the jury will probably confuse the evidence and law applicable to each defendant; (2) whether evidence inadmissible against one defendant will be considered against the other defendant despite admonitory instructions; (3) whether there are antagonistic defenses. People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978).

When deciding whether to grant a motion for severance, the trial court should consider whether evidence inadmissible against one defendant will be considered against the other defendant, despite the issuance by the trial court of the proper admonitory instructions. An additional consideration is whether the defendants plan to offer antagonistic defenses. People v. Gonzales, 198 Colo. 450, 601 P.2d 1366 (1979).

Important inquiry is whether the trier of fact will be able to separate the facts and legal theories applicable to each offense. People v. Pickett, 194 Colo. 178, 571 P.2d 1078 (1977); People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Joinder of offenses permissible to show common elements. Joinder of sexual assault offenses is permissible where the evidence tending to prove each offense would be admissible in separate trials to show common plan, scheme, design, identity, modus operandi, motive, guilty knowledge, or intent. People v. Allen, 42 Colo. App. 345, 599 P.2d 264 (1979).

Desire to testify on one count does not entitle defendant to separate trial. The mere fact that defendant wishes to testify on one count and not on the other does not automatically entitle one to severance. People v. Walker, 189 Colo. 545, 542 P.2d 1283 (1975); People v. Early, 692 P.2d 1116 (Colo. App. 1984); People v. Garcia, 2012 COA 79, 296 P.3d 285.

And fact of antagonistic defenses may not always demand severance, but certainly it justifies separate trials in many instances. Eder v. People, 179 Colo. 122, 498 P.2d 945 (1972).

When separate trial not required. Where references to a defendant are carefully and completely deleted from a codefendant's written statement which also implicates the defendant and the jury is instructed that such written statement is to be considered solely for the purpose of determining the guilt or innocence of the codefendant, then, in a separate trial of the defendant as an accessory, the questioned statement, under such a limiting instruction, would be admissible on the issue of the guilt of the codefendant, and, accordingly, this rule, by its very terms, does not require a separate trial. Stewart v. People, 161 Colo. 1, 419 P.2d 650, 26 A.L.R.3d 943 (1966).

Bifurcated trial before single jury did not result in defendant being denied his right to a fair trial on previous offender charges or abuse of court's discretion in denying motion for separate trials before different juries. People v. Robinson, 187 P.3d 1166 (Colo. App. 2008).

When separate trial to be granted as of right. Upon motion, any defendant must be granted a separate trial as of right if the court finds that the prosecution probably will present, against a joint defendant, evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant. Ruark v. People, 158 Colo. 287, 406 P.2d 91 (1965); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); People v. Horne, 619 P.2d 53 (Colo. 1980).

Severance not mandatory where one codefendant testifies while other does not. The fact that one codefendant testifies while the other does not, does not mandate severance. People v. Toomer, 43 Colo. App. 182, 604 P.2d 1180 (1979).

But if defendant fails to move for severance, he cannot raise question on appeal. Pineda v. People, 152 Colo. 545, 383 P.2d 793 (1963); Reed v. People, 174 Colo. 43, 482 P.2d 110 (1971); People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

Failure to renew pretrial motion to sever waives right to challenge trial court's denial on appeal. People v. Aalbu, 696 P.2d 796 (Colo. 1985).

Nor where defendant accedes to limitation on admissibility of evidence. Where the trial court rules that certain evidence is admissible only as to a codefendant and the defendant accedes to this ruling, he waives any further objection. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

And motion need not detail specific objectionable evidence. Where the court has no basis for concluding that the defendant was aware of objectionable testimony relied on in a motion for severance of trials until after the trial commenced, and the defendant rightfully filed his motion before the evidence was presented, it is not necessary for the motion to make reference to the specific evidence being relied upon. People v. Gonzales, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

But motion for severance must contain evidence which is claimed to be incompetent toward the moving party, so that the court will be given the opportunity to determine whether the one requesting a severance may be preju-

diced by testimony admissible against the codefendant, but not admissible as to him. Padilla v. People, 171 Colo. 521, 470 P.2d 846 (1970); People v. Gonzales, 43 Colo. App. 312, 602 P.2d 6 (1978), rev'd on other grounds, 198 Colo. 450, 601 P.2d 1366 (1979).

Applied in People v. Story, 182 Colo. 122, 511 P.2d 492 (1973); People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974); People v. Ciari, 189 Colo. 325, 540 P.2d 1094 (1975); People v. Renfrow, 193 Colo. 131, 564 P.2d 411 (1977); People v. McGregor, 635 P.2d 912 (Colo. App. 1981); People v. Peterson, 656 P.2d 1301 (Colo. 1983); People v. Gregory, 691 P.2d 357 (Colo. App. 1984).

Rule 15. Depositions

(a) Motion and Order. The prosecutor or the defendant may file a motion supported by an affidavit any time after an indictment, information, complaint, or summons and complaint is filed requesting that the deposition of a prospective witness be taken before the court. The court may order that a deposition be taken before the court if a prospective witness may be unable to attend a trial or hearing and it is necessary to take that person's deposition to prevent injustice. The court shall identify the witness and fix the date and time for the deposition in the order and shall give every party reasonable notice of the time and place for taking the deposition. For good cause shown, the court may reschedule the date and time for the deposition.

(a.5) Deposition by Stipulation Permitted. The prosecution and defense may take a deposition before a judge by stipulation.

(b) Subpoena of Witness. Upon entering an order for the taking of a deposition, the court shall direct that a subpoena issue for each person named in the order and may require that any designated books, papers, documents, photographs, or other tangible objects, not privileged, be produced at the deposition. If it appears, however, that the witness will disregard a subpoena, the court may direct the sheriff to produce the prospective witness in court where the witness may be released upon personal recognizance or upon reasonable bail conditioned upon the witness's appearance at the time and place fixed for the taking of deposition. If the witness fails to give bail, the court shall remand him to custody until the deposition can be taken but in no event for longer than forty-eight hours. If the deposition be not taken within forty-eight hours, the witness shall be discharged.

(c) Presence of Defendant. The defendant shall be present at the deposition unless the defendant voluntarily fails to appear after receiving notice of the date, time, and place of the deposition.

(d) Taking and Preserving Depositions. Depositions shall be taken as directed by the court. All depositions shall be preserved by video recording at the expense of the requesting party. A copy of the video recording shall be filed with the clerk of the court and provided to the opposing party.

(e) Use. At the trial, or at any hearing, a part or all of a deposition may be used, so far as otherwise allowed by law or by stipulation.

(f) Transcripts of Depositions. The requesting party shall file a transcript of the deposition with the clerk of the court and provide a copy to the opposing party without cost.

Source: Entire rule amended and adopted May 25, 2006, effective July 1, 2006; (d) and (f) amended and effective September 6, 2018.

Cross references: For video tape depositions in specific circumstances, see § 18-3-413 (children who are victims of sexual offenses), C.R.S., § 18-6-401.3 (victims of child abuse), and 18-6.5-103.5 (victims or witnesses who are at-risk adults).

ANNOTATION

Law reviews. For article, "Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

This rule limits taking of depositions in a criminal proceeding to those situations where the prospective witness ''may be unable to attend a trial or hearing''. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

Primary purpose of section (e) is to safeguard the confrontation rights of the criminally accused by limiting the use of deposition testimony to narrowly defined situations of unavailability. People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983).

Trial court has great discretion in determining whether to allow the taking of deposition testimony under this rule. People v. Hernandez, 899 P.2d 297 (Colo. App. 1995).

A Colorado court does not have authority under this rule to order a deposition of a person outside of its jurisdiction. Trial court was in error in granting a motion to depose a witness residing in Mexico. The rule specifically provides that the deposition must be taken in the court's presence. It also logically follows that, since the rule requires the court to subpoena the witness who is to be deposed, the court may not order a deposition of any person who may not be legally served a subpoena. The provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which extends a court's jurisdiction to persons in other states, applies only within the United States and only to other states that have enacted the same law. Thus, in ordering the deposition of a person in Mexico, the district court was proceeding without jurisdiction. People v. Arellano-Avila, 20 P.3d 1191 (Colo. 2001).

This rule does not allow taking of depositions for purely discovery purposes, be it in-state or out-of-state. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

"Unavailability" determined at time of trial. Unavailability within the context of section (e) is to be determined at the time of trial in light of the circumstances then existing. The mere granting of a pretrial motion to depose a witness accords no presumption of unavailability at the time of trial. People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); People v. Hernandez, 899 P.2d 297 (Colo. App. 1995).

Showing required before deposition admitted. Before a deposition is admitted into evidence, the proponent of the deposition must make some showing, by evidence or stipulation, that the witness's inability to testify at trial is due to sickness or infirmity. Mere inconvenience or passing discomfort does not satisfy the unambiguous provisions of the rule. People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983).

Affidavit not essential to motion. The purpose of the affidavit requirement in section (a) is to ensure that the court has sufficient information to decide the merits of the motion, i.e., whether a witness might be unable to attend the trial. Where the court is thoroughly informed of the facts supporting the motion by other means, and defendant does not dispute these assertions, the lack of an affidavit is not fatal. People v. Hernandez, 899 P.2d 297 (Colo. App. 1995).

Lack of finding of unavailability may not constitute deprivation of rights. Where prosecution uses depositions of witnesses at trial, and the defendant was present with counsel and granted full rights of cross-examination at the time of the taking of the depositions before a judge, the defendant is not deprived of his right to confront the witnesses at the trial where the depositions are used without a finding of unavailability of the deponents when it is a matter of his counsel's trial strategy. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Applied in People v. Mann, 646 P.2d 352 (Colo. 1982).

Rule 16. Discovery and Procedure Before Trial

Definitions.

(1) ''Defense'', as used in this rule, means an attorney for the defendant, or a defendant if pro se.

Part I. Disclosure to the Defense

(a) Prosecutor's Obligations.

(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:

(I) Police, arrest and crime or offense reports, including statements of all witnesses;

(II) With consent of the judge supervising the grand jury, all transcripts of grand jury testimony and all tangible evidence presented to the grand jury in connection with the case;

(III) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(IV) Any books, papers, documents, photographs or tangible objects held as evidence in connection with the case;

(V) Any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;

(VI) All tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case;

(VII) A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;

(VIII) Any written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one.

(2) The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.

(b) Prosecutor's Performance of Obligations.

(1) The prosecuting attorney shall perform his or her obligations under subsections (a)(1)(I), (IV), (VII), and with regard to written or recorded statements of the accused or a codefendant under (VIII) as soon as practicable but not later than 21 days after the defendant's first appearance at the time of or following the filing of charges, except that portions of such reports claimed to be nondiscoverable may be withheld pending a determination and ruling of the court under Part III but the defense must be notified in writing that information has not been disclosed.

(2) The prosecuting attorney shall request court consent and provide the defense with all grand jury transcripts made in connection with the case as soon as practicable but not later than 35 days after indictment.

(3) The prosecuting attorney shall perform all other obligations under subsection (a)(1) as soon as practicable but not later than 35 days before trial.

(4) The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.

(c) Material Held by Other Governmental Personnel.

(1) Upon the defense's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense.

(2) The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

(d) Discretionary Disclosures.

(1) The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing by the defense that the request is reasonable.

(2) The court may deny disclosure authorized by this section if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense.

(3) Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's

opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross-examination under CRE 705.

(e) Matters not Subject to Disclosure.

(1) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

(2) **Informants.** Disclosure shall not be required of an informant's identity where his or her identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

Part II. Disclosure to Prosecution

(a) The Person of the Accused.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon request of the prosecuting attorney, the court may require the accused to give any nontestimonial identification as provided in Rule 41.1(h)(2).

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provision may be made for appearance for such purposes in an order admitting the accused to bail or providing for his or her release.

(b) Medical and Scientific Reports.

(1) Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(2) Subject to constitutional limitations, and where the interests of justice would be served, the court may order the defense to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. The intent of this section is to allow the prosecution sufficient meaningful information to conduct effective cross-examination under CRE 705.

(c) Nature of Defense.

Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial. The defense shall also disclose the names and addresses of persons whom the defense intends to call as witnesses at trial. At the entry of the not guilty plea, the court shall set a deadline for such disclosure. In no case shall such disclosure be less than 35 days before trial for a felony trial, or 7 days before trial for a non-felony trial, except for good cause shown. Upon receipt of the information required by this subsection (c), the prosecuting attorney shall notify the defense of any additional witnesses which the prosecution intends to call to rebut such defense within a reasonable time after their identity becomes known.

(d) Notice of Alibi.

The defense, if it intends to introduce evidence that the defendant was at a place other than the location of the offense, shall serve upon the prosecuting attorney as soon as practicable but not later than 35 days before trial a statement in writing specifying the place where he or she claims to have been and the names and addresses of the witnesses he or she will call to support the defense of alibi. Upon receiving this statement, the prosecuting attorney shall advise the defense of the names and addresses of any additional witnesses who may be called to refute such alibi as soon as practicable after their names become known. Neither the prosecuting attorney nor the defense shall be permitted at the

trial to introduce evidence inconsistent with the specification, unless the court for good cause and upon just terms permits the specification to be amended. If the defense fails to make the specification required by this section, the court shall exclude evidence in his behalf that he or she was at a place other than that specified by the prosecuting attorney unless the court is satisfied upon good cause shown that such evidence should be admitted.

Part III. Regulation of Discovery

(a) Investigation Not to be Impeded.

Subject to the provisions of Parts I (d) and III (d), neither the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case or with showing any relevant material to any party, counsel or their agent, nor shall they otherwise impede counsel's investigation of the case. The court shall determine that the parties are aware of the provision.

(b) Continuing Duty to Disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, including the names and addresses of any additional witnesses who have become known or the materiality of whose testimony has become known to the district attorney after making available the written list required in part I (a)(1)(VII), he or she shall promptly notify the other party or his or her counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(c) Custody of Materials.

Materials furnished in discovery pursuant to this rule may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for purposes of preparation and trial of the case, and shall be subject to such other terms, conditions or restrictions as the court, statutes or rules may provide. Defense counsel is not required to provide actual copies of discovery to his or her client if defense counsel reasonably believes that it would not be in the client's interest, and other methods of having the client review discovery are available. An attorney may also use materials he or she receives in discovery for the purposes of educational presentations if all identifying information is first removed.

(d) Protective Orders.

With regard to all matters of discovery under this rule, upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party to make beneficial use thereof.

(e) Excision.

(1) When some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the nondiscoverable material may be excised and the remainder made available in accordance with the applicable provisions of these rules.

(2) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(f) In Camera Proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(g) Failure to Comply; Sanctions.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not

previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

Part IV. Procedure

(a) General Procedural Requirements.

(1) In all criminal cases, in procedures prior to trial, there may be a need for one or more of the following three stages:

(I) An exploratory stage, initiated by the parties and conducted without court supervision to implement discovery required or authorized under this rule;

(II) An omnibus stage, when ordered by the court, supervised by the trial court and court appearance required when necessary;

(III) A trial planning stage, requiring pretrial conferences when necessary.

(2) These stages shall be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

(b) Setting of Omnibus Hearing.

(1) If a plea of not guilty or not guilty by reason of insanity is entered at the time the accused is arraigned, the court may set a time for and hold an omnibus hearing in all felony and misdemeanor cases.

(2) In determining the date for the omnibus hearing, the court shall allow counsel sufficient time:

(I) To initiate and complete discovery required or authorized under this rule;

(II) To conduct further investigation necessary to the defendant's case;

(III) To continue plea discussion.

(3) The hearing shall be no later than 35 days after arraignment.

(c) Omnibus Hearing.

(1) If an omnibus hearing is held, the court on its own initiative, utilizing an appropriate checklist form, should:

(I) Ensure that there has been compliance with the rule regarding obligations of the parties;

(II) Ascertain whether the parties have completed the discovery required in Part I (a), and if not, make orders appropriate to expedite completion;

(III) Ascertain whether there are requests for additional disclosures under Part I (d);

(IV) Make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(V) Ascertain whether there are any procedural or constitutional issues which should be considered; and

(VI) Upon agreement of the parties, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference.

(2) Unless the court otherwise directs, all motions and other requests prior to trial should be reserved for and presented orally or in writing at the omnibus hearing. All issues presented at the omnibus hearing may be raised without prior notice by either party or by the court. If discovery, investigation, preparation, and evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(3) Any pretrial motion, request, or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(4) Stipulations by any party or his or her counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(5) A verbatim record of the omnibus hearing shall be made. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matter determined or pending.

(d) Omnibus Hearing Forms.

(1) The forms set out in the Appendix to Chapter 29 shall be utilized by the court in conducting the omnibus hearing. These forms shall be made available to the parties at the time of the defendant's first appearance.

(2) Nothing in the forms shall be construed to make substantive changes of these rules.

(e) Pretrial Conference.

(1) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of the parties, the trial court may (in addition to the omnibus hearing) hold one or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might be considered include:

(I) Making stipulations as to facts about which there can be no dispute;

(II) Marking for identification various documents and other exhibits of the parties;

(III) Excerpting or highlighting exhibits;

(IV) Waivers of foundation as to such documents;

(V) Issues relating to codefendant statements;

(VI) Severance of defendants or offenses for trial;

(VII) Seating arrangements for defendants and counsel;

(VIII) Conduct of jury examination, including any issues relating to confidentiality of juror locating information;

(IX) Number and use of peremptory challenges;

(X) Procedure on objections where there are multiple counsel or defendants;

(XI) Order of presentation of evidence and arguments when there are multiple counsel or defendants;

(XII) Order of cross-examination where there are multiple defendants;

(XIII) Temporary absence of defense counsel during trial;

(XIV) Resolution of any motions or evidentiary issues in a manner least likely to inconvenience jurors to the extent possible; and

(XV) Submission of items to be included in a juror notebook.

(2) At the conclusion of the pretrial conference, a memorandum of the matters agreed upon should be signed by the parties, approved by the court, and filed. Such memorandum shall be binding upon the parties at trial, on appeal and in postconviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his or her attorney.

(f) Juror Notebooks.

Juror notebooks shall be available during all felony trials and deliberations to aid jurors in the performance of their duties. The parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. In non-felony trials, juror notebooks shall be optional.

Part V. Time Schedules and Discovery Procedures

(a) Mandatory Discovery.

The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) and Part II (b)(1), (c) and (d) herein, is mandatory and no motions for discovery with respect to such items may be filed.

(b) Time Schedule.

(1) In the event the defendant enters a plea of not guilty or not guilty by reason of insanity, or asserts the defense of impaired mental condition, the court shall set a deadline for such disclosure to the prosecuting attorney of those items referred to in Parts II (b) (1) and (c) herein, subject to objections which may be raised by the defense within that period pursuant to Part III (d) of this rule. In no case shall such disclosure be less than 35 days before trial for a felony trial, or 7 days before trial for a non-felony trial, except for good cause shown.

(2) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(3) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) Cost and Location of Discovery.

(1) The prosecution's costs of providing any discoverable material electronically to the defense shall be funded as set forth in section 16-9-702(2), C.R.S. The prosecution shall not charge for discovery. For any materials provided to the prosecution as part of the defense discovery obligation, the cost shall be borne by the prosecution based on the actual cost of duplication. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant.

(2) The place of discovery for materials not capable of being provided electronically shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) Compliance Certificate.

(1) When deemed necessary by the trial court, the prosecuting attorney and the defense shall furnish to the court a compliance certificate signed by all counsel listing specifically each item furnished to the other party. The court may, in its discretion, refuse to admit into evidence items not disclosed to the other party if such evidence was required to be disclosed under Parts I and II of this rule.

(2) If discoverable matters are obtained after the compliance certificate is filed, copies thereof shall be furnished forthwith to the opposing party and, upon application to the court, the court may either permit such evidence to be offered at trial or grant a continuance in its discretion.

Source: Entire rule repealed and readopted March 15, 1985, effective July 1, 1985; Part I IP(a)(1), (a)(1)(I), and (b)(1) and Part V (d)(1) amended September 9, 1985, effective January 1, 1986; Part I (a)(1) and (b)(1) and Part III (b) amended and adopted September 4, 1997, effective January 1, 1998; Part IV (e) amended and Part IV (f) added June 25, 1998, effective January 1, 1999; Part IV (f) corrected, effective January 7, 1999; Part I (a)(1)(VI) corrected, effective March 2, 1999; Part I (a)(1)(I) and (a)(1)(VII), Part II (c), and Part V (a) and (b)(1) amended and Part I (a)(1)(VIII) and (d)(3) and Part II (b)(2) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted May 17, 2001, effective July 1, 2001; entire rule amended and effective January 17, 2008; Part III (c) amended and effective April 6, 2009; Part I (b)(1), (b)(2), and (b)(3), Part II (c) and (d), Part IV (b)(3), and Part V (b)(1) amended and adopted December 14, 2011, effective July 1, 2012; Part V (c) amended and effective August 24, 2017.

Cross references: For furnishing names and addresses of witnesses, see § 16-5-203, C.R.S.; for the ''statewide discovery sharing system surcharge fund'', see § 18-26-102.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For case note, ''A Proposed Rule of Criminal Pretrial Discovery'', see 49 U. Colo. L. Rev. 443 (1978). For article, ''Attacking the Seizure — Over-coming Good Faith'', see 11 Colo. Law. 2395 (1982). For article, ''Governmental Loss or Destruction of Exculpatory Evidence: A Due Process Violation'', see 12 Colo. Law. 77 (1983). For article, ''Discovery and Admissibility of Police Internal Investigation Reports'', see 12 Colo. Law. 1745 (1983). For comment, '''Twenty Questions' Doesn't Yield Due Process: Chaney v. Brown and the Continued Need to Open Prosecutor's Files in Criminal Proceeding'', see 62 Den. U. L. Rev. 193 (1985). For comment, ''Limiting Prosecutorial Discovery Under the Sixth Amendment Right to Effective Assistance of Counsel: Hutchinson v. People'', see 66 Den. U. L. Rev. 123 (1988). For article, ''The Ethics of

Contacting Witnesses'', see 46 Colo. Law. 40 (Dec. 2017).

Trial court must rule on motion for disclosure of the names of confidential informants. A trial court cannot delay ruling on a defendant's motion for disclosure of the names of confidential informants, notwithstanding the agreement of the parties, on the theory that the motion would be moot if the court were to deny defendant's motion to suppress evidence because reasonable suspicion justified an investigatory stop even absent the information obtained from the confidential informants. The court must rule on the disclosure motion so that the basis for the investigatory detention can be considered in light of the totality of the circumstances. People v. Saint-Veltri, 945 P.2d 1339 (Colo. 1997).

Right to pretrial discovery was nonexistent under the common law. People ex rel. Shinn v. District Court, 172 Colo. 23, 469 P.2d 732 (1970); Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

Trial court's authority to grant discovery is limited to the categories expressly set forth in this rule. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

Scope of discovery prior to preliminary hearing is specifically limited by this rule. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

Categories of discoverable material do not include compelled physical examination of child victim of sexual abuse. People v. Chard, 808 P.2d 351 (Colo. 1991); People v. Melendez, 80 P.3d 883 (Colo. App. 2003), aff'd on other grounds, 102 P.3d 315 (Colo. 2004).

But rule is not designed to convert preliminary hearing into a mini trial. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

Defendant and prosecution granted independent rights. This rule is not conditional, but rather grants independent discovery rights to both the prosecution and the defendant. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Exemption from discovery under the attorney work-product doctrine is intended to ensure the privacy of a party's attorney from unnecessary intrusion by opposing parties and counsel, but this privilege is not absolute; it is not personal to the client, and it can be waived by an attorney's course of conduct. People v. Small, 631 P.2d 148 (Colo. 1981).

The decision of whether to order disclosure is committed to the sound discretion of the trial court, and the court's exercise of that discretion is entitled to strong deference. People v. Vigil, 729 P.2d 360 (Colo. 1986).

Technical non-compliance with rule does not constitute reversible error, and evidence is generally not improperly withheld if the defense has knowledge of it. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984); People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

Although prosecution violated this rule by the untimely disclosure of expert's report to defendant, it did not necessarily follow that the trial court's denial of defendant's motion for a continuance was reversible error, since failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

The work product doctrine, although most frequently asserted as a bar to discovery in civil litigation, applies with equal, if not greater, force in criminal prosecutions. People v. District Court, 790 P.2d 332 (Colo. 1990); People v. Ullery, 964 P.2d 539 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 586 (Colo. 1999).

Witness statements in prosecutor's notes and work sheets of the prosecuting attorney or members of the prosecutor's staff are ordinarily considered non-discoverable work product because they are prepared for litigation. People v. District Court, 790 P.2d 332 (Colo. 1990).

Report of an interview of a witness by a lay investigator is not prosecutor's work product and, hence, is automatically discoverable under section (I)(a)(1)(I). People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Section 19-1-307 (2) does not provide equal access to social services records in a criminal case, and it changes the automatic disclosure process contemplated by section (I)(a)(1) of this rule. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) limits defendant's access to items that the court, after an in camera review, determines necessary for the resolution of an issue. Therefore, defendant cannot expect automatic disclosure of records within the possession and control of prosecuting attorney. Instead, defendant must request an in camera review, identify the information sought, and explain why disclosure is necessary for resolution of an issue. To achieve the broadest possible disclosure, defendant should explain the relevance and materiality of the information sought. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Prosecutor has full access to records while investigating a report of known or suspected incident of child abuse or neglect. Section 19-1-307 (2)(f) does not suspend prosecutor's obligation to disclose information that is materially favorable to defendant, but it does change it. The duty to disclose is subject to the in camera review process in § 19-1-307 (2)(f). Therefore, if the prosecutor believes a social services record contains information it must disclose, the prosecutor must ask the trial court to

conduct an in camera review of the information to determine if disclosure is necessary for the resolution of an issue. If the trial court determines the information is necessary, then it is disclosed to the defendant. The prosecutor does not have the right to offer the material into evidence without first obtaining the trial court's approval. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) places the trial court in the middle of a procedural issue that normally would have been handled by counsel through the automatic disclosure requirements under section (I)(a)(1) of this rule. The trial court must review the records to determine whether the records are necessary for the resolution of an issue. Although the determination of whether the records should be disclosed must be made on case-specific circumstances, there are three principles that apply generally. First, under due process considerations, the trial court must disclose any information that is materially favorable to defendant because it is either exculpatory or impeaching. Second, the trial court should disclose inculpatory information when the information would materially assist in preparing the defense. Finally, it may be significant, although not determinative, that the information would be otherwise subject to automatic disclosure under section (I)(a)(1) of this rule. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Neither the state rules of criminal procedure, the federal constitution, nor any statute provided the trial court authority to grant the criminal defendant or anyone else access to a non-party's private home for an investigation without consent. Defendant sought an order allowing defense counsel and her investigator access to the private property of a non-party to view and photograph the crime scene. People in Interest of E.G., 2016 CO 19, 368 P.3d 946; People v. Chavez, 2016 CO 20, 368 P.3d 943.

For history of this rule, see People v. Adams County Court, 767 P.2d 802 (Colo. App. 1988).

Applied in Oaks v. People, 161 Colo. 561, 424 P.2d 115 (1967); People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972); People v. Smith, 179 Colo. 413, 500 P.2d 1177 (1972); People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974); People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974); People v. Steed, 189 Colo. 212, 540 P.2d 323 (1975); People v. Pearson, 190 Colo. 313, 546 P.2d 1259 (1976); People v. Henderson, 38 Colo. App. 308, 559 P.2d 1108 (1976); People v. Bloom, 195 Colo. 246, 577 P.2d 288 (1978); Goodwin v. District Court, 196 Colo. 246, 588 P.2d 874 (1979); People v. Davenport, 43 Colo. App. 41, 602 P.2d 871 (1979); People v. Schlegel, 622 P.2d 98 (Colo. App. 1980); People v. Callis, 666 P.2d 1100 (Colo. App. 1982), aff'd in part and rev'd in part, 692 P.2d 1045 (Colo. 1984); Denbow v. Williams, 672 P.2d 1011 (Colo. 1983); People v. Aalbu, 696 P.2d 796 (Colo. 1985); People v. Madsen, 743 P.2d 437 (Colo. App. 1987).

II. DISCLOSURE TO DEFENDANT.

Remedial purpose of automatic disclosure requirement in section (I)(a)(1) is broader than merely to ensure disclosure of evidence known to prosecution but unknown to defense. Disclosure of evidence within scope of rule is required whether or not material to the case, whether or not requested by defense, and whether or not it pertains to witnesses endorsed by the defense or who would be called by prosecution only for rebuttal purposes. Rule is designed to avoid loss of defendants' rights through inadvertent failure to make timely requests and to minimize court's supervisory role in basic discovery process, and to this end disclosure must be automatic unless prosecution takes specified action. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Written notification expressly required if prosecutor deems material not discoverable. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

This rule governs the obligation of the prosecutor to cooperate with the defendant in the securing of evidence. Thus the prosecutor is obligated to give the names and addresses of witnesses as well as reports, statements, etc., of experts it intends to use. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

Duty of prosecution and courts to disclose evidence favorable to defendant. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. Cheatwood v. People, 164 Colo. 334, 435 P.2d 402 (1967); People v. Millitello, 705 P.2d 514 (Colo. 1985); People v. Terry, 720 P.2d 125 (Colo. 1986).

The prosecution is obligated to disclose to the defendant evidence favorable to the accused. People v. Austin, 185 Colo. 229, 523 P.2d 989 (1974).

This rule does not conflict with § 18-6-403 (3)(b). Therefore the prosecution was required to provide the defense an opportunity to examine photographs under the same conditions as the prosecution. People v. Arapahoe County Court, 74 P.3d 429 (Colo. App. 2003).

Scope of discovery includes names, photographs, and statements. Where the defense seeks discovery, the defense should be given access to the names of those whose prints have been compared, photographs of the crime scene, and statements which the defendant has made prior to the time he testifies at trial. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

This rule clearly grants defense counsel the right to obtain names of witnesses and any statements which they might have given prior to the preliminary hearing. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

This rule requires that every statement made by the accused which is in the possession or control of the district attorney and which relates in any way to the series of events from which the charges pending against the accused arose must be disclosed to the defense upon an appropriate motion. People v. McKnight, 626 P.2d 678 (Colo. 1981).

And appropriate portions of grand jury minutes. A prosecuting attorney shall disclose to defense counsel those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971).

This rule permits discovery of grand jury testimony of a party. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Even where trial is upon a direct information. Examination of the grand jury testimony of a witness testifying at the trial is to be permitted whether the trial is upon an indictment or upon a direct information when the grand jury has not returned any indictment. Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

Disclosure not dependent on showing of particularized need. A disclosure of grand jury testimony should be granted without a showing of a particularized need. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971); McNulty v. People, 180 Colo. 246, 504 P.2d 335 (1972).

Although automatic disclosure of grand jury testimony not required. The liberal discovery rights which have been granted to a defendant in this state do not guarantee automatic access to everything that transpires before the grand jury. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971); People v. District Court, 199 Colo. 398, 610 P.2d 490 (1980).

Refusal to allow examination of grand jury testimony held not error. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Generally, defendant has no constitutional right to compel disclosure of a confidential informant, but consideration of fundamental fairness sometimes requires that identity of such informant be revealed. People v. Dailey, 639 P.2d 1068 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

In determining whether the government's privilege of not disclosing informants should yield in a particular case, court must balance the public's interest in protecting the flow of information to law enforcement officials about criminal activity against the defendant's need to obtain evidence necessary for the preparation of a defense. People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

Defendant not entitled to the disclosure of informant based on assertion that his defense requires it, but such disclosure may be ordered only where the defendant has established a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused. People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

A defendant is presumptively entitled to cross-examine a prosecution witness as to the witness's address and place of employment. Absent sufficient justification for withholding this information, a defendant's right to it is unqualified, and the defendant is under no obligation to provide reasons for seeking it. People ex. rel Dunbar v. District Court, 177 Colo. 429, 494 P.2d 841 (1972); People v. Thurman, 787 P.2d 646 (Colo. 1990).

The trial court, in exercising its sound discretion, is in the best position to assess the basis for and seriousness of the witness's apprehension. When such apprehension is expressed, the key consideration for a trial court in assessing a defendant's constitutional claim to a witness's identity, address or place of employment is whether in absence of that information the defendant will have sufficient opportunity to place the witness in his proper setting. People v. Thurman, 787 P.2d 646 (Colo. 1990).

The rule that an adequate showing by the prosecution that the witness legitimately fears for his safety requires some showing in turn by the defendant that the disclosure is so material as to outweigh the matter of the safety of the witness followed by a balancing of interests by the trial court should not be interpreted as requiring a threshold demonstration by the defendant that the information to be developed from learning the witness's identity, address and place of employment would prove highly material. The defendant's burden extends only to showing that the confidential informant is a material witness on the issue of guilt and that nondisclosure would deprive the defendant of a fair opportunity to test the witness's credibility. People v. Thurman, 787 P.2d 646 (Colo. 1990); People v. Turley, 870 P.2d 498 (Colo. App. 1993).

A witness's assertion of concern for personal safety does not have a talismanic quality automatically giving the witness the right to withhold information about identity, address and place of employment. Rather, the proper resolution of such issues requires careful attention to the facts of each case and application of the law concerning the right of an accused to confront adverse witnesses. People v. Thurman, 787 P.2d 646 (Colo. 1990).

Witnesses' personal safety outweighs defendant's confrontation right, as evidenced by the delay in the disclosure of their identities until they had been placed under witness protection. Witnesses' former addresses and telephone numbers should not be disclosed. People v. District Court, 933 P.2d 22 (Colo. 1997).

Dismissal of an action may be ordered in proper circumstances if the government declines to disclose a confidential informant in accordance with the court's order. People v. Martinez, 658 P.2d 260 (Colo. 1983); People v. Vigil, 729 P.2d 360 (Colo. 1986).

Dismissal was not warranted where the evidence that the prosecution failed to disclose was not exculpatory to the defendant, and the trial court's proposed remedy was a continuance conditioned on defendant's waiver of speedy trial until the date of the continuance. People v. Loggins, 981 P.2d 630 (Colo. App. 1998).

Trial court properly granted defendant additional time at trial to review previously undisclosed bank records for which summaries had been provided. Material was not exculpatory to defendant, there was no prejudice to defendant, and the information was relevant to show what defendant did with the victim's money. People v. Pagan, 165 P.3d 724 (Colo. App. 2006).

The decision to order disclosure of a witness's address and place of employment was committed to the sound discretion of the trial court. If there is evidence in the record to support the trial court's order compelling disclosure despite the witness's apprehension, the prosecution's willful refusal to comply with that order was properly sanctioned by the trial court under part III (g). People v. Thurman, 787 P.2d 646 (Colo. 1990).

The trial court acted within the bounds of its discretion in dismissing an information against the defendants where no actual threat was made against a witness, the trial court attempted to accommodate all parties by limiting disclosure to defense counsel alone, both the witness's and place of employment were withheld, and without the sought-after information the defense could not place the witness in her proper setting. People v. Thurman, 787 P.2d 646 (Colo. 1990).

Dismissal was appropriate sanction where disclosure of investigator's report of interview of victim was not made until after victim had testified, defense was in the midst of presenting its case, and alternative sanction of striking victim's testimony would have been tantamount to dismissal. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Written statements outside possession and control of prosecution cannot be discovered pursuant to this rule. Dickerson v. People, 179 Colo. 146, 499 P.2d 1196 (1972); People v. Garcia, 690 P.2d 869 (Colo. App. 1984).

However, statements in possession of police are within "possession or control" of the prosecuting attorney so as to meet the requirement of this rule. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Material in possession of the police is constructively in the possession of the prosecution. People v. Lucero, 623 P.2d 424 (Colo. App. 1980).

Offense report not within scope of discovery. An offense report, although signed by a complaining witness, is not within the scope of a pretrial discovery order as it is not a statement of a witness; it is, in fact, a compilation of information relating to the commission of crimes. People v. Morgan, 189 Colo. 256, 539 P.2d 130 (1975).

As internal police documents are not within purview of pretrial discovery order. People v. Morgan, 189 Colo. 256, 539 P.2d 130 (1975); Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972).

When contents of police records discoverable. Where the district attorney's office regularly receives information from police records, defense attorneys, including public defenders, are entitled to obtain such information in possession of prosecution. Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972).

Prosecution's failure to provide defendant with a written police incident report violated this section, but a new trial was not required because the report was either cumulative to information provided to the defense or was immaterial to the outcome of the trial, and the judge allowed defendant a continuance to study the document and the opportunity to examine witnesses as to its contents. People v. Banuelos, 674 P.2d 964 (Colo. App. 1983).

Failure by prosecution to provide defendant statement codefendant made to federal drug enforcement administration agent harmless error because defendant was not tried jointly with codefendant who had already pled guilty and been sentenced prior to defendant's trial and because defendant knew of the statement and its contents but failed to request it. People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008).

Failure by district court to provide defendant the opportunity to cross-examine a confidential informant about whether informant believed he would receive immigration support for his willingness to participate in a controlled buy was harmless error. However, the remedy provided by the court, an opportunity for the defense to interview the investigator who hired the informant, was inadequate. People v. Mendez, 2017 COA 129, __ P.3d __.

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following spe-

cific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).

Where defendant received forensics report linking him to tire slashing incident prior to trial and the court allowed the defendant to interview the report's introducing witness prior to testifying, court's admission of the evidence in an arson prosecution was not reversible error even though defendant claimed the evidence had not been disclosed to him. People v. Copeland, 976 P.2d 334 (Colo. App. 1998), aff'd on other grounds, 2 P.3d 1283 (Colo. 2000).

Notes of interviews with witnesses discoverable. This rule includes not only materials which have been signed or adopted by the government's witness, but also notes taken by officers when talking to the witness. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Defendant's right to discovery of a witness's statement includes the right to examine notes which are substantial recitals of the statement and were reduced to writing contemporaneously with the making of the statement. People v. Shaw, 646 P.2d 375 (Colo. 1982).

All that is required is that notes be substantially verbatim recitals of the oral statement. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967); People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Notes must not contain the interpretations, impressions, comments, ideas, opinions, conclusions, evaluations, or summaries of the person transcribing the notes. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Destruction of notes not necessarily violation of rule. Destruction of written notes made by a government agent during the taping of a phone conversation is not a violation of this rule when the substance of that conversation is set forth in the agent's formal report and made available to the defendant. People v. Alonzi, 40 Colo. App. 507, 580 P.2d 1263 (1978), aff'd, 198 Colo. 160, 597 P.2d 560 (1979).

Failure to disclose prosecutor's notes of an interview with a defense expert witness before the prosecutor relied on the notes when cross-examining the witness was harmless error, even if assumed to be a discovery violation, where the notes were provided to defense counsel during the cross-examination in time for redirect examination of the witness the next day. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

Right to discover statements of prosecution witnesses not absolute. The defendant does not have an absolute right to discover statements of prosecution witnesses under any and all circumstances. People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

Witness statements included in prosecution's notes and emails are not automatically discoverable. Those statements are only provided to the defense if they contain exculpatory information or if the trial court, exercising its discretion, finds the information is relevant, unavailable from any other source, and request is reasonable. People v. Vlassis, 247 P.3d 196 (Colo. 2011).

Court granted discretion to require disclosure. This rule vests in the trial court discretion to require disclosure prior to trial of any relevant material and information. People ex rel. Shinn v. District Court, 172 Colo. 23, 469 P.2d 732 (1970).

Trial court must exercise sound discretion in permitting discovery under part I (e)(1) (now (d)(1)), guided by the standards suggested in part I (e)(2) (now (d)(2)). People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973); People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And in granting discovery, court may enter appropriate protective orders under part III (d). People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And trial court's discovery ruling may consider judicial economy as long as constitutional rights are not violated. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Defendant must prove prejudice to show abuse of discretion. To show an abuse of discretion in not permitting discovery, the facts must reveal that the defendant was prejudiced. People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973).

When court may refuse discovery of relevant testimony. It is within the sound discretion of the court to refuse to compel discovery of what may be relevant testimony where defense counsel had the opportunity and failed to institute timely discovery. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

But discovery compelled when information of material importance to defense. Where the defense has made a specific request for certain information in the possession or control of the prosecution, discovery of that information is constitutionally compelled, not only when it is exculpatory, but also when it is of material importance to the defense. People v. Thatcher, 638 P.2d 760 (Colo. 1981); Chambers v. People, 682 P.2d 1173 (Colo. 1984).

Discovery material used for impeachment purposes is of material importance. The use of discovery material for impeachment pur-

poses implicates the due process rights of the defendant and is of material importance to the defense. People v. Thatcher, 638 P.2d 760 (Colo. 1981); People v. Hamer, 689 P.2d 1147 (Colo. App. 1984).

Material to be used for impeachment purposes is subject to the discovery provisions of this rule. People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

"Material" defined. In the context of a completed trial, ''material,'' constitutionally, means evidence which, when evaluated in light of the entire record, likely would have affected the outcome of the trial. People v. Shaw, 646 P.2d 375 (Colo. 1982); People v. Hamer, 689 P.2d 1147 (Colo. App. 1984); People v. Wilson, 841 P.2d 337 (Colo. App. 1992).

And refusal to disclose such evidence mandates reversal. Where information sought on discovery by a defendant might have affected the outcome of the trial, failure to disclose that information mandates reversal of trial court's guilty verdict. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Minimal showing of necessity required of defendant. A defendant seeking disclosure must make a minimal showing of necessity, and mere speculation concerning the need for disclosure will not suffice. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

Defense counsel to determine relevance and usefulness of statement to defense. Generally, defense counsel is the appropriate party to make the determination that a statement is relevant to the conduct of the defense. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Determination of usefulness of evidence under part I (e) (now (d)) is a defense function, not a prosecutorial function, as only the defense can determine what will be material and helpful to its case. People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And statement need not be admissible to be relevant. A witness' statement, to be relevant, need not contain information admissible at trial, as long as the contents of the statement are relevant to the conduct of the defense. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

But must tend to prove or disprove fact of consequence. Information which would not tend to prove or disprove any fact that is of consequence to the defendant's guilt or innocence is not relevant and need not be disclosed under part I (a)(1)(I). People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Whether nondisclosure is erroneous depends on all circumstances of case, the nature of the crime charged, and possible defenses, as well as the possible significance of the informant's testimony. People v. Peterson, 40 Colo. App. 102, 576 P.2d 175 (1977).

Since this rule imposes disclosure obligations for information only obtained before or during trial by the prosecution, the rule's disclosure obligation does not apply to information acquired in response to defendant's post-conviction claims. People v. Owens, 2014 CO 58M, 330 P.3d 1027.

Prosecution not required to furnish statements of anticipated witnesses. A discovery order does not impose an affirmative obligation on the prosecution to reduce the oral statements of anticipated witnesses to writing and to furnish the substance of their testimony to the defense. People v. Garcia, 627 P.2d 255 (Colo. App. 1980).

Section (a)(1) of part I specifically requires disclosure only of the substance of oral statements made by the accused, or, if a joint trial is to be held, by a codefendant, and, aside from these specified situations, additional disclosure of oral statements is not mandated. People v. Garcia, 627 P.2d 255 (Colo. App. 1980).

Prosecution fulfilled its discovery obligations by providing notice that officer would testify and providing officer's written report. Prosecution was not required to reduce the substance of the officer's anticipated testimony to writing and furnish it to the defense before trial. People v. Knight, 167 P.3d 141 (Colo. App. 2006).

Part I (a)(1)(I) requires the prosecution to provide the defense only with the written statements of witnesses or any written reports that quote or summarize oral statements made by witnesses. If the supreme court had intended the disclosure of unrecorded oral statements, then it would have so specified. People v. Denton, 91 P.3d 388 (Colo. App. 2003).

No abuse of discretion where trial court found prosecution had not committed a discovery violation by failing to disclose certain oral statements that the victim made to a police officer and to the prosecutor. The victim's statements were not exculpatory, and nothing in the record suggests that the prosecutor or the police officer deliberately refrained from reducing the victim's statements to writing in order to avoid a discovery obligation. People v. Denton, 91 P.3d 388 (Colo. App. 2003).

When disclosure of rebuttal witness unnecessary. The requirement, contained in part II (c), that the prosecution disclose the identity of its rebuttal witnesses under certain circumstances, is inapplicable where the rebuttal testimony is not introduced to refute a defense, but is introduced solely to impeach the credibility of a defense witness. People v. Vollentine, 643 P.2d 800 (Colo. App. 1982).

The disclosure requirements of this rule are not applicable to impeachment testimony which does not contradict alibi evidence but does attack the credibility of defense witnesses on matters collateral to the alibi defense. People v. Muniz, 622 P.2d 100 (Colo. 1980).

And prosecution not required to disclose which witnesses will be called for rebuttal. Neither this rule nor § 16-5-203 specifically requires the prosecution to endorse or to disclose which of the endorsed witnesses it will call for rebuttal. People v. Hamrick, 624 P.2d 1333 (Colo. App. 1979), aff'd, 624 P.2d 1320 (Colo. 1981); People v. Avila, 944 P.2d 673 (Colo. App. 1997).

Disclosure of identity of confidential informant. The prosecution's privilege to refuse to disclose the identity of a confidential informant is subject to a defendant's right to disclosure of the identity of an informant when the informant's testimony or identity is relevant or helpful to the defense of the accused or is necessary to a fair determination of the cause. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

When determining whether the identity of a confidential informant should be disclosed, the trial court must balance the needs of law enforcement officials to preserve the anonymity of the informant with the defendant's right to obtain evidence necessary for the preparation of his defense. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

When informant's identity to be disclosed. The interests of a fair trial require disclosure of the informant's identity if the facts reveal that he is ''so closely related'' to the defendant as to make his testimony highly material. People v. Peterson, 40 Colo. App. 102, 576 P.2d 175 (1977).

When informant's identity not be disclosed. There was no prejudicial error in the denial of appellant's motion to disclose the informer's identity where the trial judge concluded that the public's and the informer's interest in preserving his anonymity outweighed appellant's interest in disclosure. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

This rule does not require the prosecution to specifically identify that a witness is an expert witness, although that is the better practice. People v. Greer, 262 P.3d 920 (Colo. App. 2011).

Under reciprocal discovery order, defendant was not entitled to disclosure of police interview with witness which concerned crime other than that with which the defendant was charged. People v. Green, 759 P.2d 814 (Colo. App. 1988).

Prosecution's duty is to keep in contact with witness to offense. The prosecution is under a duty to make reasonable and good faith efforts to keep in contact with an eye and ear witness to an alleged criminal offense from the time the decision to file charges is made. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982); People v. Wandel, 696 P.2d 288 (Colo. 1985), cert. denied, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

However, this duty does not include the obligation to establish and employ a regularized method of maintaining contact with the informant. People v. Wandel, 696 P.2d 288 (Colo. 1985), cert. denied, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

Lack of full name or current address not violation of disclosure obligation. Although the prosecution is obligated to provide all pertinent information in its possession which might assist the defense in locating the informant, if such information does not contain the informant's full name or current address, the disclosure obligation may, nonetheless, still be satisfied. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982).

Charges dismissed for failure to disclose informant's address. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982).

Prosecution must disclose to the defense any evidence within the prosecution's possession or control that tends to negate the guilt of the accused as to the offense charged, or tends to reduce the punishment therefor. People v. Bradley, 25 P.3d 1271 (Colo. App. 2001).

Tangible evidence must be preserved and made available to defendant, where it may assist defense. People v. Morgan, 199 Colo. 237, 606 P.2d 1296 (1980).

Requirements of part I (a)(1)(IV) (now (a)(1)(III)) met. Where the trial court denied a defense motion to allow the defense's expert to examine a sample of the alleged cocaine in the expert's lab, but did allow the defense expert to examine a sample of cocaine in the forensic laboratory at the Denver general hospital and also ordered the disclosure of the test results of the people's expert, this met the requirements of part I (a)(1)(IV) (now (a)(1)(III)). People v. Brown, 185 Colo. 272, 523 P.2d 986 (1974).

Test to determine whether destruction of evidence violates due process. There is a three-prong test to determine whether the loss or destruction of evidence by the state, with the result that the defendant is denied access to that evidence, violates a defendant's right to due process of law: (1) Whether the evidence was suppressed or destroyed by the prosecution; (2) whether the evidence is exculpatory; and (3) whether the evidence is material to the defendant's case. People v. Garries, 645 P.2d 1306 (Colo. 1982).

For the imposition of a judicial sanction in connection with a defendant's due process claim based upon the loss or destruction of evidence, the record must show that the destroyed evidence is constitutionally material. People v. Shaw, 646 P.2d 375 (Colo. 1982). (See note above, with the catchline '"Material' defined.")

No due process violation where mere claim that evidentiary material could have been subjected to tests and a failure to preserve that evidence, unless an accused can show bad faith on the part of the police. People v. Wyman, 788 P.2d 1278 (Colo. 1990); People v. Apodaca, 998 P.2d 25 (Colo. App. 1999).

Failure to comply with this rule is not reversible error unless the withheld evidence was material to guilt or punishment. No due process violation unless the accused can show bad faith by the police or the prosecution. People v. Bradley, 25 P.3d 1271 (Colo. App. 2001).

Where testimony about destroyed evidence suppressed, defendant not entitled to dismissal of complaint. Where all physical evidence collected by law enforcement officers in the investigation of a crime was destroyed or released prior to the defendant's arrest, so it was unavailable to him at trial, and the defendant is granted an order suppressing testimony by officers about the missing evidence, he is not entitled to a dismissal of the complaint against him. People v. Archuleta, 43 Colo. App. 474, 607 P.2d 1032 (1979).

Discovery during trial of prior out-of-court statement. Under this rule defense counsel is provided with access to a witness' out-of-court statements immediately after the witness testifies on direct examination. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Notes of district attorney are not within ambit of this rule and are not to be furnished to defense counsel. Hopper v. People, 152 Colo. 405, 382 P.2d 540 (1963); Rapue v. People, 171 Colo. 324, 466 P.2d 925 (1970); Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

Prosecution's notes on voir dire are protected by the work product doctrine even under a Batson challenge. People v. Trujillo, 15 P.3d 1104 (Colo. App. 2000).

Record of witnesses' oral statement not protected as work product. Where the majority of notes are in substance a record of oral statements made by witnesses, such notes are not protected by the work-product exception. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Finding of denial of fair trial because of violation of rule. People v. Edgar, 40 Colo. App. 377, 578 P.2d 666 (1978).

Where district attorney learned of physician's opinion in an oral interview, and it appeared that the interview was not recorded in any manner, and the defense learned of physician's opinion before trial and did not request a continuance, the district attorney was under no duty to furnish the opinion to the defendant, and there was no prejudice to defendant. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

A compelling reason or need for an involuntary psychological examination of a victim must be shown before the trial court will grant such a motion by the defense. The defendant's right to a fair trial must be balanced against the victim's privacy interests. People v. Chard, 808 P.2d 351 (Colo. 1991); People v. Turley, 870 P.2d 498 (Colo. App. 1993).

Defendant failed to show he was prejudiced by the late disclosure of the prosecution's expert's report where, at the time the report was disclosed, defendant had already obtained the services of an expert witness to examine evidence and 25 days still remained to review prosecution's expert's report and perform additional tests if desired. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Defendant's failure to move for continuance, after admission of incriminating evidence at trial, discredited any claim of prejudice arising from alleged discovery violation. People v. Wieghard, 727 P.2d 383 (Colo. App. 1986).

Mere speculation regarding the court's disposition of a motion for a continuance or to recall a witness does not obviate the defendant's duty to seek such procedures if the defendant is to base his claim of prejudice on the inability to prepare new theories of defense or to cross-examine past witnesses in light of previously undisclosed evidence. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Information in possession of detective concerning drug use and crimes of prosecution witness is covered by this rule, and failure of prosecution to disclose such information violates this rule even if prosecutor had no actual knowledge of the information. People v. District Court, 793 P.2d 163 (Colo. 1990).

Trial court's refusal to order the prosecution to obtain and disclose the criminal histories of all prosecution witnesses, including police officers, was not in error. Trial court's order requiring the prosecution to disclose any criminal history of a police officer witness of which it is aware was also held to not be in error. People v. Fox, 862 P.2d 1000 (Colo. App. 1993).

The sanction for nondisclosure applies only against the prosecution and not against a co-defendant; a co-defendant in a joint trial should be able to use prior felony convictions to impeach the testimony of a defendant who chooses to testify. People v. Lesney, 855 P.2d 1364 (Colo. 1993).

No mistrial resulted when the prosecution refused to provide defendant with the readouts printed by the instruments used to reach the test results. This rule requires only that the expert's report and the results be provided, and defendant had the results for four months before trial and did not file a motion indicating the results were incomplete or inadequate. People v. Evans, 886 P.2d 288 (Colo. App. 1994).

Defendant's statement was not subject to the mandatory disclosure provisions of part I (a)(2), or the constitutional obligation to dis-

close exculpatory information where the trial court found defendant's testimony implausible and essentially made a finding of fact that the statement was not made. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Prosecution not required to disclose derivative trial exhibits of identical content that prosecution prepared from disclosed material. People v. Armijo, 179 P.3d 134 (Colo. App. 2007).

Protection against disclosure extends to opinion work product prepared by the prosecution in anticipation of any criminal prosecution. Trial court erred in ordering prosecution to disclose materials that the prosecution prepared in anticipation of a different but related criminal investigation. Court must conduct ex parte, in camera review to determine whether contested materials constitute opinion work product prepared in anticipation of a criminal prosecution. People v. Angel, 2012 CO 34, 277 P.3d 231.

Juvenile adjudications are not part of a witness's criminal history and therefore not subject to automatic disclosure. People v. Corson, 2016 CO 33, 379 P.3d 288.

Applied in People v. Shannon, 683 P.2d 792 (Colo. 1984); People v. Doss, 782 P.2d 1198 (Colo. App. 1989); People v. Cobb, 962 P.2d 944 (Colo. 1998).

III. DISCLOSURE TO PROSECUTION.

Part II (b) is constitutional on its face, as it does not violate the privilege against self-incrimination. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Part II (c) is constitutional on its face, as it does not violate the privilege against self-incrimination. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Trial court to determine whether discovery will violate defendant's constitutional rights. The trial court, in ruling on the prosecution's motions under this rule, must first determine whether discovery which has been objected to will constitute a violation of the defendant's constitutional rights. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975); People v. Castro, 854 P.2d 1262 (Colo. 1993).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) Whether the discovery violation was willful or in bad faith; (2) the materiality of the evidence excluded; (3) the extent to which the prosecution will be surprised or prejudiced; (4) the effectiveness of less severe sanctions; and (5) whether the defendant himself knew of or cooperated in the discovery violation. People v. Pronovost, 756 P.2d 387 (Colo. App. 1987).

Balancing approach applied in People v. Pronovost, 756 P.2d 387 (Colo. App. 1987).

Discovery of statements of nonexpert defense witnesses not authorized. Part II (c) neither explicitly nor implicitly authorizes trial courts to grant prosecution motions for pretrial discovery of statements of nonexpert defense witnesses. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

Scope of part II (c) does not purport to extend to work product. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

But discovery of defense theories and names of supporting witnesses permitted upon condition. By its direct and uncontradicted terms, part II (c) permits discovery of defense theories and the names of supporting witnesses only when the defendant intends to introduce them at trial. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Demonstrative, nontestimonial evidence. While the privilege against self-incrimination does not extend to demonstrative evidence obtained from a defendant or from a witness, demonstrative evidence is limited to nontestimonial evidence such as fingerprints, blood specimens, handwriting examples, photographs and other evidence of similar character. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

When request for disclosure by prosecution invalid. The request for disclosure by the prosecution under this rule may be overbroad and, therefore, invalid if it seeks information which might serve as an unconstitutional link in a chain of evidence tending to establish the accused's guilt of a criminal offense. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975); Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

This rule governs a prosecution request for nontestimonial identification once judicial proceedings against a defendant have been initiated. People v. Angel, 701 P.2d 149 (Colo. App. 1985).

A prosecuting attorney has both a statutory and a constitutional obligation to disclose to the defense any material, exculpatory evidence he possesses; however, failure to disclose information helpful to the accused results in a violation of due process only where the evidence is "material" either to guilt or punishment. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

More specifically, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

"Reasonable time" requirement of rule violated when defendant failed to respond to prosecution's specification for several months or until actual commencement of trial unless

there is a showing of unusual circumstances. People v. Hampton, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

Factors for determining when exclusion of alibi testimony is proper are discussed in People v. Hampton, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

The trial court, after applying the factors for determining when exclusion of alibi testimony is proper, determined that the exclusion of the alibi evidence was appropriate under the facts of the case and the trial court's exercise of its discretionary authority will not be overturned on appeal because the trial court did not abuse its discretion. People v. Hampton, 758 P.2d 1344 (Colo. 1988) (decided under former Crim. P. 12.1).

No abuse of discretion when court prohibited defense witness from testifying when the defense did not disclose the witness within the time period in the rule and failed to articulate why the disclosure was made late. In addition, the witness was not a key witness, and the evidence that the witness was going to rebut was rebutted by another defense witness. People v. Carmichael, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Although a prosecutor's duty to disclose potentially exculpatory evidence is not limited by the circumstances of known defense theories or considerations of relevancy, reversible error did not exist since the only evidence linking gun to the shooting in question was its discovery in the back seat of the suspects' vehicle and there was no reasonable probability that had the evidence been disclosed, the result of the trial would have been different. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Although an alibi defense not an affirmative defense so as to place on the People the burden of proof to rebut, and trial court did not err by refusing a theory of case instruction treating alibi as an affirmative defense, defendant was entitled to a properly worded instruction setting forth his theory of the case. People v. Nunez, 824 P.2d 54 (Colo. App. 1991).

Notice of alibi is admissible as a prior inconsistent statement when a defendant testifies at trial in a manner inconsistent with such notice. People v. Lowe, 969 P.2d 746 (Colo. App. 1998).

Trial court did not abuse its discretion in ordering a mistrial when the defense did not disclose to prosecution a defense witness's new alibi evidence and elicited the evidence on cross- examination. People v. Jackson, 2018 COA 79, __ P.3d __.

Defendant's statement to psychiatrist that was provided to the prosecution under this rule loses its confidential nature and cross-examination of the defendant concerning such statements as prior inconsistent statements is proper impeachment, even if the psychiatrist did not testify at the defendant's trial. Use of such statements do not violate the attorney-client privilege or the right to effective assistance of counsel. People v. Lanari, 811 P.2d 399 (Colo. App. 1989), aff'd, 827 P.2d 495 (Colo. 1992).

Purpose of the rule is fulfilled by the entry of a not guilty plea followed by no further disclosure of defenses, which operates to inform the prosecution that the defense is a general denial. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Nor does the rule require disclosure of intent to cross-examine prosecution witnesses. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Exclusion of a defense witness by the court as a sanction against the defense attorney, for failing to disclose such witness to the prosecution in violation of this rule, was excessive and violated defendant's right to challenge a prosecution witness's credibility through cross-examination based on testimony that would have been given by the excluded witness. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Although the trial court has broad discretion in deciding the appropriate course of action in response to a violation of this rule by the defense, it must consider: (1) The reason for and degree of culpability associated with the violation; (2) the extent of resulting prejudice to the other party; (3) any events after the violation that mitigate such prejudice; (4) reasonable and less drastic alternatives to exclusion; and (5) any other relevant facts. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Because the error violated the defendant's right under the sixth amendment to confront the witnesses against him and caused material prejudice to his defense, the error was not harmless beyond a reasonable doubt and required a new trial. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Prosecution could not be sanctioned for police conduct in which it did not participate. Trial court may not preclude prosecution from applying for and obtaining order for nontestimonial identification evidence though blood and hair samples obtained by police through a warrantless search were suppressed. People v. Diaz, 55 P.3d 1171 (Colo. 2002).

IV. REGULATION.

Rule relates only to pretrial discovery and not to posttrial discovery. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Preservation of evidence upon motion for protective order. If the government seeks a protective order regarding grand jury testimony,

the court should first examine ''in camera'' the material sought to be protected before making its ruling, and if material is withheld from the defendant under such an order, it should be sealed by the court and preserved for consideration on appeal. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971).

Introduction of identification testimony within court's discretion. But where a trial judge, after considering the totality of the circumstances at an ''in camera'' hearing, permits the introduction of identification testimony, he does not abuse his discretion, and a reviewing court will not substitute its judgment for that of the trial court. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Trial court properly allowed witness endorsed as a perceiving witness to testify as an expert witness after defense raised the issue related to the expertise at trial. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

In camera review of documents obtained only by showings of necessity and undue hardship. Although section (f) of part III allows for in camera review of documents to determine whether they are covered by attorney work-product doctrine, the party seeking inspection in camera of confidential portions of the attorney's documents must show necessity and that obtaining the information through other means would cause undue hardship. People v. Madera, 112 P.3d 688 (Colo. 2005).

If, however, parties in a discovery dispute must resort to court intervention, the moving party must show that other means of resolving the dispute have been exhausted and that the requested relief is narrowly tailored to fit the implied waiver of the attorney-client privilege involved. People v. Madera, 112 P.3d 688 (Colo. 2005).

Sanction within discretion of trial court. Whether the sanction imposed by the trial court for failure to comply with section (c) of part II is appropriate, under the facts and circumstances of a case, is a matter which is within the sound discretion of the trial court. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980); People v. Madsen, 743 P.2d 437 (Colo. App. 1987).

A trial judge has broad discretion in considering motions to endorse additional witnesses and fashioning remedies for violations of a discovery order under this rule. People v. District Court, 664 P.2d 247 (Colo. 1983).

Trial court need not prevent district attorney from using evidence that was not disclosed to defendant when the court recessed for the day to permit defense time to investigate evidence and the substance of the evidence was similar to other statements which had been disclosed. People v. Hammons, 771 P.2d 1 (Colo. App. 1988).

When exercising its discretion in fashioning remedies for violations of this rule, the trial court should impose the least severe sanction that will ensure full compliance with the court's discovery orders. People v. District Court, 793 P.2d 163 (Colo. 1990); People v. Castro, 854 P.2d 1262 (Colo. 1993); People v. Lee, 18 P.3d 192 (Colo. 2001).

The trial court should also take into account the reason why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. People v. District Court, 793 P.2d 163 (Colo. 1990); People v. Castro, 854 P.2d 1262 (Colo. 1993); People v. Lee, 18 P.3d 192 (Colo. 2001).

Sanction held to abridge right to fair trial. Discovery sanction which substantially prevents the negation of the prosecution's direct testimony, abridges defendant's right to a fair trial and constitutes an abuse of discretion. People v. Willis, 667 P.2d 246 (Colo. App. 1983).

Sanction held not to be abuse of discretion. An order preventing the district attorney from using certain evidence is a harsh sanction, but it is not necessarily an abuse of discretion. People v. District Court, 664 P.2d 247 (Colo. 1983).

Sanction of excluding presentation of evidence by a defendant is a matter of judicial discretion to be preceded by adequate inquiry into circumstances of defendant's noncompliance with court's discovery order and effect of exclusion. People v. Reger, 731 P.2d 752 (Colo. App. 1986).

Factors pertinent to sanction of excluding evidence for noncompliance with a discovery order include reason for and degree of culpability associated with failure to timely respond to prosecution's request for discovery, whether and to what extent nondisclosure prejudiced prosecution's opportunity effectively to prepare for trial, whether events occurring subsequent to noncompliance mitigate prejudice to prosecution, whether there is a reasonable and less drastic alternative to preclusion of evidence, and any other relevant factors arising out of circumstances of the case. People v. Reger, 731 P.2d 752 (Colo. App. 1986).

Monetary sanction payable from public funds for violation of discover rules is beyond authority of district court. People v. District Court, 808 P.2d 831 (Colo. 1991).

Preclusion is proper method to assure compliance with discovery order. People v. Patterson, 189 Colo. 451, 541 P.2d 894 (1975).

Sanction of a continuance held to be abuse of discretion where delay was not attributable to the defendant and he was thereby denied his right to a speedy trial. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Decision whether to continue trial is within court's sound discretion, even when a defendant asserts a need to prepare to meet unexpected or newly discovered evidence or testimony. Trial court properly denied defense motion for continuance where prosecution's toxicologist had been endorsed two months before trial and materials used by toxicologist during his testimony were made during trial. People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) The reason for and the degree of culpability associated with the failure to timely respond to the prosecution's specification of time and place; (2) whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial; (3) whether events occurring subsequent to the defendant's noncompliance mitigate the prejudice to the prosecution; (4) whether there is a reasonable and less drastic alternative to the preclusion of alibi (or other defense) evidence; (5) and any other relevant factors arising out of the circumstances of the case. People v. Hampton, 696 P.2d 765 (Colo. 1985); People v. Pronovost, 773 P.2d 555 (Colo. 1989); cert. denied, 785 P.2d 611 (Colo. 1990).

Exclusion or suppression of exculpatory evidence which should have been disclosed by prosecution to defense does not further search for truth and is not merited by the possible deterrence of prosecutorial misconduct, where the prosecutor had no actual knowledge of the evidence, where the evidence is crucial to the case, where a continuance would cure any prejudice suffered by the defendant because of the violation of the rule, and where the prosecutor did not willfully act in bad faith. People v. District court, 793 P.2d 163 (Colo. 1990).

No prosecutorial misconduct exists where the prosecutor leaves it to the discretion of the potential witness as to whether the witness talks to the defendant's investigator. People v. Antunes, 680 P.2d 1321 (Colo. App. 1984).

It was an abuse of discretion to exclude DNA evidence when record supported prosecutor's explanation that she was complying with court's earlier directives, when such exclusion could have a potentially distorting effect on truth finding, and when record shows that continuance may have been adequate to cure any prejudice suffered by defendant. People v. Lee, 18 P.3d 192 (Colo. 2001).

It was an abuse of discretion to impose sanctions that were tantamount to dismissal of the charges where trial court had found no bad faith or willful violation of this rule and determined that dismissal would be inappropriate. People v. Daley, 97 P.3d 295 (Colo. App. 2004).

Defendant's counsel's decision to provide defendant with limited access to selected discovery materials, though the defendant wants to review all discovery materials, does not create a conflict warranting substitution of counsel. Counsel's sharing of some discovery materials with defendant and summarizing of other discovery materials for defendant were appropriate ''other methods'' for having defendant review discovery. People v. Krueger, 2012 COA 80, 296 P.3d 294.

V. PROCEDURE.

Discovery rules not applicable to extradition proceedings. Allowing full discovery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. Temen v. Barry, 695 P.2d 745 (Colo. 1984).

Evidentiary hearing on disclosure. Once a defendant has made an initial showing of the necessity for disclosure, the issue becomes an evidentiary matter for resolution by the trial court and an evidentiary hearing normally will be required. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

Rule not guide as to when discovery to take place. This rule is only intended to create a cut-off time for the filing of discovery motions, and offers no guidance as to when the discovery should take place. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Procedure for exchange of statements from prosecution to defense counsel established. Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Informally or through in camera proceedings, the trial court should have examined the requested medical files to determine which portions, if any, were defense counsel's work product and therefore entitled to protection from discovery. On completing the examination, the trial court should have protected confidential or privileged material, only allowing disclosure of the files after defense counsel had an opportunity to excise any confidential or privileged material. People v. Ullery, 984 P.2d 506 (Colo. 1999).

The court erred by allowing the jurors to take juror notebooks home, but the error was not a structural error requiring reversal. The error was not a fundamentally serious error that would prevasively prejudice the entire of the proceedings. People v. Willcoxon, 80 P.3d 817 (Colo. App. 2002).

Failure to allow defense counsel to review juror notebooks prior to trial is harmless error if counsel is allowed to review the notebook during trial and make objections. People v. Baird, 66 P.3d 183 (Colo. App. 2002).

Jury notebooks are not to supplant the requirement of Crim. P. 30 that jurors be orally instructed prior to closing arguments. People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

Part V (c) applies only to materials that are discoverable and actually received by the requesting party. Any other reading would require a requesting party to pay for materials that requesting party might not be allowed to review. People v. Trujillo, 114 P.3d 27 (Colo. App. 2004).

District court erred in suppressing statements in a case in one county made by defendant during lawful investigation of a crime in another county. Because defendant effectively waived his fifth and sixth amendment right to counsel through a knowing and voluntary Miranda waiver as to the particular crime being investigated, there was no duty pursuant to part II of this rule for the officers in the second county to notify counsel in the first county of the time and place of the Crim. P. 41.1 identification procedure. This rule applies to judicial proceedings, and there was no judicial proceeding initiated against defendant in the second county for the crime being investigated. People v. Luna-Solis, 2013 CO 21, 298 P.3d 927.

Rule 17. Subpoena

In every criminal case, the prosecuting attorneys and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness upon the trial or other hearing.

(a) For Attendance of Witnesses — Form — Issuance. A subpoena shall be issued either by the clerk of the court in which case is filed or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. It shall state the name of the court and the title, if any, of the proceedings, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) Pro Se Defendants. Subpoenas shall be issued at the request of a pro se defendant, as hereinafter provided. The court or a judge thereof, in its discretion in any case involving a pro se defendant, may order at any time that a subpoena be issued only upon motion or request of a pro se defendant and upon order entered thereon. The motion or request shall be supported by an affidavit stating facts supporting the contention that the witness or the items sought to be subpoenaed are material and relevant and that the defendant cannot safely go to trial without the witness or items which are sought by subpoena. If the court is satisfied with the affidavit it shall direct that the subpoena be issued.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service on a Minor. Service of a subpoena upon a parent or legal guardian who has physical care of an unemancipated minor that contains wording commanding said parent or legal guardian to produce the unemancipated minor for the purpose of testifying before the court shall be valid service compelling the attendance of both said parent or legal guardian and the unemancipated minor for examination as witnesses. In addition, service of a subpoena as described in this subsection shall compel said parent or legal guardian either to make all necessary arrangements to ensure that the unemancipated minor is available before the court to testify or to appear in court and show good cause for the unemancipated minor's failure to appear.

(e) Service. Unless service is admitted or waived, a subpoena may be served by the sheriff, by his deputy, or by any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena may be made by delivering a copy thereof to

the person named. Service may also be made in accordance with Section 24-30-2104(3), C.R.S. Service is also valid if the person named has signed a written admission or waiver of personal service, including an admission or waiver signed using a scanned or electronic signature. If ordered by the court, a fee for one day's attendance and mileage allowed by law shall be tendered to the person named if the person named resides outside the county of trial.

(f) Place of Service.

(1) **In Colorado.** A subpoena requiring the attendance of a witness at a hearing or trial may be served anywhere within Colorado.

(2) **Witness from Another State.** Service on a witness outside this state shall be made only as provided by law.

(g) For Taking Deposition — Issuance. A court order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described in the order.

(h) Failure to Obey Subpoena.

(1) **Contempt.** Failure by any person without adequate excuse to obey a duly served subpoena may be deemed a contempt of the court from which the subpoena issued. Such contempt is indirect contempt within the meaning of C.R.C.P. 107. The trial court may issue a contempt citation under this subsection (1) whether or not it also issues a bench warrant under subsection (2) below.

(2) **Trial Witness — Bench Warrant.**

(A) When it appears to the court that a person has failed without adequate excuse to obey a duly served subpoena commanding appearance at a trial, the court, upon request of the subpoenaing party, shall issue a bench warrant directing that any peace officer apprehend the person and produce the person in court immediately upon apprehension or, if the court is not then in session, as soon as court reconvenes. Such bench warrant shall expire upon the earliest of:

(i) submission of the case to the jury; or

(ii) cancellation or termination of the trial.

(B) Upon the person's production in court, the court shall set bond.

Source: (d) amended June 19, 1986, effective January 1, 1987; (c) amended and effective October 31, 1996; (d) to (h) amended November 4, 1999, effective January 1, 2000; entire rule amended and effective September 4, 2003; (e) amended and adopted October 15, 2009, effective January 1, 2010; (h) amended and adopted April 23, 2012, effective July 1, 2012; (e) amended and effective May 15, 2013; (e) amended and effective November 3, 2015.

Cross references: For fees of witnesses, see §§ 13-33-102 and 13-33-103, C.R.S.

ANNOTATION

Law reviews. For article, ''The Ethics of Contacting Witnesses'', see 46 Colo. Law. 40 (Dec. 2017).

A defendant is not entitled to issue ex parte subpoenas duces tecum by leave of the court. The fifth and sixth amendments to the federal constitution do not give the defendant the right to engage in this type of discovery without providing the information to the prosecution. People v. Baltazar, 241 P.3d 941 (Colo. 2010).

Effect of failure of subpoenaed witness to appear. Under some circumstances, failure of court to grant continuance or to order mistrial when witness who has been subpoenaed fails to appear requires reversal. People v. Lee, 180 Colo. 376, 506 P.2d 136 (1973).

A trial court does not abuse its discretion in denying a continuance because the defendant's psychiatric witness who had not been served with a subpoena failed to appear. People v. Mann, 646 P.2d 352 (Colo. 1982).

Order of court should be required before a subpoena duces tecum is issued. Digiallonardo v. People, 175 Colo. 560, 488 P.2d 1109 (1971).

During the course of a criminal prosecution, the prosecution may compel production of telephone and bank records through the use of a subpoena duces tecum so long as the defendant has the opportunity to challenge the subpoena for lack of probable cause. Use of a subpoena duces tecum for such records is

not an unreasonable search and seizure provided that it is supported by probable cause and is properly defined and executed. People v. Mason, 989 P.2d 757 (Colo. 1999).

Probable cause for issuance of a subpoena duces tecum for obtaining telephone and bank records exists if there is a reasonable likelihood that the evidence sought exists and that it would link the defendant to the crime charged. People v. Mason, 989 P.2d 757 (Colo. 1999).

District attorney has standing to challenge defense subpoena of third party. As the prosecuting party, the district attorney has an independent interest in ensuring the propriety of third-party subpoenas as part of the management of the case and the prevention of complainant or witness harassment through improper discovery. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

To withstand challenge to criminal pretrial third-party subpoena, defendant must demonstrate: (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis; (2) that the materials are evidentiary and relevant; (3) that the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) that the application is made in good faith and is not intended as a general fishing expedition. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

In addition to this basic test, for subpoenas issued for materials that may be protected by privilege or a right to confidentiality, a balancing of interests is necessary and the defendant must make a greater showing of need. In camera review may be necessary in some instances, but is not mandated. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

District attorney has standing to move to quash defense subpoena of alleged victim to appear at preliminary hearing. The district attorney has an independent interest in ensuring the propriety of subpoenas and in preventing witness harassment. People v. Bros., 2013 CO 31, 308 P.3d 1213.

Trial court abused discretion in failing to rule on motion to quash witness subpoena prior to preliminary hearing. Court may quash witness subpoena prior to hearing prosecution's evidence at preliminary hearing. With respect to a defense subpoena of a child victim, the prosecution indicated that the child's testimony would not be required for the probable cause determination and that the child could suffer harm by preparing for and attending the preliminary hearing, even if not ultimately required to testify. People v. Bros., 2013 CO 31, 308 P.3d 1213.

Witnesses for indigent defendants. The expenses of obtaining the testimony of witnesses for an indigent defendant must be paid by the state. People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Defendant must establish indigency to satisfaction of court. People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

No authority to quash properly issued subpoena. There is no authority under this rule to quash a subpoena if the district attorney has complied with the technical requirements. People v. Ensor, 632 P.2d 641 (Colo. App. 1981).

Mailing a subpoena to a witness, without more, does not comply with the requirements in section (e). The record does not indicate that the prosecution exercised diligence in trying to obtain the witness' presence. People v. Stanchieff, 862 P.2d 988 (Colo. App. 1993).

Subpoena served by mail insufficient to invoke contempt. A subpoena served by mail, pursuant to an administrative order, is insufficient to invoke the sanction of contempt under section (h). People v. Mann, 646 P.2d 352 (Colo. 1982).

For in camera examination of subpoenaed bank records, see Pignatiello v. District Court, 659 P.2d 683 (Colo. 1983).

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following specific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).

Applied in People v. Duncan, 179 Colo. 253, 500 P.2d 137 (1972); A v. District Court, 191 Colo. 10, 550 P.2d 315 (1976); Losavio v. Robb, 195 Colo. 533, 579 P.2d 1152 (1978).

V. VENUE

Rule 18. Venue

Deleted by amendment March 4, 2004, effective July 1, 2004.

Comment. The place for trying criminal cases is governed by applicable statutes or rules, such as section 18-1-202 (general venue statute), section 13-73-107 and section 13-74-107 (on statewide and judicial district grand jury indictments), section 18-2-202 (2) (a) (conspiracy), section 18-3-304 (4) (violation of custody orders), and section 19-2-105 (juvenile cases), as well as section 16-6-101 et seq. and Crim. P. 21 (change of venue), or the state or federal constitutions.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; entire rule amended and deleted March 4, 2004, effective July 1, 2004.

ANNOTATION

I. General Consideration.
II. Place of Trial.

I. GENERAL CONSIDERATION.

Applied in People v. Gould, 193 Colo. 176, 563 P.2d 945 (1977); People v. Freeman, 668 P.2d 1371 (Colo. 1983).

II. PLACE OF TRIAL.

Burden is on the state to prove venue in a criminal prosecution. Stout v. People, 171 Colo. 142, 464 P.2d 872 (1970).

But venue is a matter which may be proved by positive testimony or inferred from proof of other facts. Stout v. People, 171 Colo. 142, 464 P.2d 872 (1970).

For venue is a matter to be determined from all evidence in the case. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

Venue may be established by circumstantial evidence. People v. Bd., 656 P.2d 712 (Colo. App. 1982).

Waiver of error related to venue. Any error relating to venue, not mentioned during trial, in motion for acquittal, or in motion for a new trial, is waived, and cannot be raised on appeal. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Failure of county resident to pay taxes constitutes act in that county. Failure of a Pueblo county resident to pay taxes or file a return constitutes an act in Pueblo county in furtherance of the crimes charged, within the meaning of this rule. People v. Vickers, 199 Colo. 305, 608 P.2d 808 (1980).

Rule 19. No Colorado Rule

Rule 20. No Colorado Rule

Rule 21. Change of Venue or Judge

(a) Change of Venue.

(1) **For Fair or Expeditious Trial.** The place of trial may be changed when the court in its sound discretion determines that a fair or expeditious trial cannot take place in the county or district in which the trial is pending.

(2) **The Motion for Change of Venue.**

(I) A motion for a change of venue shall be in writing and accompanied by one or more affidavits setting forth the facts upon which the moving party relies, or in lieu of such affidavits the motion, with approval of the court, may contain a stipulation of the parties to a change of venue.

(II) The written motion and the affidavits shall be served upon the opposing party 7 days before the hearing; the nonmoving party may submit a written brief or affidavit or both in opposition to the motion.

(III) As soon as practicable, the court may hold a hearing on the motion.

(3) **Effect of Motions.** After a motion for a change of venue has been denied, the applicant may renew his motion for good cause shown, if since denial he has learned of new grounds for a change of venue. All questions concerning the regularity of the proceedings in obtaining changes of venue or the right of the court to which the change is made to try the case and execute the judgment, and all grounds for a change of venue, shall be considered waived if not raised before trial.

(4) **Order of Change.** Every order for a change of venue shall be in writing, signed by the judge, and filed by the clerk with the motion as a part of the record in the case. The

order shall state the court to which venue has been changed and the date and time at which the defendant shall appear at said court. The bond made, if any, shall remain in force and effect.

(5) **Disposition of Confined Defendant.** When the defendant is in custody, the court shall order the sheriff, or other officer having custody of the defendant, to remove him not less than 7 days before trial to the jail of the county to which the venue is changed and there deliver him together with the warrant under which he is held, to the jailer. The sheriff or other officers shall endorse on the warrant of commitment the reason for the change of custody, and deliver the warrant, with the prisoner, to the jailer of the proper county, who shall give the sheriff or other officer a receipt and keep the prisoner in the same manner as if he had originally been committed to his custody.

(6) **Transcript of Record.** When a change of venue is granted, the clerk of the court from which the change is granted shall immediately make a full transcript of the record and proceedings in the case, and of the motion and order for the change of venue, and shall transmit the same, together with all papers filed in the case, including the indictment or information, complaint, or summons and complaint, and bonds of the defendant and of all witnesses, to the proper court. When the change is granted to one or more, but not of several defendants, a certified copy of the indictment or information, and of each other paper in the case, shall be transmitted to the court to which the change of venue is ordered. Such certified copies shall stand as the originals, and the defendant shall be tried upon them. The transcript and papers may be transmitted by mail, or in any other way the court may direct. The clerk of the court to which the venue is changed shall file the transcript and papers transmitted to him, and docket the case; and the case shall proceed before and after judgment, as if it had originated in that court.

(7) **Imprisonment.** When after a change of venue the defendant is convicted and sentenced to imprisonment in the county jail, the sheriff shall transport him at once to the county where the crime was committed if that county has a jail or other place of confinement.

(b) Substitution of Judges.

(1) Within 14 days after a case has been assigned to a court, a motion, verified and supported by affidavits of at least two credible persons not related to the defendant, may be filed with the court and served on the opposing party to have a substitution of the judge. Said motion may be filed after the 14-day period only if good cause is shown to the court why it was not filed within the original 14-day period. The motion shall be based on the following grounds:

(I) The judge is related to the defendant or to any attorney of record or attorney otherwise engaged in the case; or

(II) The offense charged is alleged to have been committed against the person or property of the judge, or of some person related to him; or

(III) The judge has been of counsel in the case; or

(IV) The judge is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

(3) Upon the filing of a motion under this section (b), all other proceedings in the case shall be suspended until a ruling is made thereon. If the motion and supporting affidavits state facts showing grounds for disqualification, the judge shall immediately enter an order disqualifying himself or herself. Upon disqualifying himself or herself, the judge shall notify forthwith the chief judge of the district, who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the state court administrator, who shall obtain from the Chief Justice the assignment of a replacement judge.

Source: (a)(2)(II), (a)(5), and IP(b)(1) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. Change of Venue.
II. Substitution of Judges.

I. CHANGE OF VENUE.

Right to fair and impartial jury is a constitutional right which can never be abrogated. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

Change of venue subject to judicial discretion. Motion for change of venue due to local prejudice is a matter of judicial discretion. People v. Simmons, 183 Colo. 253, 516 P.2d 117 (1973).

Trial court has inherent power to change venue on its own motion if such action is necessary to provide a fair trial and, in appropriate circumstances, may do so over the defendant's objections. Wafai v. People, 750 P.2d 37 (Colo. 1988).

Question of prejudice one of fact. The question as to the existence of prejudice such as would dictate the granting of a motion for a change of venue is one of fact and rests within the sound discretion of the trial court. Nowels v. People, 166 Colo. 140, 442 P.2d 410 (1968); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Inquiry on review relating to fair trial. Regardless of the means imposed by the trial judge to insure the accused's constitutional right to a fair trial by a panel of impartial jurors, the critical inquiry on appellate review is whether the chosen means did in fact preserve the accused's right to a fair trial. People v. Botham, 629 P.2d 589 (Colo. 1981).

When change of venue must be granted. If a community is prejudiced against a citizen, or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972); Sollitt v. District Court, 180 Colo. 114, 502 P.2d 1108 (1972).

Denial of fair trial may be presumed when pretrial publicity is massive, pervasive, and prejudicial. People v. Simmons, 183 Colo. 253, 516 P.2d 117 (1973).

Pretrial publicity was extensive, but not so massive, pervasive, and prejudicial as to create a presumption that defendant was denied a fair trial. People v. Hankins, 2014 COA 71, 361 P.3d 1033.

Showing required when pretrial publicity not presumptively prejudicial. Where a defendant has not demonstrated the existence of massive, pervasive, and prejudicial publicity, which would create a presumption that he was denied a fair trial, he must establish the denial of a fair trial based upon a nexus between extensive pretrial publicity and the jury panel. People v. Botham, 629 P.2d 589 (Colo. 1981).

Record did not show actual prejudice. Only one impaneled juror said he had formed an opinion, and he adamantly declared that he could set it aside. People v. Hankins, 2014 COA 71, 361 P.3d 1033.

If prejudice exists, it should show up in the voir dire examination. Nowels v. People, 166 Colo. 140, 442 P.2d 410 (1968).

Burden of showing partiality of jurors met. Where it is shown that a significant number of jurors entertained an opinion of the defendant's guilt, had been exposed to pretrial publicity, and had knowledge of the details of the crime, the defendant has met his burden of showing the existence of an opinion in the minds of the jurors which raises a presumption of partiality. People v. Botham, 629 P.2d 589 (Colo. 1981).

Failure to grant change of venue not error. People v. Trujillo, 181 Colo. 350, 509 P.2d 794 (1973); People v. Medina, 185 Colo. 101, 521 P.2d 1257 (1974).

Change of venue is available pursuant to writ of habeas corpus. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

II. SUBSTITUTION OF JUDGES.

Law reviews. For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses a case relating to the personal interest of judge in case, see 15 Colo. Law. 1609 (1986).

Rule to be strictly applied. This rule and its statutory counterpart on change of judge must be strictly applied. People in Interest of A.L.C., 660 P.2d 917 (Colo. App. 1982).

Purpose of section (b) is to guarantee that no person is forced to stand trial before a judge with a bent of mind. People v. Botham, 629 P.2d 589 (Colo. 1981).

Judge's duty to sit on case unless prejudiced. Unless a reasonable person could infer that the judge would in all probability be prejudiced against the petitioner, the judge's duty is to sit on the case. Smith v. District Court, 629 P.2d 1055 (Colo. 1981).

Prejudice is mental condition or status, a certain bent of mind, which cannot be demonstrated, ordinarily, by direct proof. Smith v. District Court, 629 P.2d 1055 (Colo. 1981).

To be distinguished from normal personal opinions. Prejudice must be distinguished from the sort of personal opinions that as a matter of course arise during a judge's hearing of a cause. Smith v. District Court, 629 P.2d 1055 (Colo. 1981).

Discourteousness or rudeness do not dictate disqualification. It does not comport with

sound judicial policy or the intent of either section (b) or § 16-6-201 to require disqualification of a judge solely on the basis of subjective conclusions that he was discourteous or rude. Carr v. Barnes, 196 Colo. 70, 580 P.2d 803 (1978).

But appearance of possible prejudice can dictate disqualification. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

In reviewing the motion and affidavits, both the actuality and appearance of fairness must be considered. Even where the trial judge is convinced of his own impartiality, the integrity of the judicial system is impugned when it appears to the public that the judge is partial. People v. Botham, 629 P.2d 589 (Colo. 1981).

Section (b) of this rule has uniformly been applied in disqualification cases. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

Rule measures timeliness of motion to disqualify. One apparent purpose of section (b) of this rule was to provide a standard by which to measure timeliness of a motion for disqualification, whether filed pursuant to § 16-6-201, or to this rule. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

Later discovered or occurring disqualifying facts. When disqualifying facts do not occur or are not discovered by the moving party until after expiration of the time within which the motion and affidavits normally must be presented, application for a change of judge is timely if made as soon as possible after occurrence or discovery of those facts. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977); People v. Botham, 629 P.2d 589 (Colo. 1981).

Good cause for delay in filing shown. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

Defendant's claim that sentencing judge was biased, depriving him of his constitutional right to have an impartial judge determine his sentence, can only be reviewed for actual bias by the sentencing judge because defendant failed to file a motion to disqualify the sentencing judge in a timely manner, thereby waiving his argument that the sentencing judge should have recused himself based on an appearance of partiality. People v. Dobler, 2015 COA 25, 369 P.3d 686.

Because prosecutor did not argue to the trial court that the motion was untimely and court did not consider the timeliness issue and further because the motion to recuse was triggered by comments the trial judge made at sentencing, good cause existed for the late filing. People v. Barton, 121 P.3d 230 (Colo. App. 2004).

Timeliness and sufficiency of motion and affidavit deemed questions of law. Whether the motion is timely and whether it sufficiently states grounds for disqualification are questions of law subject to plenary review. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

A motion for recusal must be verified and supported by affidavits of at least two credible witnesses not related to defendant. People v. Grenemyer, 827 P.2d 603 (Colo. App. 1992).

Whether recusal is required will depend on whether defendant's motion and supporting affidavits set forth legally sufficient facts upon which bias or prejudice may be implied. James v. People, 727 P.2d 850 (Colo. 1986); People v. Grenemyer, 827 P.2d 603 (Colo. App. 1992).

And facts in affidavits and motion taken as true. As a matter of judicial policy courts must take as true, for purposes of a motion to disqualify, facts stated in the affidavits and motion. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977); People v. Botham, 629 P.2d 589 (Colo. 1981).

The facts set forth in affidavits supporting a motion to disqualify a judge are not subject to a trial court's inquiry, but are presumed to be true. Smith v. District Court, 629 P.2d 1055 (Colo. 1981); People v. Cook, 22 P.3d 947 (Colo. App. 2000); Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008).

Thus, the trial judge engaging in this inquiry cannot pass upon the truth or falsity of statements of fact in the motion and supporting affidavits. Estep v. Hardeman, 705 P.2d 523 (Colo. 1985); S.S. v. Wakefield, 764 P.2d 70 (Colo. 1988); Brewster v. District Court, 811 P.2d 812 (Colo. 1991).

The judge must confine the analysis to the four corners of the motion and supporting affidavits, and then determine as a matter of law whether they allege legally sufficient facts for disqualification. Klinck v. District Court, 876 P.2d 1270 (Colo. 1994).

Recusal not discretionary where affidavits sufficiently allege prejudice. The trial judge has no discretion in the matter of recusing himself upon finding the affidavits sufficient under the rule to allege prejudice. He immediately loses all jurisdiction in the matter except to grant the change. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977); Brewster v. District Court, 811 P.2d 812 (Colo. 1991).

Test of sufficiency of motion and affidavit. The test of the legal sufficiency of a motion to disqualify a judge is whether the motion and affidavits state facts from which it may reasonably be inferred that the respondent judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the petitioner. People v. Botham, 629 P.2d 589 (Colo. 1981); Smith v. District Court, 629 P.2d 1055 (Colo. 1981); People v. Baca, 633 P.2d 528 (Colo. App. 1981); People v. Hrapski, 718 P.2d 1050 (Colo. 1986).

To be sufficient, the affidavits must state facts from which the respondent judge's prejudice may reasonably be inferred. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

Test is applied in Estep v. Hardeman, 705 P.2d 523 (Colo. 1985).

There can be no presumption that a judge is intimidated by the outrage of the community in which the judge serves. Thus, motion for disqualification properly denied where there was no allegation that the judge was in fact intimidated by the community's animosity toward the defendant. People v. Vecchio, 819 P.2d 533 (Colo. App. 1991).

Prejudgments regarding the quality of evidence to be heard are not consistent with the duty of a trial court to reach an unbiased decision after weighing all the evidence. Estep v. Hardeman, 705 P.2d 523 (Colo. 1985).

Subjective conclusion of party not sufficient. Neither § 16-6-201 nor section (b) of this rule requires disqualification of a judge on the basis of a party's subjective conclusion that the judge is not impartial because of acts or statements made by the party. Smith v. District Court, 629 P.2d 1055 (Colo. 1981).

And motion without supporting affidavits or facts insufficient. Where defendant filed no affidavits and alleged no facts which would reasonably indicate that the judge was interested or prejudiced with respect to the case, the parties, or counsel, the defendant's motion to disqualify the judge was insufficient as a matter of law. People v. Johnson, 634 P.2d 407 (Colo. 1981).

The mere allegation that a trial judge engaged in an ex parte communication with a doctor who would testify as an expert witness is not alone sufficient to require recusal of the trial judge. Comiskey v. District Ct., 926 P.2d 539 (Colo. 1996).

Recusal not required where the trial court's statements merely consisted of comments about a second co-defendant as part of the consideration of mitigating factors during sentencing of first co-defendant, and not statements expressing bias or prejudice about the second co-defendant, especially when judge specifically refused at the co-defendant's sentencing hearing to speculate as to co-defendant's role in the crimes charged. People v. Cook, 22 P.3d 947 (Colo. App. 2000).

An appearance of impropriety cannot be inferred simply because the judge was a member of the general public that witnessed the fire started by defendant or because the judge assisted in general relief efforts. People v. Barton, 121 P.3d 230 (Colo. App. 2004).

However, numerous other allegations of the judge's personal involvement and comments made by the judge during the sentencing hearing about his or her personal experience presented legally sufficient basis to create the appearance of prejudice that could have prevented the judge from dealing fairly with the defendant. People v. Barton, 121 P.3d 230 (Colo. App. 2004).

Trial judge's presence in courtroom in which defendant allegedly threatened a witness did not require recusal. A mere order for an investigation of threat did not create a potential conflict of interest or indicate that the judge might become a witness. People v. Hagos, 250 P.3d 596 (Colo. App. 2009).

Defendant's attorney may file affidavit in support of motion for substitution of judge where the attorney-affiant is not related to the defendant within the third degree by blood, adoption, or marriage. People v. Botham, 629 P.2d 589 (Colo. 1981).

To disqualify, suit against judge must be probably successful. To create an adverse interest sufficient to disqualify a trial judge from presiding over a criminal trial, a suit brought against him by the accused person must have some probability of success. Watson v. People, 155 Colo. 357, 394 P.2d 737 (1964), cert. denied, 380 U.S. 966, 85 S. Ct. 1111, 14 L. Ed. 2d 156 (1965).

Challenged judge may request hearing before another judge. A challenged judge in juvenile delinquency matters may, after self-disqualification, request a hearing before another judge on the issues raised in respondent's motion and affidavits. People in Interest of A.L.C., 660 P.2d 917 (Colo. App. 1982).

Referring a motion for substitution to another judge for decision is not reversible error, even if it is not the procedure contemplated by this rule. Comiskey v. District Ct., 926 P.2d 539 (Colo. 1996).

Disqualification where court only determining matters of law. It is unnecessary to determine whether a trial judge errs in not disqualifying himself where the error committed by him is not prejudicial error in that there is no disagreement over the facts and the sole material determinations to be made by the trial court are matters of law, in which case an appellate court is to determine whether the trial court correctly ruled on such matters. Robran v. People ex rel. Smith, 173 Colo. 378, 479 P.2d 976 (1971).

A judge's bias or prejudice against defense counsel, while not generally requiring recusal, may so require when the judge's manifestation of hostility or ill will is apparent from the motion and affidavits and indicates the absence of the impartiality required for a fair trial. Brewster v. District Court, 811 P.2d 812 (Colo. 1991).

A government attorney is not an "attorney otherwise engaged in the case" unless he has worked on it directly. While a partner in a law firm is said to be ''engaged'' in every case in which a member of his firm represents a party because he has a financial interest in the case's

outcome, a government lawyer's compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case. Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984).

Judges are not disqualified solely on the basis that they were formerly employed by the prosecutor's office. Instead, when employed by that office, the judge to be disqualified must have performed some role in the case or have obtained actual knowledge of disputed evidentiary facts of the case. People v. Julien, 47 P.3d 1194 (Colo. 2002).

Where defendant failed to submit affidavits in accordance with requirements of § 16-2-201 and section (b) of this rule, and supplied allegations himself that record did not verify, there were insufficient grounds for disqualification. People v. Grenemyer, 827 P.2d 603 (Colo. App. 1992).

Where defendant failed to present evidence to substantiate his claim that the judge knew of circumstances that would disqualify him from presiding in case and improperly filed a motion for case transfer with another trial court judge but failed to inform presiding judge of defendant's motion or to seek a decision on such motion, there were insufficient grounds for disqualification. People v. Harmon, 3 P.3d 480 (Colo. App. 2000).

Mere filing of complaint with the judicial performance commission, without more, does not establish sufficient grounds for recusal. Further, county court judge's decision to recuse herself in seven prior cases does not lead to the conclusion that she should permanently recuse herself in all cases involving the attorneys. Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008).

Rule 22. Time of Motion to Transfer

A motion for a change of venue or for a change of judge under these Rules may be made at or before arraignment or, for good cause shown for a late filing, at any time before trial.

VI. TRIAL

Rule 23. Trial by Jury or to the Court

(a) (1) Every person accused of a felony has the right to be tried by a jury of twelve. Before the jury is sworn, the defendant may, except in class 1 felonies, elect a jury of less than twelve but no fewer than six, with the consent of the court.

(2) Every person accused of a misdemeanor has the right to be tried by a jury of six. Before the jury is sworn, the defendant may elect a jury of less than six but no fewer than three, with the consent of the court.

(3) Every person accused of a class 1 or class 2 petty offense has the right to be tried by a jury of three, if he or she:

(I) Files a written jury demand within 21 days after entry of a plea;

(II) Tenders twenty-five dollars to the court within 21 days after entry of a plea, unless such fee is waived by the judge because of the indigence of the defendant. If the charge is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court, at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be returned to the defendant.

(4) The jury, in matters involving class 1 and class 2 petty offenses, shall consist of a greater number than three, not to exceed six, if requested by the defendant in the jury demand.

(5) (I) The person accused of a felony or misdemeanor may, with the consent of the prosecution, waive a trial by jury in writing or orally in court. Trial shall then be to the court.

(II) The court shall not proceed with a trial to the court after waiver of jury trial without first determining:

(a) That the defendant's waiver is voluntary;

(b) That the defendant understands that:

(i) The waiver would apply to all issues that might otherwise need to be determined by a jury including those issues requiring factual findings at sentencing;

(ii) The jury would be composed of a certain number of people;

(iii) A jury verdict must be unanimous;

(iv) In a trial to the court, the judge alone would decide the verdict;

(v) The choice to waive a jury trial is the defendant's alone and may be made contrary to counsel's advice.

(III) In a proceeding where the waiver of a jury trial is part of a determination preceding the entry of a guilty or nolo contendere plea, the court need only make the determinations required by Rule 11(b) and not those required by this rule.

(6) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, with the consent of the prosecution, may permit withdrawal of the waiver prior to the commencement of the trial.

(7) In any case in which a jury has been sworn to try a case, and any juror by reason of illness or other cause becomes unable to continue until a verdict is reached, the court may excuse such juror. Except in class 1 felonies, if no alternate juror is available to replace such juror, the defendant and the prosecution, at any time before verdict, may stipulate in writing or on the record in open court, with approval of the court, that the jury shall consist of less than twelve but no fewer than six in felony cases, and less than six but no fewer than three in misdemeanor cases, and the jurors thus remaining shall proceed to try the case and determine the issues.

(8) All jury verdicts must be unanimous.

COMMITTEE COMMENT

Amended Rule 23(a)(5) reflects the legislature's 1989 decision to condition a defendant's waiver of a jury trial upon the consent of the prosecution. See 1989 S.B. 246, Section 35, amending Section 16-10-101, C.R.S. See also People v. District Court, 731 P.2d 720, 722 (Colo. 1987). Also, consistent with Colorado caselaw, the amended rule would permit the waiver of a jury trial even in a class 1 felony case. See People v. Davis, 794 P.2d 159, 209-12 (Colo. 1990).

Source: (a)(1) and (a)(2) amended June 9, 1988, effective January 1, 1989; headnote (a) repealed and (a)(5) amended July 16, 1992, effective November 1, 1992; (a)(5) amended and adopted September 7, 2006, effective January 1, 2007; entire rule amended and effective April 17, 2008; entire rule corrected July 16, 2008, effective nunc pro tunc April 17, 2008; (a)(3) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Annotator's note. For other annotations concerning the right to trial by jury, see § 23 of art. II, Colo. Const., and § 18-1-406.

Section 18-1-406 (1) and this rule, which provide for six jurors in misdemeanor cases, are constitutional under § 23 of art. II of the Colorado Constitution. People v. Rodriguez, 112 P.3d 693 (Colo. 2005).

Right to waive trial by jury is substantive in nature. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980).

Rule conflicts with § 18-1-406. Section (a)(5) of this rule and § 18-1-406 (2) are not reconcilable and are in direct conflict with each other. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980).

And § 18-1-406 (2) controls over section (a)(5) of this rule, so that the consent of the prosecuting attorney cannot be imposed as a condition on right to waive trial by jury. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980).

Defendant must personally waive right to jury. The plain meaning of section (a)(5) requires that a defendant personally waive his right to a jury trial and that a statement by his counsel does not operate as a waiver. Rice v. People, 193 Colo. 270, 565 P.2d 940 (1977); People v. Evans, 44 Colo. App. 288, 612 P.2d 1153 (1980); Moore v. People, 707 P.2d 990 (Colo. 1985).

A waiver must be understandingly, voluntarily, and deliberately made. A defendant in a criminal case may waive his right to a jury trial; however, that waiver must be understandingly, voluntarily, and deliberately made, and a determination of waiver must be a matter of certainty and not implication. People v. Evans, 44 Colo. App. 288, 612 P.2d 1153 (1980); Moore v. People, 707 P.2d 990 (Colo. 1985).

Presumption accorded waiver of jury trial. Where, when the jury was assembled in the courtroom ready for trial, defendants' counsel orally announced that defendants had decided to waive their right to a jury trial, and the court inquired of each defendant if that was their desire and both indicated in the affirmative, and as a further precaution, the court then insisted that a written waiver of jury trial be prepared and be signed by each defendant and their counsel, which was done, it will be presumed that

defendants understandingly, voluntarily, and deliberately decided to waive the jury. People v. Fowler, 183 Colo. 300, 516 P.2d 428 (1973).

A defendant is not automatically entitled to an evidentiary hearing on the challenge to an advisement when the advisement did not comply with section (a)(5)(II). Rather, a defendant must allege specific facts suggesting the waiver was not knowing, voluntary, and intelligent. People v. Walker, 2014 CO 6, 318 P.3d 479, cert. denied, __ U.S. __, 135 S. Ct. 112, 190 L. Ed. 2d 88 (2014).

Waiver not constitutional right. The defendant in a criminal case does not have a constitutional right to waive a jury and be tried by the court. People v. Linton, 193 Colo. 64, 565 P.2d 919 (1977).

Effect of waiver. Where the defendant voluntarily and with advice of counsel waived a jury trial, defendant in such circumstances cannot be heard to complain when he creates a situation which necessarily makes the trial judge both the one who decides the admissibility of evidence and the one who renders the verdict. People v. Thompson, 182 Colo. 198, 511 P.2d 909 (1973).

Waiver is effective where defendant fails to present evidence from which it could be reasonably inferred that the waiver was not voluntary, knowing, and intentional. People v. Porterfield, 772 P.2d 638 (Colo. App. 1988).

Jury to be sworn. While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, section (a)(7) of this rule and section (b)(2) and section (e) of Crim. P. 24, implicitly require that a jury will be sworn to try a case. Hollis v. People, 630 P.2d 68 (Colo. 1981).

But delayed swearing not error. Where no prejudice is shown by the delayed swearing of the jury, no objection is made, and the oath is administered before the jury retires to begin its deliberations, the error is harmless. Hollis v. People, 630 P.2d 68 (Colo. 1981).

Juror properly dismissed and replaced. A juror, after being sequestered for eight days, was properly dismissed and replaced with an alternative when the juror was shown to be quite nervous and upset, and no evidence of prejudice against the defendant was shown by the dismissal and replacement of the juror. People v. Evans, 674 P.2d 975 (Colo. App. 1983).

Requirement of written stipulation to jury of less than 12 met. Where defense counsel stipulates to a jury of less than 12 in open court and on the record, the requirement of section (a)(7) that the stipulation be in writing is met. People v. Waters, 641 P.2d 292 (Colo. App. 1981).

Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and not with respect to alternative means by which the crime was committed. People v. Taggart, 621 P.2d 1375 (Colo. 1981).

Although there is a statutory right to a unanimous verdict in criminal cases in Colorado, the state constitution does not explicitly guarantee the right to a unanimous verdict. Nevertheless, there are some cases in which the jury may return a general verdict of guilty when instructed on alternative theories of principal and complicitor liability and in which the state constitution has provided a criminal defendant the right to a unanimous jury verdict. People v. Hall, 60 P.3d 728 (Colo. App. 2002).

Section (a)(5)(II) is intended to require that trial courts conduct on-the-record advisements to defendants, informing them of specific elements of their right to a trial by jury and of certain consequences if they waive that right. People v. Montoya, 251 P.3d 35 (Colo. App. 2010).

Trial court did not substantially comply with section (a)(5)(II)(b) due to omissions in the court's advisement to defendant about the waiver. Nor did the omissions in the advisement merely constitute a ''slip-up'' by the trial court. People v. Montoya, 251 P.3d 35 (Colo. App. 2010).

Advisement regarding waiver was not deficient simply because trial court did not advise defendant of the possible penalties upon conviction. Such an advisement is neither required nor necessary. People v. Montoya, 251 P.3d 35 (Colo. App. 2010).

Where advisement is deficient under section (a)(5)(II), the appropriate remedy is to remand the case to the trial court for an evidentiary hearing to resolve defendant's challenge to the validity of the waiver of a jury trial. People v. Montoya, 251 P.3d 35 (Colo. App. 2010).

The right to a 12-person jury is purely statutory. The sixth and fourteenth amendments to the U.S. Constitution guarantee the right to trial by jury, but do not, nor does the Colorado Constitution guarantee the right to a 12-person jury. People v. Chavez, 791 P.2d 1210 (Colo. App. 1990).

Constitutional right to a jury of 12 lies only with felony cases and does not extend to misdemeanor cases. A defendant in a misdemeanor case does not have a constitutional right under art. II, § 23, of the Colorado Constitution to demand a 12-person jury. People v. Rodriguez, 112 P.3d 693 (Colo. 2005).

The statutory right to a 12-person jury could be waived by counsel's statements. The requirement that a defendant must make a written or oral ''announcement'' of his intention to waive a jury does not extend to a reduction in the number of jurors. People v. Chavez, 791 P.2d 1210 (Colo. App. 1990).

Defense counsel stipulation to a jury of less than 12 in open court and on the record satisfies the statutory requirement that the stipu-

lation must be in writing. People v. Baird, 66 P.3d 183 (Colo. App. 2002).

Applied in Hawkins v. Superior Court, 196 Colo. 86, 580 P.2d 811 (1978); People v. Ledman, 622 P.2d 534 (Colo. 1981); People v. Andrews, 632 P.2d 1012 (Colo. 1981); People v. Norman, 703 P.2d 1261 (Colo. 1985).

Rule 24. Trial Jurors

(a) Orientation And Examination Of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to faciliate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(i) The grounds for challenge for cause;

(ii) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(iii) The identities of the parties and their counsel;

(iv) The nature of the case using applicable instructions if available or, alternatively a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements;

(v) General legal principles applicable to the case including the presumption of innocence, burden of proof, definition of reasonable doubt, elements of charged offenses and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.

(b) Challenges for Cause.

(1) The court shall sustain a challenge for cause on one or more of the following grounds:

(I) Absence of any qualification prescribed by statute to render a person competent as a juror;

(II) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(III) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or associated in business with, or surety on any bond or obligation for, any defendant;

(IV) The juror is or has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;

(V) The juror has served on the grand jury which returned the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or the information, or on any other investigatory body which inquired into the facts of the crime charged;

(VI) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(VII) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(VIII) The juror was a witness to any matter related to the crime or its prosecution;

(IX) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court;

(XI) [Reserved]

(XII) The juror is an employee of a public law enforcement agency or public defender's office.

(2) If either party desires to introduce evidence, other than the sworn responses of the prospective juror, for the purpose of establishing grounds to disqualify or challenge the juror for cause, such evidence shall be heard and all issues related thereto shall be determined by the court out of the presence of the other prospective jurors. All matters pertaining to the qualifications and competency of the prospective jurors shall be deemed waived by the parties if not raised prior to the swearing in of the jury to try the case, except that the court for good cause shown or upon a motion for mistrial or other relief may hear such evidence during the trial out of the presence of the jury and enter such orders as are appropriate.

(c) Challenge to Pool.

(1) Upon the request of the defendant or the prosecution in advance of the commencement of the trial, the defendant or the prosecution shall be furnished with a list of prospective jurors who will be subject to call in the trial.

(2) Either the prosecution or the defendant may challenge the pool on the ground that there has been a substantial failure to comply with the requirements of the law governing the selection of jurors. Such challenge must be made in writing setting forth the particular ground upon which it is based and shall be accompanied by one or more affidavits specifying the supporting facts and demographic data. The challenge must be filed prior to the swearing in of the jury selected to try the case.

(3) If the court finds the affidavit or affidavits filed under subsection (2) of this section, if true, demonstrate a substantial failure to comply with the ''Uniform Jury Selection and Service Act'', the moving party is entitled to present in support of the motion the testimony of any person responsible for the implementation of the ''Uniform Jury Selection and Service Act.'' Any party may present any records used in the selection and summoning of jurors for service, and any other relevant evidence. If the court determines, by a preponderance of the evidence, that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with the ''Uniform Jury Selection and Service Act'', the court shall discharge the jury panel and stay the proceedings pending the summoning of a new juror pool or dismiss an indictment, information, or complaint, or grant other appropriate relief.

COMMITTEE COMMENT

These changes were made in order to conform Rule 24 to the legislative changes in the Colorado Uniform Jury Selection and Service Act, Sections 13-71-101 to 13-71-145, C.R.S. which became effective January 1, 1990.

(d) Peremptory Challenges.

(1) For purposes of Rule 24 a capital case is a case in which a class 1 felony is charged.

(2) In capital cases the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases where there is one defendant and the punishment may be by imprisonment in a correctional facility, the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in a correctional facility, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summons and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.

(3) For good cause shown, the court at any time may add peremptory challenges to either or both sides.

(4) Peremptory challenges shall be exercised by counsel, alternately, the first challenge to be exercised by the prosecution. A prospective juror so challenged shall be excused, and another juror from the panel shall replace the juror excused. Counsel waiving the exercise of further peremptory challenges as to those jurors then in the jury box may thereafter exercise peremptory challenges only as to jurors subsequently called into the jury box without, however, reducing the total number of peremptory challenges available to either side.

COMMITTEE COMMENT

The rule is changed to permit, but not to require, the court to allow the simultaneous questioning of more than 12 potential jurors and one or two alternate jurors at one time. Further, the rule permits, but does not require, the court to allow the exercise of peremptory challenges, in writing, in its discretion, as is done in civil cases. This rule change is intended to apply to both district and county court criminal cases.

(e) Alternate Jurors. The court may direct that a sufficient number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. When alternate jurors are impaneled, each side is entitled to one peremptory challenge for each alternate to be selected, and such additional peremptory challenges may be exercised as to any prospective jurors. In a case in which a class 1, 2 or 3 felony is charged and in any case in which a felony listed in section 24-4.1-302 (1), C.R.S. is charged, the court, at the request of the defendant or the prosecution, shall impanel at least one alternate juror.

(f) Custody of Jury.

(1) The court should only sequester jurors in extraordinary cases. Otherwise, (J)urors should be permitted to separate during all trial recesses, both before and after the case has

been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be given to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff whenever they are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.

(g) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause. After giving the parties notice and an opportunity to be heard on each question, the court shall determine whether to ask the submitted question. The trial court shall permit appropriate follow-up questions from the parties within the scope of the jurors' questions.

Source: (e) amended September 20, 1984, effective January 1, 1985; (d)(4) amended June 9, 1988, effective January 1, 1989; the introductory portion to (c), (c)(2), and (c)(3) amended July 16, 1992, effective November 1, 1992; (e) amended February 4, 1993, effective April 1, 1993; (a) repealed and readopted and (f)(1) amended June 25, 1998, effective January 1, 1999; (b)(1)(XI) repealed and reserved March 11, 1999, effective July 1, 1999; (g) added and adopted February 19, 2003, effective July 1, 2004; (e) amended and effective May 15, 2013; (g) amended and effective September 6, 2018.

Cross references: For the ''Colorado Uniform Jury Selection and Service Act'', see article 71 of title 13, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Challenges for Cause in Criminal Trials'', see 12 Colo. Law. 1799 (1983). For article, ''Criminal Procedure'', which discusses a Tenth Circuit decision dealing with co-conspirators and voir dire, see 61 Den. L.J. 310 (1984). For article, ''Curbing the Prosecutor's Abuse of the Peremptory Challenge'', see 14 Colo. Law. 1629 (1985). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses cases relating to peremptory challenges on the basis of race, see 15 Colo. Law. 1609 (1986). For article, ''Criminal Jury Selection After People v. Novotny'', see 44 Colo. Law. 41 (Feb. 2015).

Standard of review is "abuse of discretion". Phrases used in prior case law such as ''clear abuse of discretion'' and ''gross abuse of discretion'' are deemed to express this standard and have the same meaning. Carrillo v. People, 974 P.2d 478 (Colo. 1999).

Defendant entitled to impartial jury. It is fundamental to the right to a fair trial that a defendant be provided with an impartial jury. Nailor v. People, 200 Colo. 30, 612 P.2d 79 (1980); People v. Gurule, 628 P.2d 99 (Colo. 1981); People v. Collins, 730 P.2d 293 (Colo. 1986).

Although a defendant is entitled to a trial by a fair and impartial jury, he is not entitled to any particular juror. People v. Johnson, 757 P.2d 1098 (Colo. App. 1988).

The right to an impartial jury does not require counsel be granted unlimited voir dire examination. People v. O'Neill, 803 P.2d 164 (Colo. 1990).

And discrimination in summoning of jurors may be ground for reversal. Counsel may request, in the presence of the presiding judge, or the judge himself may direct, that only good and lawful men be summoned as jurors; but to discriminate in favor of or against any class of citizens eligible for jury duty would be a grievous wrong. Whether such intermeddling would be ground for reversal depends upon the circumstances of the case. Babcock v. People, 13 Colo. 515, 22 P. 817 (1889).

Court's procedure of calling prospective jurors by their juror number or seat number did not violate defendant's right to presumption of innocence or right to a public trial. Since court indicated to the jury that the procedure was ''his policy'' to respect the jurors' privacy, the question of defendant's guilt or innocence was not undermined. Additionally, because court's procedure allowed defendant access to the jurors' names and other information, the process was not an ''anonymous jury'' requiring the court to demonstrate good cause. Perez v. People, 2013 CO 22, 302 P.3d 222; Rizo v. People, 2013 CO 23, 302 P.3d 232; Robles v. People, 2013 CO 24, 302 P.3d 229.

Qualified person should not be excused except for statutory reason. Jury service being an obligation of citizenship, the court should not excuse a person otherwise qualified for jury service for any reason short of the statutory criteria of ''undue hardship, extreme inconvenience, or public necessity'' set out in § 13-71-112 (2). People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983).

Jury to be sworn. While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, section (b)(2) and section (e) of this rule and Crim. P. 23(a)(7) implicitly require that a jury will be sworn to try a case. Hollis v. People, 630 P.2d 68 (Colo. 1981).

And delayed swearing not necessarily error. Where no prejudice is shown by the delayed swearing of the jury, no objection is made, and the oath is administered before the jury retires to begin its deliberations, the error is harmless. Hollis v. People, 630 P.2d 68 (Colo. 1981).

Defendant who failed to make a timely objection forfeited the right to a jury free of the presiding judge's spouse. It is the responsibility of the litigants — not the judge — to preserve issues for review. People v. Richardson, 2018 COA 120, __ P.3d __.

A ruling by the trial court which calls an alternative juror to replace a juror who becomes ''disqualified'' to perform his duties is a matter within the discretion of the trial court and will not be disturbed on review unless an abuse of discretion is shown. People v. Johnson, 757 P.2d 1098 (Colo. App. 1988).

It is within the trial court's prerogative to give considerable weight to a potential juror's statement that he or she can fairly and impartially serve on the case. People v. Montoya, 942 P.2d 1287 (Colo. App. 1996).

This rule is not in agreement with § 16-10-105 because that section requires that jurors may be replaced with alternate jurors before deliberations begin and not after. Since the court rules govern practice and procedure in civil and criminal cases while the statute affects the substantive right to a fair trial, § 16-10-105 is the operative provision in deciding that the trial court erred by applying section (e) of this rule and allowing the replacement of a regular juror with an alternate juror after the jury had begun its deliberations People v. Montoya, 942 P.2d 1287 (Colo. App. 1996).

Trial court's use of random selection to choose alternate juror was error, but, in the absence of any prejudice demonstrated against the defendant, it was harmless error. People v. Tippett, 733 P.2d 1183 (Colo. 1987).

The purpose of seating an alternate juror is to have available another juror when, through unforeseen circumstances, a juror is unable to continue to serve and the trial court is in the best position to evaluate whether a juror is unable to serve, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion. People v. Abbott, 690 P.2d 1263 (Colo. 1984); People v. Christopher, 896 P.2d 876 (Colo. 1995).

Applied in Raullerson v. People, 157 Colo. 462, 404 P.2d 149 (1965); Reed v. People, 171 Colo. 421, 467 P.2d 809 (1970); People v. Bercillio, 179 Colo. 383, 500 P.2d 975 (1972); People v. Fink, 41 Colo. App. 47, 579 P.2d 659 (1978); Kaltenbach v. Julesburg Sch. Dist. Re-1, 43 Colo. App. 150, 603 P.2d 955 (1979); People v. Velarde, 200 Colo. 374, 616 P.2d 104 (1980); People v. Gonzales, 631 P.2d 1170 (Colo. App. 1981); People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

II. EXAMINATION.

Purpose of voir dire examination is to enable counsel to determine whether any prospective jurors are possessed of beliefs which would cause them to be biased in such a manner as to prevent his client from obtaining a fair and impartial trial. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974); People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986); People v. Collins, 730 P.2d 293 (Colo. 1986).

While a defendant does not have a constitutional right to voir dire a prospective jury panel, such right is expressly granted under rules of criminal procedure. People v. Lefebre, 981 P.2d 650 (Colo. App. 1998), aff'd on other grounds, 5 P.3d 295 (Colo. 2000).

Court may limit, but may not deny, the defendant's right to voir dire. People v. Lefebre, 981 P.2d 650 (Colo. App. 1998), aff'd on other grounds, 5 P.3d 295 (Colo. 2000).

The court's error in denying defense counsel the right to question a prospective juror who was excused by the court does not constitute prejudice requiring a reversal of the conviction where defendant does not allege that the jury that was seated was unfair or partial and where the prosecution did not exhaust its peremptory challenges and thus could have re-

moved the prospective juror even if the court had not excused him. People v. Evans, 987 P.2d 845 (Colo. App. 1998).

The knowledge or ignorance of prospective jurors concerning questions of law is generally not a proper subject of inquiry for voir dire. People v. Collins, 730 P.2d 293 (Colo. 1986).

Restrictions within court's discretion. Restrictions on the scope of the voir dire examination are within the trial court's discretion, and will not be reversed on appeal absent an abuse of that discretion. People v. Saiz, 660 P.2d 2 (Colo. App. 1982); People v. Rivers, 727 P.2d 394 (Colo. App. 1986); People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

If there is firm and clear evidence that a potential juror holds an actual bias that is unlikely to change through education concerning the trial process, exposure to basic principles governing criminal trials, or questioning by the court or the parties, the judge is permitted to excuse that juror without additional questioning. Under section (a)(3) of this rule, a trial judge must ordinarily permit voir dire of jurors in circumstances that could involve actual bias. Such questioning is useful to determine whether the juror can set aside bias and decide the case based on the evidence presented and the court's instructions. However, the trial need not waste time on further questioning where there is firm and clear evidence that a juror is unfit to serve under section (b)(1)(X) of this rule or if there is implied bias under sections (b)(1)(I) through (IX) or (b)(1)(XII) of this rule. People v. Lefebre, 5 P.3d 295 (Colo. 2000).

Trial court abused its discretion in dismissing jurors without allowing the defense to question them where the record did not contain firm and clear evidence that the jurors removed for cause held actual biases that they could not set aside. The following responses on a written questionnaire were insufficient to support dismissal for cause without further questioning: Juror's assertion that he could not be fair because his brother had been convicted of the same offense with which defendant was charged; juror's assertion that a prior criminal background would prevent him from being fair; and juror's statement that he could not be fair because his sister serves as an expert witness and he had not liked the district attorney's treatment of her on the witness stand. People v. Lefebre, 5 P.3d 295 (Colo. 2000).

Propriety of questions within discretion of trial court. The propriety of questions to potential jurors on voir dire is within the discretion of the trial court, and its ruling thereon will not be disturbed on appeal unless an abuse of that discretion is shown. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972); People v. Collins, 730 P.2d 293 (Colo. 1986); People v. Shipman, 747 P.2d 1 (Colo. App. 1987).

Trial court did not abuse its discretion in disallowing one of defense counsel's questions that went to the defendant's theory of the case. The court permitted other questions that allowed the defendant to determine whether potential jurors held certain attitudes toward the defendant's affirmative defense. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Rule expressly authorizes counsel to directly question prospective jurors and the judge cannot require counsel to submit questions to prospective jurors through the judge. The judge may, however, limit counsel's questions if they are unduly repetitious, irrelevant, or otherwise improper. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

The court's blanket prohibition against questions regarding a prospective juror's understanding of an instruction is an abuse of discretion where the court makes no inquiry as to the nature of the questions. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

Trial court's failure to conduct examination not plain error. Trial court's failure to explain to potential jurors the qualifications for jury service, the grounds for challenges for cause, and juror's duty to inform the court of anything that would disqualify them from service was not plain error when no party objected. People v. Page, 907 P.2d 624 (Colo. App. 1995).

Court's questioning and "rehabilitation" of prospective jurors was not improper where the questions were directed to eliciting information on the subject of the prospective jurors' possible bias and were no more leading than necessary. People v. James, 981 P.2d 637 (Colo. App. 1998).

No abuse of discretion to deny the release of juror contact information when defendant did not present sufficient evidence of juror misconduct. People v. Bohl, 2018 COA 152, __ P.3d __.

III. CHALLENGES FOR CAUSE.

A. In General.

Distinguishing between challenges. Courts distinguish between challenges ''propter affectum'', those relating to a juror's bias, prejudice, interest, etc., and challenges ''propter defectum'', those relating to the absence of some purely statutory qualification such as residence, citizenship, property owning, taxpaying, etc., holding that disregard of the former constitutes reversible error but not disregard of the latter. Also, in case of the former, prejudice to the litigant may be assumed; in case of the latter, it must be shown. Exceptions to this rule are not wanting, but these rest generally upon special facts and are supported by sound reason.

Harris v. People, 113 Colo. 511, 160 P.2d 372 (1945).

Examination and disposal of challenges within discretion of court. The method and order of procedure in ascertaining the qualifications of veniremen and in disposing of challenges for cause are commonly in the discretion of the court. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

But discretion is not an arbitrary one, and a party is not to be unreasonably denied a challenge to which he shows himself entitled, because his right in such case is a substantial right which it is not within the discretion of the court to take away. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

Determination of the trial court upon a question of fact is not subject to review in challenges to jurors. Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877).

Challenge need not be made immediately when grounds become apparent. The challenge of a particular juror for cause need not be made at the very time when the ground of challenge becomes apparent and before proceeding to the examination of another juror. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

Trial court may conduct challenges for cause in open court. While the better practice is to hear challenges for cause outside the prospective jurors' presence as espoused by the American Bar Association, a trial court retains discretion to conduct challenges in open court. However, the court may abuse its discretion depending upon the reason for the challenge, the overall tenor or contentiousness of the voir dire examination, and any other circumstances pertinent to the issue. People v. Flockhart, 2013 CO 42, 304 P.3d 227.

No dismissal if juror will render impartial verdict. No juror can be dismissed for cause if the trial court is satisfied the juror will render an impartial verdict. People v. Romero, 42 Colo. App. 20, 593 P.2d 365 (1978).

No abuse of discretion to deny challenge for cause where trial court conducted inquiry of juror who was related to sheriff's posse members and was satisfied with juror's specific assurances that she could render a fair and impartial verdict. People v. Goodpaster, 742 P.2d 965 (Colo. App. 1987).

No abuse of discretion to deny challenge for cause where trial court concluded that prospective juror, who was a neighbor of police officer who would be testifying, specifically stated that he would not give more or less credibility to the officer's testimony as a result. People v. Loggins, 981 P.2d 630 (Colo. App. 1998).

No abuse of discretion in denying challenge for cause where trial court determined that first cousin of investigating police department's chief of police who indicated that while her relationship with the mother of the chief could create a hardship for her she could nonetheless be impartial. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

Missing portion of transcript of voir dire proceedings does not automatically require reversal. Where trial court held a hearing to reconstruct, to the extent possible, the relevant portion of voir dire, the court's denial of the challenge for cause was upheld. People v. Loggins, 981 P.2d 630 (Colo. App. 1998).

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. People v. Prator, 833 P.2d 819 (Colo. App. 1992).

Court properly denied challenge for cause of a prospective juror because, although the juror stated that she basically believed children to be honest, she also indicated she would apply the principles of law given by the court to their testimony. People v. Howard, 886 P.2d 296 (Colo. App. 1994).

Defendant must exercise reasonable diligence to determine whether a prospective juror should have been excused. If defendant fails to do so, he or she is considered to have waived his or her opportunity to raise any matters pertaining to the qualifications and competency of the excluded juror on appeal. People v. Asberry, 172 P.3d 927 (Colo. App. 2007).

B. Effect of Juror's Opinion or Interest.

Section (b)(1)(X) of this rule does not conflict with the sixth amendment to the United States Constitution, which secures to persons charged with crime the right to be tried by an impartial jury. Jones v. People, 2 Colo. 351 (1874).

Defendant has right to ask questions to show existence of grounds for challenge. The defendant has a right to propound questions to the proposed jurors, to show not only that there exists proper grounds for a challenge for cause but also to elicit facts to enable him to decide whether or not he would make a peremptory challenge. Union Pac. Ry. v. Jones, 21 Colo. 340, 40 P. 891 (1895); Jones v. People, 23 Colo. 276, 47 P. 275 (1896); Zancannelli v. People, 63 Colo. 252, 165 P. 612 (1917).

The mere expression of some concern by a prospective juror regarding a certain aspect or issue of a case should not result in automatic dismissal of that prospective juror for cause. Likewise, dismissal for cause is not required merely because a prospective juror answers questions in a way that might indicate some bias, prejudice, or preconceived notion.

The decisive question is whether it is possible for the prospective juror to set aside his or her preconceived notions and decide the case based on the evidence and the court's instructions. In determining whether a prospective juror can do so, the trial court should consider all available facts, including the prospective juror's assurances of fairness and impartiality. People v. Arko, 159 P.3d 713 (Colo. App. 2006), rev'd on other grounds, 183 P.3d 555 (Colo. 2008).

Challenge for cause should be granted where prospective juror is unwilling or unable to accept the basic principles of law applicable to the case and to render a fair and impartial verdict based upon the trial. People v. Russo, 713 P.2d 356 (Colo. 1986); People v. Esch, 786 P.2d 462 (Colo. App. 1989).

Juror who is not impartial should be dismissed. If there is sufficient reason to question the impartiality of the juror, the trial court should grant a challenge for cause and dismiss the juror. Nailor v. People, 200 Colo. 30, 612 P.2d 79 (1980); People v. Russo, 677 P.2d 386 (Colo. App. 1983).

To ensure that the right to a fair trial is protected, the trial court must excuse prejudiced or biased persons from the jury. Nailor v. People, 200 Colo. 30, 612 P.2d 79 (1980); People v. Gurule, 628 P.2d 99 (Colo. 1981).

If the trial court has genuine doubt about the juror's ability to be impartial, it should resolve the doubt by sustaining the challenge. People v. Russo, 713 P.2d 356 (Colo. 1986).

Or who will not follow court's instructions. A prospective juror should be excused if it appears doubtful that he will be governed by the instructions of the court as to the law of the case. Morgan v. People, 624 P.2d 1331 (Colo. 1981).

And failure to excuse prejudiced juror is abuse of discretion. Where a juror repeatedly indicated that he would have difficulty applying the principles that the burden of proof rests solely upon the prosecution to establish the guilt of the accused, the trial court abused its discretion by failing to excuse him. Morgan v. People, 624 P.2d 1331 (Colo. 1981).

Where the prospective juror patently demonstrates a fixed prejudgment about the merits of the case and an unwillingness to accept and apply those principles that form the bedrock of a fair trial, the trial court errs in refusing to excuse that juror when casually challenged. People v. Gurule, 628 P.2d 99 (Colo. 1981).

But denying challenge to juror with bias against handguns not abuse. In a prosecution for armed robbery, the court does not abuse its discretion in denying a challenge for cause to potential juror who admits his long-standing bias against handguns, where the juror is questioned extensively by the court and defendant's counsel on his opinions concerning handguns and the probable effect of his opinions and experiences on his evaluation of the evidence, where the juror reveals no enmity or bias toward the defendant or the state, and where he expresses an understanding of the principles upon which a fair trial is based. People v. Ward, 673 P.2d 47 (Colo. App. 1983).

General prejudice against crime does not disqualify. Under this rule a general prejudice against crime, or prejudice against the particular crime with which the accused stands charged, does not disqualify a juror. Smith v. People, 39 Colo. 202, 88 P. 1072 (1907); Ausmus v. People, 47 Colo. 167, 107 P. 204 (1910); Forte v. People, 57 Colo. 450, 140 P. 789 (1914); McGonigal v. People, 74 Colo. 270, 220 P. 1003 (1923); Shank v. People, 79 Colo. 576, 247 P. 559 (1926); Fleagle v. People, 87 Colo. 532, 289 P. 1078 (1930).

Nor does a financial interest not directly affected. Where, in a prosecution of bank officers for a conspiracy to defraud the bank, certain jurors, though creditors of the bank or financially interested therein at the time of its failure, testified that they had no bias or prejudice against the defendants, and any interest they might have in the bank's affairs could not be affected in any way by the litigation, they were not disqualified. Imboden v. People, 40 Colo. 142, 90 P. 608 (1907).

And fact that jurors have read newspaper articles relating to a case does not disqualify them as jurors. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Even though juror may have preconceived notion as to the guilt or innocence of an accused he may not be automatically disqualified from serving. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

That a person has an opinion or impression concerning the guilt or innocence of the accused which can only be removed by evidence is by no means conclusive of his disqualification to serve as a juror. Solander v. People, 2 Colo. 48 (1873); Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877); Jones v. People, 6 Colo. 452, 45 Am. R. 526 (1882); Denver, S. P. & P. R. R. v. Driscoll, 12 Colo. 520, 21 P. 708, 13 Am. St. R. 243 (1889); Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972).

Court did not abuse discretion in denying challenge for cause for juror who expressed some doubts about being fair and impartial and being biased against the defendant, but also repeatedly stated she thought she could perform her duties and keep an open mind when hearing the evidence. People v. Doubleday, 2012 COA 141M, 369 P.3d 595, rev'd on other grounds, 2016 CO 3, 364 P.3d 193.

On the theory that news report will not control judgment. As a rule, citizens who are fit to try criminal cases will not allow previous opinions based upon unofficial reports to control their judgment against the sworn evidence in a case. Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Power v. People, 17 Colo. 178, 28 P. 1121 (1892).

Where the voir dire amply demonstrates the absence of prejudice and the ability of the jurors to set aside any opinions that they may have received from the news media to the end that the case could be determined on the law and on the evidence, reversal is not called for. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

Where the record contained no evidence that any juror was prejudiced by having read anything in the newspapers, the denial of a challenge for cause was clearly within the trial court's discretion. People v. McKay, 191 Colo. 381, 553 P.2d 380 (1976).

The fact that a juror entertains an opinion as to the guilt or innocence of a defendant does not disqualify him, if the court believes that he can and will disregard that opinion and return a verdict based solely upon the evidence. McGonigal v. People, 74 Colo. 270, 220 P. 1003 (1923); Johns v. Shinall, 103 Colo. 381, 86 P.2d 605 (1939); Goldsberry v. People, 149 Colo. 431, 369 P.2d 787 (1962); People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972).

So long as the court is satisfied, from an examination of the prospective juror or from other evidence, that the juror will render an impartial verdict according to the evidence admitted at trial and the court's instructions of law, the court may permit the juror to serve. People v. Gurule, 628 P.2d 99 (Colo. 1981).

The proper test under this rule when a juror states he has ''partially'' formed an opinion is, can and will the juror render a verdict according to the evidence heard upon the trial impartially and fairly under his oath so to do, regardless of his preconceived opinions. If the juror declares upon his voir dire oath that he can and will so decide, there is no cause for sustaining a challenge on the ground of such previously formed opinion. Solander v. People, 2 Colo. 48 (1873); Jones v. People, 6 Colo. 452, 45 Am. R. 526 (1882).

General discussions of crime and possible punishments by a prospective juror do not show sufficient bias or prejudice to disqualify him from serving where he clearly states to the court that he has not arrived at any conclusions and that his mind is free and open. Fleagle v. People, 87 Colo. 532, 289 P. 1078 (1930); Abshier v. People, 87 Colo. 507, 289 P. 1081 (1930).

Trial courts have considerable discretion in ruling on challenges for cause, because the trial judge is in the best position to assess the credibility, demeanor, and sincerity of the potential juror's responses, including statements that linguistically may appear to be inconsistent. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

Trial court did not abuse its discretion in denying challenge for cause to juror who admitted familiarity with murder case from press accounts, but who stated she would attempt to be fair and impartial despite such knowledge. People v. Brown, 731 P.2d 763 (Colo. App. 1986).

Nor did trial court abuse its discretion in denying challenge for cause to juror who admitted that she had read about the case involving felony child abuse that resulted in death and may have formed an opinion about the defendant's affirmative defense. Juror, upon sufficient questioning by the court, said she would listen to the evidence presented and would apply the court's instruction on the law in reaching a verdict. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Test as to whether prospective juror has been unduly affected by pretrial publicity is whether the nature and strength of the opinion formed or of the information learned from that publicity are such as necessarily raise the presumption of partiality or of the inability of the potential juror to block out the information from his consideration. People v. Romero, 42 Colo. App. 20, 593 P.2d 365 (1978); People v. Bashara, 677 P.2d 1376 (Colo. App. 1983).

Neither the department of social services nor the equal employment opportunity commission constitute a "law enforcement agency", and therefore trial court did not err by refusing defendant's challenge for cause of jurors employed by such entities. People v. Zurenko, 833 P.2d 794 (Colo. App. 1991).

Exclusion of unconscious influence of preconceptions cannot be assumed. One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may exclude even the unconscious influence of his preconceptions. Beeman v. People, 193 Colo. 337, 565 P.2d 1340 (1977).

Belief that failure to testify indicates guilt does not disqualify. Notwithstanding a juror expressed belief that failure of defendant to testify would be an indication of guilt, where such juror acknowledges a willingness to lay aside any personal belief and follow the law as instructed by the court, a challenge for cause is properly overruled. Goldsberry v. People, 149 Colo. 431, 369 P.2d 787 (1962).

Trial court did not abuse its discretion in denying defendant's challenge for cause where defense counsel asked during voir dire whether anyone believed it would be impossible to be fair if defendant did not testify and juror stated that it would and that it might upset

her, but not so much as to affect her decision making. The trial court found that the juror indicated she would do what the court instructed her to do even though she might not like it. People v. Frantz, 114 P.3d 34 (Colo. App. 2004).

Informing jurors of mandatory sentence for crime not proper purpose for voir dire. The trial court did not err in refusing to allow defense counsel to conduct voir dire for the purpose of informing potential jurors of the mandatory sentence for a crime of violence. People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979).

Voir dire examination concerning capital punishment. Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972); Segura v. District Court, 179 Colo. 20, 498 P.2d 926 (1972); People v. District Court, 190 Colo. 342, 546 P.2d 1268 (1976).

Knowledge of jurors concerning questions of law not proper subject for voir dire. The knowledge or ignorance of prospective jurors concerning questions of law is generally not a proper subject of inquiry for voir dire, for it is presumed that jurors will be adequately informed as to the applicable law by the instructions of the court. People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979).

Juror with tenuous relationship with law enforcement agency should be excused. To insure that a jury is impartial in both fact and appearance, a prospective juror who has even a tenuous relationship with any prosecutorial or law enforcement arm of the state should be excused from jury duty in a criminal case. People in Interest of R.A.D., 196 Colo. 430, 586 P.2d 46 (1978).

Challenge for cause valid. Juror's close association with the law enforcement establishment, the crime scene, and the co-employee who attended the murder victim required dismissal for cause. People v. Rogers, 690 P.2d 886 (Colo. App. 1984).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror that had multiple associations with law enforcement. The juror understood that the defense had no burden of proof, that the prosecution had the burden of proving every element, and that both sides would get a fair trial from said juror. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

The trial court did not abuse its discretion in denying defendant's challenge for cause to a juror based on said juror's views regarding the death penalty and previous traumatic experiences. The juror did not express any partiality for or bias in favor of or against either side. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

No abuse of discretion for denying challenge for cause. Although the potential juror indicated his relationship with law enforcement officers might bias him in favor of believing police testimony, he also explained he would be fair and impartial and fair to the defendant. People v. Garrison, 2012 COA 132M, 303 P.3d 117.

State penitentiary deemed law enforcement agency. The state penitentiary, as a state ''institution'' within the department of institutions, is a law enforcement agency for the purposes of determining the eligibility of employees thereof to serve as jurors. People v. Scott, 41 Colo. App. 66, 583 P.2d 939 (1978).

Showing of bias not required. Under § 16-10-103 and section (b)(1)(XII), the actual bias of a law enforcement employee need not be shown to sustain a challenge for cause. People in Interest of R.A.D., 196 Colo. 430, 586 P.2d 46 (1978).

But disqualification not applicable to former employees. As § 16-10-103 and this rule do not purport to disqualify former employees of a public law enforcement agency challenged for cause, a defendant's challenge of a retired guard member of the jury panel should be denied. People v. Scott, 41 Colo. App. 66, 583 P.2d 939 (1978).

Prospective juror clearly was not an "employee" under section (b)(1)(XII) of this rule or § 16-10-103 where she volunteered to serve on an on-call basis to work with victims, at the time of trial had been an advocate for a brief period, had been called only approximately six times, and had only a casual limited time commitment. People v. Gilbert, 12 P.3d 331 (Colo. App. 2000).

Defendants were not prejudiced by having the wife of the deputy sheriff on jury where voir dire questions revealed that her husband was a police officer, but where she was not asked whether he was a deputy sheriff nor did she disclose the information, because it would have added nothing material to counsel's decision as to whether to challenge for bias. Ray v. People, 147 Colo. 587, 364 P.2d 578 (1961).

A marital relationship between a judge and a juror is not included in specific circumstances under which a court must sustain a challenge to a juror for cause. Considering § 16-10-103 as a whole and giving the word ''attorney'' its plain and ordinary meaning in context, it is apparent that it refers to attorneys who represent or have represented the parties and advocated on their behalf. Moreover, an attorney is defined as someone who practices law, and a judge is prohibited from engaging in the practice of law. People v. Richardson, 2018 COA 120, __ P.3d __.

Although it would have been prudent for the judge to excuse his wife, or to recuse himself as presiding judge, the judge's misjudgment was not so egregious that it requires reversal under

the plain error standard. People v. Richardson, 2018 COA 120, __ P.3d __.

When a presiding judge's spouse serves on a jury, the inquiry is not whether the jurors were influenced by the judge's spouse. The inquiry is, if the jurors deferred to the spouse, did that deference lead to an actual bias against the defendant. People v. Richardson, 2018 COA 120, __ P.3d __.

Where the defendant could not point to any prejudice resulting from the judge's spouse serving on the jury, the presiding judge's spouse's presence on the jury did not rise to the level of structural error. People v. Richardson, 2018 COA 120, __ P.3d __.

Noncitizen properly excused from jury. It is proper to excuse from the jury a person who is not a citizen of the United States. Babcock v. People, 13 Colo. 515, 22 P. 817 (1889).

A county official whose office, by statutory mandate, is represented by the prosecutor need not automatically be excluded from serving on a jury on the grounds that the county official is implicitly biased. The relationship between the offices of the clerk and county recorder and of the district attorney, standing alone, does not provide sufficient grounds to justify a challenge for cause. People v. Rhodus, 870 P.2d 470 (Colo. 1994).

Applied in People v. Pernell, 2014 COA 157, 414 P.3d 1, aff'd on other grounds, 2018 CO 13, 411 P.3d 669.

C. Public Law Enforcement Agency or Public Defender's Office Employee as Juror.

Employees of an agency being classified by statute as "peace officers" while engaged in their duties is not determinative of whether the agency is a law enforcement agency. People v. Carter, 2015 COA 24M-2, 402 P.3d 480.

While § 16-10-103 (1)(k) and section (b)(1)(XII) of this rule require a trial court to grant a party's challenge for cause to a juror who is employed by a public law enforcement agency, neither expressly requires the court to excuse a juror sua sponte. People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 169 P.3d 662 (Colo. 2007).

For purposes of § 16-10-103 (1)(k) or section (b)(1)(XII) of this rule, the public utilities commission is not a public law enforcement agency, because it is charged primarily with the regulation of civil matters and only has incidental penal enforcement authority. People v. Carter, 2015 COA 24M-2, 402 P.3d 480.

For purposes of § 16-10-103 (1)(k) or section (b)(1)(XII) of this rule, the environmental protection agency is properly characterized as an investigatory and rulemaking body, and not a law enforcement agency. People v. Simon, 100 P.3d 487 (Colo. App. 2004).

Division of youth corrections (DYC) within the department of human services is a public law enforcement agency within the meaning of § 16-10-103 (1)(k) and section (b)(1)(XII) of this rule. The court erroneously denied defendant's challenge for cause to a prospective juror employed by the DYC. People v. Sommerfeld, 214 P.3d 570 (Colo. App. 2009).

An employee of a community corrections facility is an employee of a public law enforcement agency within the meaning of § 16-10-103 (1)(k) and section (b)(1)(XII) of this rule. People v. Romero, 197 P.3d 302 (Colo. App. 2008).

The office of the state attorney general is a law enforcement agency for purposes of § 16-10-103 (1)(k). People v. Novotny, 356 P.3d 829 (Colo. App. 2010), rev'd on other grounds, 2014 CO 18, 320 P.3d 1194.

D. Determination of Juror's Fitness.

Court is trier of qualifications of jurors. Babcock v. People, 13 Colo. 515, 22 P. 817 (1889).

Extent of examination by trial judge. The trial judge may examine prospective jurors on any matter relevant to their competence as jurors. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974).

A trial court should do one of three things if a prospective juror indicates an unwillingness to apply the law: (1) Dismiss the juror for cause; (2) conduct rehabilitative questioning following up on the juror's concerning statements before denying the challenge for cause; or (3) make findings on the record explaining why the juror's statements indicating an unwillingness or inability to follow the law should be disregarded in light of other seemingly inconsistent statements. People v. Marciano, 2014 COA 92M, 411 P.3d 831.

Court to determine if juror indifferent. This rule makes the trial court the trier of the qualifications of the jurors when challenged on the ground of having formed opinions, and it is for that court to determine, as a matter of fact, whether the juror stands indifferent. Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); Solander v. People, 2 Colo. 48 (1873); Jones v. People, 6 Colo. 452, 45 Am. R. 526 (1882); Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Power v. People, 17 Colo. 178, 28 P. 1121 (1892); Leick v. People, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

While a challenge based upon the interest or bias or prejudice of a juror is somewhat differ-

ent from that based upon the grounds of having formed an opinion, so far as the determination of his qualifications is concerned, the principle is the same; and as this rule makes the trial court trier of the qualifications of jurors when challenged upon the grounds of having formed opinions, it is for that court to determine as a matter of fact whether the juror stands indifferent. Imboden v. People, 40 Colo. 142, 90 P. 608 (1907); Minich v. People, 8 Colo. 440, 9 P. 4 (1885); Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Thompson v. People, 26 Colo. 496, 59 P. 51 (1899).

"Undue hardship" may include financial burden. What constitutes ''undue hardship'' sufficient to excuse a juror lies within the discretion of the trial court, and includes one for whom jury service would impose an undue financial burden. People v. Reese, 670 P.2d 11 (Colo. App. 1983).

Trial judge determines as a fact the fitness of the jurors to hear and determine an issue. Leick v. People, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

And appellate court to review trial judge's determination. The placing of discretion in the trial judge in jury selection procedures does not permit appellate courts to abdicate their responsibility to ensure that the requirements of fairness are fulfilled. Morgan v. People, 624 P.2d 1331 (Colo. 1981).

But trial court's determination will not be disturbed on review. Where a trial court is satisfied that a juror can lay aside a previously formed opinion and decide a case upon its evidence, the court's decision will not be disturbed on review. Fleagle v. People, 87 Colo. 532, 289 P. 1078 (1930); Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Hillen v. People, 59 Colo. 280, 149 P. 250 (1915); Shank v. People, 79 Colo. 576, 247 P. 559 (1926); People v. Nunez, 698 P.2d 1376 (Colo. App. 1984), aff'd, 737 P.2d 422 (Colo. 1987).

The trial court is in the best position to view the demeanor of a juror claiming impartiality, and the record must affirmatively demonstrate that the trial court abused its discretion before its decision can be disturbed on appeal. People v. Russo, 713 P.2d 356 (Colo. 1986); People v. Christopher, 896 P.2d 876 (Colo. 1995).

A new trial may be required where a juror deliberately misrepresents or knowingly conceals information relevant to a challenge for cause or a preemptory challenge; however, where the juror's nondisclosure was inadvertent, the defendant must show that the nondisclosed fact was such as to create an actual bias either in favor of the prosecution or against the defendant. People v. Christopher, 896 P.2d 876 (Colo. 1995).

Absent abuse of discretion. If the trial judge is persuaded that a juror would fairly and impartially try the issues, his denial of a challenge for cause should not be disturbed, except where such denial is clearly an abuse of discretion. Leick v. People, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958); Solander v. People, 2 Colo. 48 (1873); Jones v. People, 2 Colo. 351 (1874); Jones v. People, 6 Colo. 452, 45 Am. R. 526 (1882); Babcock v. People, 13 Colo. 515, 22 P. 817 (1889); Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); McGonigal v. People, 74 Colo. 270, 220 P. 1003 (1923); Shank v. People, 79 Colo. 576, 247 P. 559 (1926).

Since trial judge in best position to observe. While a trial judge hears the questions put to a juror and the answers given, observes a juror's demeanor while being interrogated, and discerns through the use of his eyes, ears, and intelligence wherein truth and credit should be given, a reviewing court does not have the benefit of this personal observation which is so important in judging the credibility of a juror. Leick v. People, 136 Colo. 535, 322 P.2d 674, cert. denied, 357 U.S. 922, 78 S. Ct. 1363, 2 L. Ed. 2d 1366 (1958).

The ultimate decision of whether or not to grant a challenge for cause is one for the trial court's sound discretion, since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level. Nailor v. People, 200 Colo. 30, 612 P.2d 79 (1980).

The need for a careful evaluation of the competence of potential jurors to assess the defendant's guilt or innocence solely on the evidence admitted at trial, and the serious practical problems involved with these assessments, are sound reasons for placing great discretion in the trial court in the jury selection procedures. Morgan v. People, 624 P.2d 1331 (Colo. 1981).

IV. PEREMPTORY CHALLENGES.

Section 16-10-104 controls over section (d). Peremptory challenges, while not constitutionally required, are deemed to be an effective means of securing a more impartial and better qualified jury and, as such, are an important right of an accused. While also having an incidental effect on trial procedure, § 16-10-104, is primarily an expression of policy concerning this right of the accused, a substantive matter, and, thus, controls over section (d) of this rule. People v. Hollis, 670 P.2d 441 (Colo. App. 1983).

Although § 16-10-104 refers to the number of challenges in capital cases, it does not define "capital case". By contrast, section (d)(1) of this rule does define the term. The rule and the statute, therefore, do not ''conflict'' in the sense of being irreconcilable or necessarily

incompatible with each other, and the rule can be given effect without producing a result irreconcilable with the plain language of the statute. People v. Reynolds, 159 P.3d 684 (Colo. App. 2006).

There is no conflict between the number of peremptory challenges provided by § 16-10-104 and section (d)(4) of this rule regarding nonreduction of peremptory challenges where there has been a waiver. Where counsel waives a peremptory challenge, counsel does not lose that challenge and can still take advantage of all available peremptory challenges to which the party is entitled, so long as, after waiver, at least one new juror is called into the jury box. People v. Terhorst, 2015 COA 110, 360 P.3d 239.

The time for determining the number of peremptory challenges is the time voir dire is commenced. People v. Hollis, 670 P.2d 441 (Colo. App. 1983).

Number of peremptory challenges allowed is governed by the statute and rule in effect at the time voir dire is conducted. People v. Priest, 672 P.2d 539 (Colo. App. 1983).

Party has absolute right to use all peremptory challenges granted him by this rule, and any frustration thereof, whether by erroneous ruling, false information, or concealment constitutes reversible error. Harris v. People, 113 Colo. 511, 160 P.2d 372 (1945).

And unnecessary use of peremptory challenges not error where not fatal. Where a challenge by the accused to a juror for cause should have been sustained, but the objectionable juror was subsequently peremptorily challenged by defendant, and, at the time of going to trial, defendant had left unused seven peremptory challenges, the error was not fatal to the judgment. Minich v. People, 8 Colo. 440, 9 P. 4 (1885); Solander v. People, 2 Colo. 48 (1873); Jones v. People, 2 Colo. 351 (1874).

But error where peremptory challenges exhausted unnecessarily. Where a challenge is properly made, but is overruled by the court, and the challenging party afterwards exhausted his peremptory challenges, using one of them on the disqualified juror, the action of the court in denying the challenge is error to the substantial prejudice of the party who made the challenge. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912); Denver City Tramway Co. v. Kennedy, 50 Colo. 418, 117 P. 167 (1911); People v. Maes, 43 Colo. App. 365, 609 P.2d 1105 (1979); People v. Russo, 677 P.2d 386 (Colo. App. 1983).

Appellate review not precluded by invited error where a defendant does not use a peremptory challenge to excuse a juror for whom the defendant's challenge for cause was denied. People v. Garcia, 2018 COA 180, __ P.3d __.

Reversal of a criminal conviction for other than structural error is not required absent an express legislative mandate or an appropriate case-specific outcome-determinative analysis. Allowing a defendant fewer peremptory challenges than authorized or than exercised by the prosecution is not structural error requiring reversal. People v. Novotny, 2014 CO 18, 320 P.3d 1194 (overruling People v. Macrander, 828 P.2d 234 (Colo. 1992), People v. Lefebre, 5 P.3d 295 (Colo. 2000), and other holdings to the contrary); People v. Alfaro, 2014 CO 19, 320 P.3d 1191; People v. Roldan, 2014 CO 22, 322 P.3d 922; People v. Montero-Romero, 2014 CO 23, 322 P.3d 923; People v. Wise, 2014 COA 83, 348 P.3d 482.

Prejudice is shown if defendant exhausts all of his peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause. A defendant is not required to request an additional peremptory challenge to preserve this issue on appeal. People v. Prator, 833 P.2d 819 (Colo. App. 1992).

However, defendant must show exhaustion on appeal. Where defendant claims error in denial of his challenge of a juror for cause who was later excused by peremptory challenge, but makes no showing that all of the peremptory challenges to which defendant was entitled were exercised, nor is it shown that he was deprived of the right to challenge any other prospective juror because he was forced to exhaust his peremptory challenges, even assuming that the court should have sustained the challenge for cause, there can be no prejudice to the rights of the defendant resulting from the denial of such challenge. Skeels v. People, 145 Colo. 281, 358 P.2d 605 (1961).

Where the trial court improperly removed jurors for cause and the prosecution subsequently used all of its peremptory challenges, the prosecution enjoyed an unfair tactical advantage in determining the makeup of the jury, detrimentally affecting the rights of the defendant and requiring a new trial. Improperly dismissing some jurors for cause had the effect of granting additional peremptory challenges to the prosecution. It was irrelevant that the defendant had full ability to use his peremptory challenges. The prosecution's relatively greater ability to remove jurors it viewed as objectionable was independently prejudicial to the defendant's rights, and the court presumed prejudice to the defendant. People v. Lefebre, 5 P.3d 295 (Colo. 2000), overruled in People v. Novotny, 2014 CO 18, 320 P.3d 1194.

Defendant must object to the use of excess peremptory challenges. Right to object to prosecution's use of more than statutorily allowed number of peremptory challenges is waived unless there is timely objection by the

defendant. Righi v. People, 145 Colo. 457, 359 P.2d 656 (1961).

Judge may grant peremptory challenge of juror after his acceptance. Although there is no provision in section (d), for the trial judge to exercise his discretion, in a proper case the trial judge may properly exercise his discretion, upon a showing of good cause, and grant a peremptory challenge even after the juror has been accepted. Simms v. People, 174 Colo. 85, 482 P.2d 974 (1971).

Section (d)(3) allows the court to add peremptory challenges to either or both sides, but does not require the court to do so. People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Applicability of right of 10 peremptory challenges to adjudicative stage of a juvenile proceeding. People in Interest of T.A.W., 38 Colo. App. 175, 556 P.2d 1225 (1976).

V. CUSTODY OF JURY.

This rule implements traditional practice of trial courts in this state. Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

Colorado permits the separation of jurors even in capital cases where assented to by the attorneys for the parties, although the supreme court has expressed its disapproval of the practice in serious criminal cases. Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

But rule requires sequestration of jurors in first-degree murder case unless requirement waived by the accused. Tribe v. District Court, 197 Colo. 433, 593 P.2d 1369 (1979); Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

Defendant's personal assent as opposed to counsel's alone is not mandatory for such waiver in capital cases. Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

Showing of prejudice necessary for error where counsel agrees to separation. Where defense counsel expressly agrees to separation of the jury in a capital case, error cannot be predicated on that procedure in the absence of a showing of prejudice to the defendant. Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

And, in such a case, the defendant has burden of proof. Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

Burden of showing prejudice from separation of a deliberating jury in a noncapital case also rests upon the defendant. People v. Maestas, 187 Colo. 107, 528 P.2d 916 (1974).

And absent a showing of prejudice, separation is not grounds for reversal. People v. Maestas, 187 Colo. 107, 528 P.2d 916 (1974).

Determination of whether prejudice has occurred during jury sequestration is within the sound discretion of the trial court and only where that discretion has been abused will a new trial be ordered. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974).

Trial of a first-degree murder charge is a "capital case" for purposes of jury sequestration under section (f), even though the district attorney does not intend to qualify the jury for consideration of the death penalty or to seek the imposition of the death penalty in the event of a conviction. People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983) (decided prior to 1983 amendment of this rule); People v. Jones, 677 P.2d 383 (Colo. App. 1983), aff'd in part and rev'd in part on other grounds, 711 P.2d 1270 (Colo. 1986).

While the rule does not expressly forbid a trial court from allowing jurors to predeliberate, those juror discussions are not allowed in criminal cases in Colorado. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

VI. ALTERNATE JURORS.

Alternate jurors must be discharged at the time the jury retires to deliberate; any replacement of a regular juror by an alternate must occur prior to such time. People v. Burnette, 753 P.2d 773 (Colo. App. 1987), aff'd, 775 P.2d 583 (Colo. 1989) (decided prior to 1993 amendment).

Section 16-10-105 controls over section (e) of this rule because the statute provides substantive, in addition to procedural, direction to the trial court. Carrillo v. People, 974 P.2d 478 (Colo. 1999).

Trial court has the authority under both § 16-10-105 and section (e) of this rule to replace a juror with an alternate after jury deliberations have commenced. Carrillo v. People, 974 P.2d 478 (Colo. 1999).

If a trial court interrupts deliberations of a jury and suspends the jury's fact finding functions to investigate allegations of juror misconduct, the court's inquiry must not intrude into the deliberative process. In the exercise of judicial discretion, before a juror is dismissed from a deliberating jury due to an allegation of juror misconduct, the court must make findings supporting a conclusion that the allegedly offending juror will not follow the court's instructions. Garcia v. People, 997 P.2d 1 (Colo. 2000).

Prejudice is presumed when alternate juror replaces regular juror during deliberations. People v. Burnette, 775 P.2d 583 (Colo. 1989); Carrillo v. People, 974 P.2d 478 (Colo. 1999).

Presence of alternate juror during jury's deliberations sufficiently impinges upon defendant's constitutional right to a jury that renders its verdict in secret as to create a presumption of prejudice that requires reversal if not rebutted, and, where it is unclear from the record whether the alternate juror was actually present

during the jury deliberations, the issue should be remanded for an evidentiary hearing. People v. Boulies, 690 P.2d 1253 (Colo. 1984).

Presence of alternate juror amounts to harmless error when the evidence supporting the defendant's guilt was overwhelming and the juror was only present for jury's deliberations for approximately ten minutes. James v. People, 2018 CO 72, 426 P.3d 336.

Presumption of prejudice held sufficiently rebutted where juror was replaced for an obvious and bona fide hearing impairment, court carefully instructed remaining jurors and the alternate juror to start their deliberations anew, the jury physically tore up and discarded their notes from the earlier deliberations, and the second set of deliberations took two hours longer than the first. Carrillo v. People, 974 P.2d 478 (Colo. 1999).

Presumption of prejudice may be rebutted only by a showing that trial court took extraordinary precautions to ensure that defendant would not be prejudiced and that, under the circumstances of the case, such precautions were adequate to achieve that result. People v. Burnette, 775 P.2d 583 (Colo. 1989).

Procedures instituted by the trial court did not meet the People v. Burnette standard. People v. Patterson, 832 P.2d 1083 (Colo. App. 1992).

Reversible error. Where trial court replaced regular juror with alternate juror during jury deliberations but did not ask regular jurors if they were capable of disregarding their previous deliberations or if they would be receptive to an alternate juror's attempt to assert a non-conforming view and did not ask alternate juror about his activities after being discharged or his present ability to serve on the jury, trial court did not take extraordinary measures to ensure that defendant would not be prejudiced by such mid-deliberation replacement and, as a result thereof, defendant's conviction required reversal. People v. Burnette, 753 P.2d 773 (Colo. App. 1987), aff'd, 775 P.2d 583 (Colo. 1989).

Absent a showing of prejudice, a defendant's failure to timely object to the separation of the jury during a trial constitutes a waiver of sequestration. Jones v. People, 711 P.2d 1270 (Colo. 1986).

Defendant did not waive right to challenge the procedure followed in accomplishing substitution of juror by consenting to the fact of substitution. People v. Patterson, 832 P.2d 1083 (Colo. App. 1992).

Court did not abuse its discretion by declining to prohibit or limit juror questions. Although the jurors asked hundreds of questions, the questions did not have a negative effect on the efficiency of the trial, did not turn the jurors into investigators or advocates, and did not shift the burden of proof to defendant. People v. Garrison, 2012 COA 132M, 303 P.3d 117.

Applied in People v. Avery, 736 P.2d 1233 (Colo. App. 1986).

VII. JUROR QUESTIONS.

Juror questioning in a criminal trial does not, in and of itself, violate a defendant's constitutional rights to a fair and impartial jury. Medina v. People, 114 P.3d 845 (Colo. 2005).

Where the court errs by asking an improper question from the jury, the impact of the question should be reviewed for harmless error. Medina v. People, 114 P.3d 845 (Colo. 2005).

Trial court did not commit reversible error by posing jury's questions to witnesses without first consulting defense counsel. When an improper question from the jury is asked of a witness, the proper course is not to apply structural error but to review the impact of the trial court's ruling for harmless error. People v. Zamarippa-Diaz, 187 P.3d 1120 (Colo. App. 2008).

Rule 25. Disability of Judge

If by reason of absence from the district, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties. If the substitute judge is satisfied that he cannot perform those duties because he did not preside at the trial, or for any other reason, he may, in his discretion, grant a new trial.

ANNOTATION

Substitution of judges is permitted so long as a justifiable reason for the substitution appears in the record. Substitution need not be required by an emergency or other situation beyond the control of the original judge to be justifiable. People v. Little, 813 P.2d 816 (Colo. App. 1991).

Where the reason for substituting judges does not appear in the record, the case must be remanded for statement of the reason. The

sentence will only be affirmed thereafter if the reason is one specified in the rule. If the reason is not one of those specified in the rule, the sentence will be vacated and the defendant will be resentenced by the original judge. People v. Little, 813 P.2d 816 (Colo. App. 1991).

Case remanded to trial court for the judge who tried the case to explain on the record why he recused himself before sentencing. People v. Brewster, 240 P.3d 291 (Colo. App. 2009).

Sentencing judge's explanation for the absence of the trial judge was inadequate, and the sentencing judge was incorrect in her finding that, because she heard motions in the case and reviewed the record, she was authorized to sentence the defendant. The record does not indicate the reason for substitution or whether there was a proper basis for the trial judge not to impose sentence. People v. Childress, 2012 COA 116, 409 P.3d 365, rev'd on other grounds, 2015 CO 65M, 363 P.3d 155.

Rule does not apply where conviction was the result of a guilty plea and not a trial and because a revocation hearing on a deferred judgment is not a trial. People v. Rivera-Bottzeck, 119 P.3d 546 (Colo. App. 2004).

The requirement that the same judge impose sentence after a trial, except for justifiable reasons to substitute another judge, does not apply to resentencing proceedings. People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006).

Rule 26. Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by law.

Source: Entire rule amended and adopted November 9, 2006, effective January 1, 2007.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment, ''Reporter's Privilege: Pankratz v. District Court'', see 58 Den. L.J. 681 (1981). For article, ''Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality'', see 11 Colo. Law. 704 (1982). For article, ''People v. Mitchell: The Good Faith Exception in Colorado'', see 62 Den. U. L. Rev. 841 (1985).

Opening statements and arguments of lawyers are not evidence. People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972).

Such arguments are designed only to sway findings. Arguments to the court are not matters of evidence, have no probative value, and are designed only to sway the court's findings and conclusions. People In Interest of B. L. M. v. B. L. M., 31 Colo. App. 106, 500 P.2d 146 (1972).

II. FUNCTION OF JUDGE AND JURY.

Order of proof and presentation of witnesses is within sound discretion of the trial court, and error may not be predicated thereon in the absence of a showing of prejudice. Martinez v. People, 177 Colo. 272, 493 P.2d 1350 (1972).

Allowing prosecution to recall witnesses for further cross-examination after defense rests its case is matter pertaining to proof and is within sound discretion of trial judge. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973).

Jury is permitted to draw any and all reasonable inferences of guilt from the evidence before it. Huser v. People, 178 Colo. 300, 496 P.2d 1035 (1972).

Effect of waiving jury trial. Where the defendant voluntarily waived a jury trial, the trial judge had no recourse but to examine the evidence and rule on its admissibility, and the defendant cannot be heard to complain, when he voluntarily, and with advice of counsel, created a situation which by necessity made the trial judge both the one who decides if evidence is admissible and the one who renders the verdict. People v. Mascarenas, 181 Colo. 268, 509 P.2d 303 (1973).

The credibility of witnesses, including experts, is within the province of the jury as the

fact finder and the jury's obvious acceptance of the testimony by the prosecution's experts is not subject to reversal. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

III. WITNESSES.

A. Testimony.

It is axiomatic that witnesses should relate facts and not conclusions. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

But exception when witness must summarize impressions of senses. An exception to the rule that a witness may only relate facts exists when a witness has personally observed the physical activity of another and summarizes his sensory impressions thereof because they can hardly be described in any other manner. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

Especially where witness qualifies conclusionary statement. Where a witness qualifies his conclusion immediately subsequent to defendant's objection by stating that defendant ''looked like'' he was going to do a certain act, the trial court commits no error in overruling defendant's objection to such testimony. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

Admission of unresponsive testimony not per se wrong. There is nothing per se wrong with the admission into evidence of testimony which may be unresponsive, provided that it is relevant for some purpose. People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973).

Testimony as to possible places of incarceration is not to be placed before a jury. People v. Scheidt, 186 Colo. 142, 526 P.2d 300 (1974).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. Defense counsel raised self-defense as an affirmative defense during opening statements and elicited testimony to support the affirmative defense during cross examination of a prosecution witness. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

Trial court did not abuse its discretion in requiring defendant to present his expert testimony in court rather than through videoconferencing. People v. Casias, 2012 COA 117, 312 P.3d 208.

B. Corroboration.

Defendant may be convicted upon uncorroborated testimony of accomplice. Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971).

Corroborating evidence defined. Corroborating evidence is evidence, either directly or by proof of surrounding facts and circumstances, that tends to establish the participation of the defendant in the commission of the offense. Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971).

IV. ADMISSIBILITY.

A. In General.

Trial court did not err by admitting gun where there was conflicting testimony concerning the gun's origin since the lack of a positive identification of the gun affected the weight to be given the evidence, not the admissibility. People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994).

All facts proving crime charged admissible. All the facts which are necessary to prove the crime charged, when linked to the chain of events which supports that crime, are admissible. People v. Anderson, 184 Colo. 32, 518 P.2d 828 (1974).

Weakness in chain of evidence addresses weight of evidence. Where the chain of evidence is complete, any weakness in the chain goes merely to the weight of the evidence and not to its admissibility. People v. Sanchez, 184 Colo. 25, 518 P.2d 818 (1974).

Admission of cumulative evidence is within the discretion of the trial court and its ruling will not be overturned unless a clear abuse of discretion appears. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

On rebuttal, party may introduce any competent evidence to explain, refute, counteract, or disprove proof of other party, even if evidence also tends to support the party's case in chief. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); People v. Knight, 167 P.3d 141 (Colo. App. 2006).

Propriety of permitting surrebuttal evidence is within discretion of trial court. People v. Hutto, 181 Colo. 279, 509 P.2d 298 (1973).

Where defendant seeks to discuss on surrebuttal matters that are not a reply to new evidence of prosecution, but have been specifically covered in earlier testimony, the trial court does not commit an abuse of discretion in denying defendant's request. People v. Martinez, 181 Colo. 27, 506 P.2d 744 (1973).

Except where defendant meeting matter introduced by prosecution on rebuttal. Defendants should always be permitted to introduce, as surrebuttal, evidence which tends to meet any new matter introduced by prosecution on rebuttal; otherwise, it is within discretion of trial court to allow or deny surrebuttal. People v. Martinez, 181 Colo. 27, 506 P.2d 744 (1973).

When error in admission of evidence not curable by instructions to jury. Error in admitting evidence may be cured by instructing the jury to disregard it, unless such evidence is

so prejudicial that it is unlikely that the jury will be able to erase it from their minds; if it is so prejudicial, a mistrial should be ordered. Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971).

An error in exposing to the jury certain inadmissible evidence may be cured by instructing the jury to disregard it; however, when such evidence is highly prejudicial, it is conceivable that, but for its exposure, the jury may not have found the defendant guilty, and the trial court's cautionary instruction to disregard it will not suffice. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

Remarks by judge may not constitute reversible error. Casual remarks of the trial judge, made while passing upon objections to testimony, although ill-advised, do not constitute reversible error when not so couched as to especially reflect upon defendant. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

Nor correct comments by district attorney on evidence. Where the record shows beyond a doubt that the testimony implicated the companions of defendant as accomplices, any statement by the district attorney with regard to those persons as accomplices, after such a showing, is within the boundaries of proper comment. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

Trial court's curative instruction, which directed jurors not to consider evidence relating to other transactions allegedly involving defendant, cured any errors resulting from admission of such evidence in ''theft by receiving'' prosecution where evidence of defendant's ''theft by receiving'' was overwhelming. Vigil v. People, 731 P.2d 713 (Colo. 1987).

B. Confessions and Admissions.

Admissibility of defendant's statement to be determined at trial. Where a defendant is given a full ''Miranda'' warning following his arrest, the admissibility of the statements he made as evidence must be determined by the court at the time of trial rather than on interlocutory appeal under Rule 41.2, Crim. P. People v. Vaughns, 175 Colo. 369, 489 P.2d 591 (1971).

Outside presence of jury. The trial court must make a determination of the admissibility of a confession, which entails a determination of the propriety of the ''Miranda'' warning, outside of the presence of the jury, at an in camera hearing. Perez v. people, 176 Colo. 505, 491 P.2d 969 (1971).

Including issue of voluntariness. Whenever voluntariness in an issue in a trial, there must be a hearing before the trial judge and a determination made on that issue. People v. Sanchez, 180 Colo. 119, 503 P.2d 619 (1972).

As to be admissible, confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight. People v. Pineda, 182 Colo. 385, 513 P.2d 452 (1973).

Where the defendant makes a voluntary, knowing, and intelligent waiver of his constitutional rights, the trial court's ruling that an oral statement of the defendant is admissible is not error. Dyett v. People, 177 Colo. 370, 494 P.2d 94 (1972).

Two-step procedure is proper to resolve issue of voluntariness of confession: First, the trial judge must determine whether the confession is voluntary; and, second, if the confession is voluntary and is admitted into evidence, the trial judge should instruct the jury on the weight to be given the confession. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

Admissibility need only be established by preponderance of evidence. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

A trial judge only has to find that a defendant's statement is voluntary by a preponderance of the evidence to justify submission of the statement to the jury. People v. Smith, 179 Colo. 413, 500 P.2d 1177 (1972).

Although waiver of rights must be found beyond a reasonable doubt. Before a criminal defendant's extrajudicial statement is admissible as evidence against him, a trial court must find beyond a reasonable doubt that the defendant was fully informed of his constitutional rights and that he intelligently and expressly waived them. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971).

And the burden is upon the state to show attendant circumstances sufficient from which a knowing and intelligent waiver may be implied. Roybal v. People, 178 Colo. 259, 496 P.2d 1019 (1972).

Or testimony inadmissible. Where the state does not meet its burden of showing by clear and convincing evidence that defendant was represented by counsel at a lineup, lineup testimony is properly excluded. Fresquez v. People, 178 Colo. 220, 497 P.2d 1246 (1972).

Total circumstances and conduct of accused must be considered. In passing on whether a statement is voluntary and whether the accused waived his rights, the court must consider and examine the totality of the facts and circumstances of the case, as well as the conduct of the accused. Duncan v. People, 178 Colo. 314, 497 P.2d 1029 (1972).

Findings must be supported by evidence. Where the findings of the court entered after an in camera hearing are that the statements were understandingly and voluntarily given, that defendant at the time had full knowledge of his rights, and the findings are supported by the evidence, it is not error to admit defendant's

statements with evidence. People v. Gallegos, 180 Colo. 238, 504 P.2d 343 (1972).

Appellate review. An appellate court is bound to accept the trial court's findings and ruling on the admissibility of a confession, if the evidence is sufficient to support the trial court's determination. Redmond v. People, 180 Colo. 24, 501 P.2d 1051 (1972).

Where trial court's finding that accused's confession was voluntary and admissible is supported by competent evidence, it will not be disturbed on appeal. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

Trial court's findings of facts on the voluntariness of a confession will be upheld on review if supported by adequate evidence in the record. People v. Pineda, 182 Colo. 385, 513 P.2d 452 (1973); People v. McIntyre, 789 P.2d 1108 (Colo. 1990).

Evidence held sufficient to show intelligent waiver of rights. Jorgensen v. People, 178 Colo. 8, 495 P.2d 1130 (1972); McClain v. People, 178 Colo. 103, 495 P.2d 542 (1972).

Prior refusal does not make subsequent voluntary statement inadmissible. When the police fully honor a defendant's refusal to make a statement, the fact of a prior refusal to make any statement should not taint a statement subsequently given voluntarily and with full advisement of rights. Dyett v. People, 177 Colo. 370, 494 P.2d 94 (1972).

When Miranda warning not necessary. Where defendant is not in custody nor deprived of his freedom when a police officer asks a question and the investigation has not focused upon any individual, then the Miranda warning is not necessary, since the defendant is not in custody, and no error is committed in admitting a statement into evidence. Walker v. People, 175 Colo. 173, 489 P.2d 584 (1971).

Effect of intoxication on admissibility of statement. Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972).

Police testimony as to defendant's oral confession was proper and permissible in all its aspects, where the record indicates that before being questioned the defendant was advised of her complete rights; that she read and signed a rights advisement form; that she understood her rights; that she indicated a willingness to talk; and that she freely and voluntarily told the police about her involvement in the crime. People v. Gallegos, 181 Colo. 264, 509 P.2d 596 (1973).

Admonition to jury does not cure erroneous admission of incriminating statements. An admonition or an instruction to the jury to disregard involuntary incriminating statements does not cure the erroneous admission of such statements. Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971).

Entire statement is admissible if any portion thereof is admissible. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

But burden of showing continuity or relevance in series of statements, or among various parts of a single statement, is on the party seeking to have the entire series or statement admitted. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

Consequently, admission of only the relevant portions of a statement is not error where there is no showing of continuity or relevance between the admitted portions of the statement and the remainder of the statement. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

Moreover, when the trial court admits into evidence a duplicate copy in addition to the original copy of a formal statement, which has been likewise corrected and signed by the defendant, the evidence is merely cumulative, and there is no abuse of discretion in its admission. Jorgensen v. People, 178 Colo. 8, 495 P.2d 1130 (1972).

Independent proof of corpus delicti required. An accused's extra-judicial confession or statement is not sufficient to sustain a conviction without proof of the corpus delicti independent of the statement or confession. People v. Maestas, 181 Colo. 180, 508 P.2d 782 (1973); People v. Applegate, 181 Colo. 339, 509 P.2d 1238 (1973); People v. Smith, 182 Colo. 31, 510 P.2d 893 (1973).

Use of evidence from uncounseled witness against third party. No reason exists for exclusion of evidence obtained from an uncounseled witness, so long as the evidence obtained is not offered against that witness. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

When reference to defendant's silence is reversible error. Not every reference to defendant's exercise of his fifth amendment right to remain silent mandates automatic reversal; the relevant inquiry is whether the prosecution ''utilized defendant's silence as a means of creating an inference of guilt''. People v. Key, 185 Colo. 72, 522 P.2d 719 (1974); People v. Benevidez, 679 P.2d 125 (Colo. App. 1984).

Defendant's statement held to be voluntary when given in a hospital five hours after a serious accident when he was alert, resting, and not under the effects of medication. Defendant willingly participated, no threats were made to secure his cooperation. People v. Miller, 829 P.2d 443 (Colo. App. 1991).

Defendant was not in custody when he was in the hospital for medical treatment. Confinement to a hospital bed is insufficient alone to constitute custody. People v. Miller, 829 P.2d 443 (Colo. App. 1991).

There was a valid waiver of defendant's Miranda rights when the defendant nodded his head in response to an officer's question concerning whether he understood his rights. A valid waiver need not be express, but may be

inferred from actions and words. People v. Miller, 829 P.2d 443 (Colo. App. 1991).

Defendant was not in custody when she was in the hospital even though she had been given morphine prior to her making certain incriminating statements. Expert testimony indicated that the morphine she had been given would not have affected her ability to think, speak, and understand the situation. People v. DeBoer, 829 P.2d 447 (Colo. App. 1991).

C. Exclusionary Rule.

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., part 3 of article 3 of title 16, and Crim. P. 41.

Exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during, or as the direct result of, an unlawful invasion of a defendant's rights by the police. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971).

Applicability of "fruit of the poisonous tree" doctrine. To apply the "fruit of the poisonous tree" doctrine, the fruit of the search must have been obtained as the direct result of a violation of the defendant's constitutional rights — such a violation is said to taint the tree and, in turn, the fruit. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971); People v. Potter, 176 Colo. 510, 491 P.2d 974 (1971).

Standing to object to illegal seizure. A person who is only aggrieved by the admission of evidence illegally seized from a third person lacks standing to object. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Test of admissibility of evidence seized in lawful search following an unlawful search is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been arrived at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. People v. Hannah, 183 Colo. 9, 514 P.2d 320 (1973).

Defendant's allegedly criminal acts were sufficiently attenuated from any illegal conduct of sheriff's deputies so that exclusion of evidence was not appropriate. Evidence of a new crime committed in response to an unlawful trespass is admissible. People v. Doke, 171 P.3d 237 (Colo. 2007).

Information in sheriff deputy's affidavit, when considered separately and as a whole, failed to establish a substantial basis for the magistrate's determination that probable cause existed to issue the warrant. People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd on other grounds, 2012 CO 66, 289 P.3d 24.

Deputy who conducted the search and who was the same officer who prepared the deficient affidavit either knew or should have known that the warrant he obtained based on his own affidavit was lacking in probable cause, and thus it was objectively unreasonable for him to rely on it. People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd on other grounds, 2012 CO 66, 289 P.3d 24.

Trial court erred when it concluded that (1) probable cause existed to issue the search warrant, and, (2) even absent probable cause, the officers acted in good faith in executing the warrant. People v. Hoffman, 293 P.3d 1 (Colo. App. 2010), rev'd on other grounds, 2012 CO 66, 289 P.3d 24.

D. In-Court Identification.

Admissibility of in-court identification after illegal lineup. Where evidence is presented showing that an in-court identification of the defendant has an independent origin other than an illegal lineup and the trial court so finds, the in-court identification is admissible. People v. Bowen, 176 Colo. 302, 490 P.2d 295 (1971).

Determination of independent basis at "in camera hearing". A trial judge's determination at an "in camera hearing" that an independent basis exists for in-court identification of defendant provides a proper foundation for admission of identification testimony before the jury. People v. Marion, 182 Colo. 435, 514 P.2d 327 (1973).

And reviewing court will not substitute its judgment. Where trial judge, after considering the totality of the circumstances at an "in camera hearing", permits the introduction of identification testimony, he does not abuse his discretion, and reviewing court will not substitute its judgment for that of the trial court. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Burden of proof is on prosecution. Where there is a violative lineup identification of a defendant, the burden of proof is on the prosecution to show an untainted identification of the defendant at trial. People v. Bowen, 176 Colo. 302, 490 P.2d 295 (1971).

Clear and convincing evidence required that identification from witness' own recollection. It is the burden of the prosecution to show by clear and convincing evidence that any suggestion was not present and that the identification of the defendant is the product of the witness's own recollection. Constantine v. People, 178 Colo. 16, 495 P.2d 208 (1972); Sandoval v. People, 180 Colo. 180, 503 P.2d 1020 (1972).

Suggestive circumstances do not necessitate reversal. Suggestive circumstances at an out-court identification will not by themselves necessitate reversal of a conviction. The concern of court is to prevent extrajudicial identification so unduly suggestive that, as matter of law, it results in substantial likelihood of mis-

taken in-court identification. People v. Pacheco, 180 Colo. 39, 502 P.2d 70 (1972).

Nor merely cumulative identification. Even if extrajudicial identifications were inadmissible hearsay, where, in light of the other material evidence relating defendants to the crime, such identification is clearly cumulative and any error harmless. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Behavior of witness at confrontation with defendant bears on credibility of the witness's identification of the defendant at the trial. People v. Bugarin, 181 Colo. 57, 507 P.2d 879 (1973).

Independent in-court identification of defendant held sufficient to admit into evidence. McGregor v. People 176 Colo. 309, 490 P.2d 287 (1971).

E. Codefendants.

Testimony of accomplice must be scrutinized and acted upon with great caution. People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

Evidence admissible in separate trial also admissible in joint trial. Where evidence would be admissible against defendant in a separate trial, there is no prejudice as a result of the admission of that evidence in a joint trial. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

And evidence inadmissible in separate trial admissible in joint trial with limiting instruction. It is not reversible error to admit a statement into evidence which would not be admissible against one of the defendants in a separate trial where the court gives a limiting instruction and the evidence of that defendant's involvement is overwhelming, even though it would be better trial procedure not to admit the statement. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Articles in possession of codefendant may be admitted. Where defendant and his codefendant jointly participated in the criminal venture, they acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice; hence, admitting in evidence as against defendant, the articles found in the possession of his codefendant is not error where they were a part of the state's case against both defendants. Miller v. People, 141 Colo. 576, 349 P.2d 685, cert. denied, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 75 (1960).

Codefendant cannot object to evidence of the history of the joint undertaking, even though it involves the commission of a crime by one or more of the other codefendants, if the history of the enterprise might throw light on the motive he or his codefendants might have had for committing another crime and which history constitutes a chain of circumstances throwing some light on the probability of their having jointly undertaken to commit the crime charged. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Examination of coconspirator concerning guilty plea arising out of same events. People v. Craig, 179 Colo. 115, 498 P.2d 942, cert. denied, 409 U.S. 1077, 93 S. Ct. 690, 34 L. Ed. 2d 666 (1972).

F. Circumstantial.

Circumstantial evidence is not relegated to secondary status but is to be considered under the same criteria as direct evidence. People v. Durbin, 187 Colo. 230, 529 P.2d 630 (1974).

Conviction of crime may be based upon circumstantial evidence. Diebold v. People, 175 Colo. 96, 485 P.2d 900 (1971).

Circumstantial evidence, when viewed in the light most favorable to the prosecution, can provide proof of guilt beyond a reasonable doubt. People v. Salas, 189 Colo. 111, 538 P.2d 437 (1975).

And quantum of proof required same as for direct evidence. The quantum of proof where guilt is founded upon circumstantial evidence is the same as where it is based on direct evidence. Diebold v. People, 175 Colo. 96, 485 P.2d 900 (1971).

So that evidence not compatible with hypothesis of innocence. Where a conviction is sought on circumstantial evidence alone, the prosecution must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, but the facts and circumstances must be such as are incompatible, upon any reasonable hypothesis, with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant. People v. Calise, 179 Colo. 162, 498 P.2d 1154 (1972).

In a circumstantial evidence case, the evidence must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Roybal v. People, 178 Colo. 259, 496 P.2d 1019 (1972); People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972); People v. Larsen, 180 Colo. 140, 503 P.2d 343 (1972).

And exclusion of every possible theory other than guilt is not required, when referring to the sufficiency of circumstantial evidence. People v. Florez, 179 Colo. 176, 498 P.2d 1162 (1972).

Test is exclusion of every rational hypothesis, which means reasonable hypothesis. People v. Florez, 179 Colo. 176, 498 P.2d 1162 (1972).

Where sufficient question is raised by circumstantial evidence, the finding of the jury is conclusive. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

Specific intent proved by circumstantial evidence. Specific intent is ordinarily inferable from the facts, and proof thereof is necessarily by circumstantial evidence. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

Circumstantial evidence held sufficient to justify inference of criminal intent. Evans v. People, 175 Colo. 269, 486 P.2d 1062 (1971).

Fingerprint evidence may in some instances be sufficient to support conviction where that evidence is tied directly to the commission of the crime and no explanation other than guilt exists. Solis v. People, 175 Colo. 127, 485 P.2d 903 (1971).

Fingerprints warrant a conviction when the fingerprints clearly and unequivocally establish that the accused committed the crime. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

G. Documentary.

Use of photographs. Photographs may be used to graphically portray the appearance and condition of a deceased and the extent of existing wounds and injuries and are competent evidence of any relevant matters which a witness may describe in words. Gass v. People, 177 Colo. 232, 493 P.2d 654 (1972).

Photographs may be used to graphically portray, among other things, the scene of a crime, the identification of a victim, the appearance and condition of the deceased, and the location, nature, and extent of the wounds or injuries, all of which matters are relevant. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Photographs are competent evidence of any relevant matter which is competent for a witness to describe in words. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Test for admissibility of photographs rests on whether the probative value of the photographs is "far outweighed" by their potential inflammatory effect on the jury. People v. White, 199 Colo. 82, 606 P.2d 847 (1980).

Test for admissibility applied in People v. Franklin, 683 P.2d 775 (Colo. 1984); People v. Marquiz, 685 P.2d 242 (Colo. App. 1984), aff'd, 726 P.2d 1105 (Colo. 1986).

Not inadmissible because of shocking content. That shocking details of a crime may be revealed by photographs does not render them inadmissible if they are otherwise relevant. Gass v. People, 177 Colo. 232, 493 P.2d 654 (1972); People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Rather, admissibility discretionary with trial court. The trial court has discretion to determine whether a photographic exhibit is unnecessarily gruesome and inflammatory. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Decision not disturbed absent abuse. Unless an abuse of discretion is shown, a trial court's decision as to admissibility of a photograph will not be disturbed on review. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Standard for review of admission of pictures into evidence is whether they were without probative value and they served only to incite the jurors to passion, prejudice, vengeance, hatred, disgust, nausea, revolt, and all of the human emotions that are supposed to be omitted from the jury's deliberations. Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972).

Photographs which should not be used. Photographs such as mug shots which necessarily import prior criminality to the defendant should not be used as evidence at trial. People v. Bugarin, 181 Colo. 57, 507 P.2d 879 (1973).

Although no prejudice in use of mugshot of confederate. Mugshot of defendant's confederate, used by the district attorney for identification purposes, where codefendant was tried separately and the mugshot was taken as a result of the charges in the present case, did not import prior criminal conduct on the defendant's part; no prejudice to defendant resulted by the use of the photograph of his confederate and codefendant for identification purposes in defendant's trial. People v. York, 189 Colo. 16, 537 P.2d 294 (1975).

Pretrial photographic identification. Where the pretrial photographic identification was not, as a matter of law, tainted with impermissible suggestiveness, it is not incumbent upon the prosecution to establish at trial an independent basis for the in-court identification. People v. Opson, 632 P.2d 602 (Colo. App. 1980).

Out-of-court identification by photographic array held unduly suggestive. People v. Stevens, 642 P.2d 39 (Colo. App. 1981).

Waiver of error regarding admission of photographs. Where no question as to the admission of a photographic exhibit has been raised on appeal, any error has been waived. People v. Jones, 184 Colo. 96, 518 P.2d 819 (1974).

Weight to be given fingerprint evidence for trier of fact. Where a proper foundation was laid for the admission of a fingerprint, the weight to be afforded the fingerprint evidence was for the trier of the fact. People v. Gomez, 189 Colo. 191, 537 P.2d 297 (1975).

Generally, old fingerprint card inadmissible. In the usual case, where other sample prints are available, a fingerprint card made in connection with prior criminal activity should not be admitted because of the danger of disclosing a past criminal record. Serratore v. People, 178 Colo. 341, 497 P.2d 1018 (1972).

Admissibility of tape recording in discretion of trial court. The decision as to the admissibility of a tape recording is one that rests in the sound discretion of the trial court. People v. Quintana, 189 Colo. 330, 540 P.2d 1097 (1975).

H. Exhibits.

Use of exhibits from earlier trial not prejudicial. Fact that certain exhibits used in defendant's trial had court reporter's identification marks on them remaining from their use in the codefendant's trial did not result in any prejudice, and at most, the marks constituted harmless error which is not ground for reversal. People v. Gallegos, 181 Colo. 264, 509 P.2d 596 (1973).

Exhibits of doubtful admissibility to be kept from view of jury. Matters of evidence which are of doubtful admissibility should not be placed on counsel's table where they may readily be seen by a trial jury. Zamora v. People, 175 Colo. 340, 487 P.2d 1116 (1971).

Proper admission of exhibits presumed where not certified as part of appellate record. Where appellate court is unable to appraise the alleged prejudicial effect of exhibits because none are certified as a part of the record on review, the reviewing court may presume that the trial court did not abuse its discretion in admitting them into evidence. Gass v. People, 177 Colo. 232, 493 P.2d 654 (1972).

Reconstructed scene inadmissible where accuracy disputed. Where an exhibit has been arranged simply to portray a scene and thereby support testimonial contentions, and when other witnesses dispute the accuracy or correctness of the reconstructed scene, trial court should not admit the evidence. People v. Wright, 182 Colo. 87, 511 P.2d 460 (1973).

V. ON REVIEW.

Waiver of right to appeal admission of testimony. Where defendant does not move the trial court to strike testimony complained of, such is a waiver of his right to appeal. Larkin v. People, 177 Colo. 156, 493 P.2d 1 (1972).

Absent serious prejudicial error. Where contemporaneous objection to the admission of evidence on the grounds offered for reversal is not made, then, absent serious prejudicial error, the court will not review the issue. Duncan v. People, 178 Colo. 314, 497 P.2d 1029 (1972).

Lack of contemporaneous objection at trial constitutes waiver of objections to admission of evidence, and such issues may not be raised on appeal; if they are, they will not be considered unless errors are so fundamental as to seriously prejudice basic rights of defendant. Larkin v. People, 177 Colo. 156, 493 P.2d 1 (1972); People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

On review, evidence is viewed in light most favorable to the jury's verdict. People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974).

On the issue of sufficiency of the evidence to sustain a jury's verdict, the evidence, which includes all reasonable inferences which may be drawn therefrom, must be viewed in the light which most favors the jury's verdict. People v. Trujillo, 184 Colo. 387, 524 P.2d 1379 (1974).

Reviewing court is required to view the evidence in the light most supportive of the jury's verdict, for purposes of appeal. People v. Eades, 187 Colo. 74, 528 P.2d 382 (1974).

Where there is an overwhelming amount of evidence in the record that supports the jury's verdict, that verdict cannot be set aside on review. People v. Barker, 189 Colo. 148, 538 P.2d 109 (1975).

Because the jury is presumed to have adopted that evidence which supports its verdict. People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974).

Reversal not to be predicated on admission of own evidence. A defendant cannot predicate reversible error on the admission of evidence he offered as a part of his defense. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Appellate court will not review weight of evidence jury found sufficient. Where the jury has found the guilt of an accused to have been proven beyond a reasonable doubt, a court on review will not weigh the evidence. Schermerhorn v. People, 175 Colo. 256, 486 P.2d 428 (1971).

A reviewing court cannot invade the province of the jury by making a redetermination on conflicting evidence. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

The supreme court will not substitute its judgment for that of the jury in resolving conflicts in the evidence. People v. Saavedra, 184 Colo. 90, 518 P.2d 283 (1974); People v. O'Donnell, 184 Colo. 434, 521 P.2d 771 (1974).

Nor reassess credibility of witnesses. The supreme court will not substitute its judgment for that of the jury in assessing the credibility of witnesses. People v. Saavedra, 184 Colo. 90, 518 P.2d 283 (1974); People v. O'Donnell, 184 Colo. 434, 521 P.2d 771 (1974).

Appellate court must look at evidence in state's favor after conviction. Where the evidence was conflicting in many particulars, the court on appeal must look at it in the light most favorable to the state in determining whether there is substantial evidence to support the verdict against defendant. People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972).

When reviewing the sufficiency of the evidence to sustain a conviction, it must be examined in the light most favorable to the prosecution. People v. Scheidt, 182 Colo. 374, 513 P.2d 446 (1973).

Evidence sufficient to sustain judgment. Martin v. People, 178 Colo. 94, 495 P.2d 537 (1972).

For reversal, questionable evidence must substantially influence verdict. To constitute reversible error, the questionable evidence must have had a substantial influence on the verdict.

People v. Thomas, 189 Colo. 490, 542 P.2d 387 (1975).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. During opening statements, the defense counsel raised the affirmative defense of self-defense. In addition, defense counsel elicited testimony to support the affirmative defense during cross examination of a prosecution witness. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

In addition, the court did not abuse its discretion in denying the defendant's motion for a mistrial on the basis that the court improperly allowed cumulative evidence of the defendant's flight to be admitted into evidence. Even though the prosecution elicited testimony during cross-examination that the defendant was living under an assumed name, without establishing the relevance of the evidence as instructed by the court, the court issued a curative instruction to counter any unfair prejudice to the defendant. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party. The court's determination shall be treated as a ruling on a question of law.

Rule 26.2. Written Records

Deleted by amendment November 9, 2006, effective January 1, 2007.

Rule 27. Proof of Official Record

Deleted by amendment November 9, 2006, effective January 1, 2007.

Rule 28. No Colorado Rule

Rule 29. Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint, or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the People's case.

(b) Reservation of Decision on Motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Verdict or Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 14 days after the jury is discharged or within such further time as the court may fix during the 14-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that such a similar motion has been made prior to the submission of the case to the jury.

Source: (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Judge has more leeway in granting in trial to court. In a trial to the court, the judge sits also as the trier of fact, and, thus, he has considerably more leeway in granting a motion for judgment of acquittal than if the case were tried before a jury. People v. Kirkland, 174 Colo. 362, 483 P.2d 1349 (1971).

Rule as basis for jurisdiction. Edwards v. People, 176 Colo. 478, 491 P.2d 566 (1971); People v. Ware, 187 Colo. 28, 528 P.2d 224 (1974); People v. Gould, 193 Colo. 176, 563 P.2d 945 (1977).

Applied in People v. Berry, 191 Colo. 125, 550 P.2d 332 (1976); People v. Maestas, 196 Colo. 245, 586 P.2d 4 (1978); People v. Paulsen, 198 Colo. 458, 601 P.2d 634 (1979); People in Interest of G.L., 631 P.2d 1118 (Colo. 1981); People v. Hoffman, 655 P.2d 393 (Colo. 1982).

II. MOTION FOR JUDGMENT OF ACQUITTAL.

Prosecution's burden to withstand motion. To withstand a motion for a judgment of acquittal, the prosecution has the burden of establishing a prima facie case of guilt and must introduce sufficient evidence to establish guilt beyond a reasonable doubt. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Ramos, 708 P.2d 1347 (Colo. 1985); People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

The prosecution is given the benefit of every reasonable inference which might fairly be drawn from the evidence as long as there is a logical and convincing connection between the facts established and the conclusion inferred. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

The proper standard to be applied to a defendant's motion for acquittal is whether the relevant admissible evidence, both direct and circumstantial, when viewed in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. People v. Gonzales, 666 P.2d 123 (Colo. 1983); People v. Newton, 940 P.2d 1065 (Colo. App. 1996), aff'd on other grounds, 966 P.2d 563 (Colo. 1998); People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Prima facie case against defendant required. The primary question for determining the merits of a motion under this rule is: Did the prosecution establish a prima facie case against the defendant? People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

When the state introduces evidence on its case in chief from which the jury may properly infer the essential elements of the crime, the state has then made out a "prima facie" case impregnable against a motion for acquittal. People v. Chavez, 182 Colo. 216, 511 P.2d 883 (1973); People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

Or questions for jury's determination. A court properly denies a defendant's motion for acquittal at the conclusion of all of the evidence where the question of credibility of the witnesses and the ultimate guilt of defendant remain, for such matters are for the jury's determination. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Where record contains ample evidence to sustain a conviction, the trial court is correct in denying the defendant's motion for judgment of acquittal. People v. Small, Jr., 177 Colo. 118, 493 P.2d 15 (1972); People v. Adams, 678 P.2d 572 (Colo. App. 1984).

Standard is same for trial to court or to jury. The standard for determining the merits of a motion for a judgment of acquittal is the same whether the trial is to the court or to a jury. People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

When refusal of motion at end of state's case may be reviewed. When an accused moves for acquittal at the close of the state's case, he is not entitled to have an adverse ruling on the motion reviewed unless he stands on the motion. Silcott v. People, 176 Colo. 442, 492 P.2d 70 (1971); People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972); People v. Becker, 181 Colo. 384, 509 P.2d 799 (1973).

If defendant introduces evidence following denial of a motion for acquittal made at the close of the state's case, the correctness of the ruling is determined from the state of the evidence at the end of the trial. Silcott v. People, 176 Colo. 442, 492 P.2d 70 (1971); People v. Becker, 181 Colo. 384, 509 P.2d 799 (1973).

But review not on state's evidence alone. Where, upon trial court's denial of a defendant's motion for acquittal at close of the state's case, the defendant proceeds to offer evidence warranting submission of case to jury, defendant cannot assert error on the state's evidence alone. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Effect of denial of motion. When a trial court denies a defendant's motion for acquittal, it in effect rules that the evidence presented by the state is entirely consistent with the defendant's guilt and that, upon any reasonable hy-

pothesis, this evidence is not also consistent with the defendant's innocence. Nunn v. People, 177 Colo. 87, 493 P.2d 6 (1972); People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

Role of trial judge in passing upon motion. In passing upon a motion for judgment of acquittal, the trial judge is required to give full consideration to the right of the jury to determine the credibility of witnesses and the weight to be afforded evidence, as well as the right to draw all justifiable inferences of fact from the evidence. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973).

When a trial judge is confronted with a motion for a judgment of acquittal at either the close of the prosecution's case, or the close of all of the evidence, he must determine whether the evidence before the jury is sufficient in both quantity and quality to submit the issue of the defendant's guilt or innocence to the jury. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Franklin, 645 P.2d 1 (Colo. 1982).

The issue before the trial judge in passing upon a motion for judgment of acquittal is whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Waggoner, 196 Colo. 578, 595 P.2d 217 (1979); People v. Botham, 629 P.2d 589 (Colo. 1981); People v. Gomez, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); People v. Andrews, 632 P.2d 1012 (Colo. 1981); People v. Franklin, 645 P.2d 1 (Colo. 1982); People v. Brassfield, 652 P.2d 588 (Colo. 1982); People v. Renstrom, 657 P.2d 461 (Colo. App. 1982); People v. Bartowsheski, 661 P.2d 235 (Colo. 1983); People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984); People v. Paiva, 765 P.2d 581 (Colo. 1988); People v. Williams, 827 P.2d 612 (Colo. App. 1992); People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

When ruling on a motion for judgment of acquittal, the trial court must consider both the prosecution and the defense evidence. In performing this function, the court is bound by five well-established principles of law. First, the court must give the prosecution the benefit of every reasonable inference, which might be fairly drawn from the evidence. Second, the determination of the credibility of witnesses is solely within the province of the jury. Third, the trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to various pieces of evidence or by resolving conflicts in the evidence. Fourth, a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Finally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture. People v. Sprouse, 983 P.2d 771 (Colo. 1999); People v. Beatty, 80 P.3d 847 (Colo. App. 2003).

Judge not to invade province of jury. In passing upon a motion for judgment of acquittal, the trial judge should not attempt to serve as a thirteenth juror or invade the province of the jury, but should prevent a case from being submitted to the jury when the prosecution has failed to meet its burden of proof. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

The determination of the credibility of witnesses is a matter solely within the province of the jury. Only when the testimony of a witness is so palpably incredible and so totally unbelievable as to be rejected as a matter of law can a court properly take this function from a jury. People v. Franklin, 645 P.2d 1 (Colo. 1982); People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

Testimony is ''incredible as a matter of law'' if it is in conflict with nature or fully established or conceded facts. People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

Testimony that is merely biased, inconsistent, or conflicting is not incredible as a matter of law. People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

Evidence must be viewed favorably to state. In ruling on a motion for judgment of acquittal, the court must view the evidence in the light most favorable to the people. People v. Chavez, 182 Colo. 216, 511 P.2d 883 (1973).

The trial court must give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence. People v. Bartowsheski, 661 P.2d 235 (Colo. 1983).

Where prosecution's evidence is insufficient to support conviction in that it does not prove all the elements of the offense charged, the court should enter a judgment of acquittal. People v. Rutt, 179 Colo. 180, 500 P.2d 362 (1972).

Juvenile court erred when it denied motion for acquittal where there was a constructive amendment variance between the charge and the evidence presented at trial. People ex rel. H.W., III, 226 P.3d 1134 (Colo. App. 2009).

Or fails to establish guilt beyond a reasonable doubt. Where the testimony is not sufficiently clear and convincing, standing alone, to establish guilt beyond a reasonable doubt, the trial court should grant a defendant's motion for acquittal at the end of all the evidence. Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971).

When viewing the evidence upon a motion for acquittal, the trial judge must determine whether a reasonable mind would conclude that the defendant's guilt as to each material element of the offense was proven beyond a reasonable doubt. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973); People v. Ramos, 708 P.2d 1347 (Colo. 1985).

Test for denial of motion where guilt proven by circumstantial evidence. Where the guilt of the defendant is proven by circumstantial evidence, the test for denial of a motion for judgment of acquittal is whether there is evidence in the record from which a jury can find beyond a reasonable doubt that the circumstances are such as to exclude every reasonable hypothesis of innocence. People v. Naranjo, 181 Colo. 273, 509 P.2d 1235 (1973).

Substantial evidence test affords same status to circumstantial evidence as to direct evidence, and an exclusively circumstantial case need not exclude every reasonable hypothesis other than guilt to withstand a motion for a judgment of acquittal. People v. Andrews, 632 P.2d 1012 (Colo. 1981).

In passing upon a motion for judgment of acquittal, the same test for measuring the sufficiency of evidence should apply, whether the evidence is direct or circumstantial. People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973).

A motion for judgment of acquittal does not preserve a challenge to the foundation for expert testimony that was admitted without objection. Insofar as defendant relied solely on the purported lack of an adequate foundation for the expert opinion, defendant waived the insufficiency of evidence argument. People v. Wheeler, 170 P.3d 817 (Colo. App. 2007).

Ruling against the state is a "final judgment". Although the granting of motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, and the declaration of a statute unconstitutional have been abolished by Crim. P. 12(a) and Crim. P. 29(a), the legal effect of the present nomenclature for these procedures is the same, that is, a ruling adverse to the state effectively terminates its prosecution of the defendant and results in a "final judgment". People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971).

A trial court's ruling granting a defendant's motion for judgment of acquittal at the close of the prosecution's evidence is not a final order unless and until the court terminates the trial by dismissing the jury. Before that time, the trial court retains authority to reconsider its ruling. Thus, the court could submit the case to the jury on a lesser included offense. People v. Scott, 10 P.3d 686 (Colo. App. 2000).

Defendants in Colorado are on notice that a midtrial order granting a motion for judgment of acquittal is not final and is subject to change until the jury is dismissed. People v. Madison, 176 P.3d 793 (Colo. App. 2007).

District attorney may appeal. Since the issue of sufficiency of the evidence as postured where the trial court has granted a defendant's motion for judgment of acquittal, involves a question of law, the district attorney is given authority to appeal. People v. Kirkland, 174 Colo. 362, 483 P.2d 1349 (1971).

Though such an appeal is in most instances nonproductive. An appeal after the trial judge has granted a motion for judgment of acquittal upon the completion of the state's evidence on the ground that the evidence is insufficient is, in most instances, a completely nonproductive exercise. People v. Kirkland, 174 Colo. 362, 483 P.2d 1349 (1971).

Trial court's decision not set aside where adequately supported. Upon appeal of the denial of motion for judgment of acquittal, where the trial court is the trier of fact, its decision will not be set aside when adequately supported by the evidence, even though a portion of that evidence may be in conflict. Stewart v. People, 175 Colo. 304, 487 P.2d 371 (1971).

Denial of motion for acquittal upheld. White v. People, 175 Colo. 119, 486 P.2d 4 (1971); Marn v. People, 175 Colo. 242, 486 P.2d 424 (1971); Kurtz v. People, 177 Colo. 306, 494 P.2d 971 (1972); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972); Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972); People In Interest of B. L. M. v. B. L. M., 31 Colo. App. 106, 500 P.2d 146 (1972); People v. Olona, 180 Colo. 299, 505 P.2d 372 (1973); People v. Thomas, 181 Colo. 317, 509 P.2d 592 (1973).

Denial of motion for judgment of acquittal held error. Johns v. People, 179 Colo. 8, 497 P.2d 1253 (1972); Velarde v. People, 179 Colo. 207, 500 P.2d 125 (1972).

Granting of motion for judgment of acquittal disapproved. People v. Franklin, 645 P.2d 1 (Colo. 1982); People v. Gonzales, 666 P.2d 123 (Colo. 1983); People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Judgment of acquittal upheld. People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972); People v. Theel, 180 Colo. 348, 505 P.2d 964 (1973).

III. MOTION AFTER VERDICT OR DISCHARGE OF JURY.

Standard applicable to motions for acquittal made before a case goes to the jury also applies to motions made after verdict or discharge. The court shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction of such offense. People v. Waggoner, 196 Colo. 578, 595 P.2d 217 (1979).

Motion may be renewed after verdict. When a motion for judgment of acquittal is made at the close of all the evidence and denied, the motion may be renewed after verdict. People v. Chapman, 174 Colo. 545, 484 P.2d 1234 (1971).

Motion satisfies requirement of motion for new trial. The filing of a motion for acquittal satisfies the purpose of a required motion for a new trial, since the only purpose of requiring a motion for new trial is to afford a fair opportunity to the trial court to correct its own errors, and, thus, where a defendant who does not want a new trial repeatedly asserts a motion for acquittal throughout the trial, the denial of the motion puts the defendant in a position to seek review of the judgment. Haas v. People, 155 Colo. 371, 394 P.2d 845 (1964).

Court cannot modify jury verdict under this rule. Where there were no instructions tendered, given, or refused on any offense other than the offense charged in the information, but the trial court modified the verdict of the jury, Rule 29(c), Crim. P., delineates the power and discretion of the court under the circumstances, and, accordingly, the cause will be remanded to the trial court with directions to reinstate the verdict of the jury and to rule on defendant's combined motion for judgment of acquittal or, in the alternative, for a new trial. People v. Chapman, 174 Colo. 545, 484 P.2d 1234 (1971).

If the evidence, although conflicting, supports the jury's verdict of guilty, the verdict must be upheld. People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972).

Jury verdicts shall not be reversed for inconsistency if the crimes charged required different elements of proof and the jury could find from the very same evidence that the element of one crime was present while finding that the element of another crime was absent. People v. Strachan, 775 P.2d 37 (Colo. 1989).

When a trial judge detects a material deficiency in the evidence after a careful examination of it and expresses a strong and abiding belief that the jury's verdict of guilty cannot stand, it becomes his responsibility to vacate the verdict. People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972).

Court may not sua sponte order a judgment of acquittal after the date it has "fixed" pursuant to section (c), and any extension of time after that date is a nullity for purposes of entertaining a motion for judgment of acquittal. People v. Darland, 200 Colo. 276, 613 P.2d 1310 (1980).

Even if victim was grossly inaccurate or confused about the incidents, it was not physically impossible for assaults to have occurred as she testified they did, and victim's therapist testified that inconsistencies and contradictions in her story were normal for a child of recurrent abuse. Thus, child victim's testimony was not incredible as a matter of law, and it was error for trial court to grant defendant's motion for judgment of acquittal notwithstanding the verdict on that basis. People v. Ramirez, 30 P.3d 807 (Colo. App. 2001).

Rule 30. Instructions

A party who desires instructions shall tender his proposed instructions to the court in duplicate, the original being unsigned. All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on review. Before argument the court shall read its instructions to the jury, but shall not comment upon the evidence. Such instructions may be read to the jury and commented upon by counsel during the argument, and they shall be taken by the jury when it retires. All instructions offered by the parties, or given by court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as a part of the record of the case.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Limitations of the Power of Courts in Instructing Juries'', see 6 Dicta 23 (Mar. 1929). For article, ''Criminal Procedure'', which discusses a Tenth Circuit decision dealing with the failure to instruct on lesser included offense, see 62 Den. U. L. Rev.

191 (1985). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses a case relating to jury instructions, see 15 Colo. Law. 1616 (1986).

"Instruction" construed. An instruction is an exposition of the principles of law applicable to a case, or to some branch or phase of a case, which the jury is bound to apply in order to render the verdict, establishing the rights of the parties in accordance with the facts proved. Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931).

Jury presumed to understand and heed. In the absence of a showing to the contrary, it is presumed that the jury understands instructions and heeds them. People v. Motley, 179 Colo. 77, 498 P.2d 339 (1972); People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972); People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Applied in Brasher v. People, 81 Colo. 113, 253 P. 827 (1927); Marshall v. People, 160 Colo. 323, 417 P.2d 491 (1966); People v. Butcher, 180 Colo. 429, 506 P.2d 362 (1973); People v. Thorpe, 40 Colo. App. 159, 570 P.2d 1311 (1977); People v. Padilla, 638 P.2d 15 (Colo. 1981); People v. Swanson, 638 P.2d 45 (Colo. 1981); People v. Mack, 638 P.2d 257 (Colo. 1981); People v. Founds, 631 P.2d 1166 (Colo. App. 1981); People v. Dillon, 633 P.2d 504 (Colo. App. 1981); Massey v. People, 649 P.2d 1070 (Colo. 1982); People v. Handy, 657 P.2d 963 (Colo. App. 1982); People v. Jones, 665 P.2d 127 (Colo. App. 1982).

II. DUTY TO INSTRUCT.

A. In General.

Law reviews. For article, ''Jury Nullification and the Rule of Law'', see 17 Colo. Law. 2151 (1988).

Purpose of this rule is to enable the trial judge to prevent error from occurring and to correct an error if an improper instruction is tendered. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

The procedure set forth in this rule affords counsel the opportunity to structure closing arguments based on the instructions which will govern the jury's deliberations. People v. Bastin, 937 P.2d 761 (Colo. App. 1996).

Court has a duty to instruct the jury properly on all of the elements of the offenses charged. People v. Bastin, 937 P.2d 761 (Colo. App. 1996).

Court has a corresponding duty to correct erroneous instructions. People v. Bastin, 937 P.2d 761 (Colo. App. 1996).

Counsel has a duty to assist the court by objecting to erroneous instructions and by tendering correct instructions. Arellano v. People, 177 Colo. 286, 493 P.2d 1362 (1972); Fresquez v. People, 178 Colo. 220, 497 P.2d 1246 (1972); People v. Zapata, 759 P.2d 754 (Colo. App. 1988).

It is incumbent on counsel to object to the court's proposed instruction, if defective or deficient, and to request and tender correct instructions, or instructions that have been overlooked or omitted by the court. People v. Sharpe, 183 Colo. 64, 514 P.2d 1138 (1973).

And to request instruction. It is the responsibility of a party's counsel to request an instruction if he believed circumstances warranted, and, having failed to do so, the party cannot afterwards complain that such instruction was not given. Edwards v. People, 73 Colo. 377, 215 P. 855 (1923); Rhodus v. People, 158 Colo. 264, 406 P.2d 679 (1965).

All objections must be made prior to submission to jury. Defendant must make all objections which he has to instructions prior to their submission to the jury. People v. O'Donnell, 184 Colo. 104, 518 P.2d 945 (1974); People v. Tilley, 184 Colo. 424, 520 P.2d 1046 (1974).

In determining the propriety of any one instruction, the instructions must be considered as a whole, and, if the instructions as a whole properly instruct a jury, then there is no error. People v. Kurts, 721 P.2d 1201 (Colo. App. 1986).

Failure to instruct the jury properly with respect to an essential element of the offense charged generally constitutes reversible error. People v. Williams, 707 P.2d 1023 (Colo. App. 1985); People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

The trial court's failure to re-instruct the jury on the presumption of innocence and the burden of proof prior to closing arguments did not constitute structural or plain error. The court instructed the jury on these matters before the trial and reminded the jury of these instructions before closing arguments. The court also pointed jurors to their handbooks that included the instruction. This was enough to indicate that jurors were aware of the proper standard of review. People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

Jury notebooks are not to supplant the requirement of this rule that jurors be orally instructed prior to closing arguments. People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

The practice of instructing the jurors immediately prior to closing arguments has many benefits, including ensuring that the jury hears and considers all the applicable law before deliberations and aiding the overall comprehension of the jury. Because the presumption of innocence and the burden of proof beyond a reasonable doubt are so critical in a criminal case, it is especially important to instruct the jury on those points at the close of the case.

People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

It was not plain error that the court only instructed the jury about defendant's right not to testify during voir dire, but not immediately before closing arguments as required by this rule. People v. Deleon, 2017 COA 140, __ P.3d __.

B. Law of the Case.

Duty to instruct on all issues. The trial court has a duty to properly instruct the jury on every issue presented, and the failure to do so with respect to the essential elements of the crime charged constitutes plain error. People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972).

Ingrained in the law is the right of an accused to insist that the court instruct the jury on all legal questions in order to reach a true verdict. People v. Woods, 179 Colo. 441, 501 P.2d 117 (1972).

It is the trial court's duty to instruct the jury on all matters of law which it may consider. People v. Alvarez, 187 Colo. 290, 530 P.2d 506 (1975).

Trial court has duty to instruct the jury on the law, properly, plainly, and accurately, on every issue presented. People v. Zapata, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989).

Instruction directing the jury to accept as fact any portion of a witness' testimony invades the province of the jury. People v. Roybal, 775 P.2d 67 (Colo. App. 1989).

Thus, in a felony child abuse case where the defendant raised the affirmative defense of religious healing, the defendant's tendered instruction asking the court to instruct the jury that the court had determined as a matter of law that the defendant was acting in good faith and that the defendant was a duly accredited practitioner of a recognized church or religion would have invaded the province of the jury, and therefor was properly denied. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Whether or not requested to do so. The court has a duty to fully instruct the jury on every issue presented, whether requested to do so or not. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974).

Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. Sopris v. Truax, 1 Colo. 89 (1868); Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962); People v. Bercillio, 179 Colo. 383, 500 P.2d 975 (1972).

And to issues for which evidence has been presented. Instructions should relate to and be confined to issues concerning which evidence has been presented. Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962).

Including presumptions of fact. It is the duty of the court to draw the attention of the jury to the points in the case and to presumptions of fact, which the law authorizes them to deduce from the evidence. Hill v. People, 1 Colo. 436 (1872).

As well as issues presented by pleadings. No instruction should be given by the court, either on its own motion or at the request of counsel, which tenders an issue that is not presented by the pleadings or supported by the evidence or which deviates therefrom in any material respect. Martinez v. People, 166 Colo. 524, 444 P.2d 641 (1968); Luna v. People, 170 Colo. 1, 461 P.2d 724 (1969).

Instructions must be plain and accurate. It is the duty of the trial court to instruct the jury so plainly and accurately on the law of the case that they may comprehend the principles involved. Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962); People v. Garcia, 690 P.2d 869 (Colo. App. 1984).

It is bad practice to give to the jury instruction on abstract propositions of law not called for by the evidence even though the instruction is harmless. Nilan v. People, 27 Colo. 206, 60 P. 485 (1900).

The trial court should instruct on a principle of law when there is some evidence to support it, but should not instruct on abstract principles of law unrelated to the issues in controversy. People v. Kurts, 721 P.2d 1201 (Colo. App. 1986).

Or excerpts from court opinions. Mere abstract statements of law or excerpts from court opinions generally should not be given as instructions. Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962).

Or law review article. To allow counsel to read an opinion from a law review article on the credibility of eyewitness identifications would have substituted the writer for the judge, and usurped the trial court's duty to instruct on the law. People v. Alvarez, 187 Colo. 290, 530 P.2d 506 (1975).

Sufficiency of instruction determined by facts of case. The question of the sufficiency of instructions must be determined always by the facts of each case. Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962).

Requested instruction not justified by the evidence is properly refused. Morletti v. People, 72 Colo. 7, 209 P. 796 (1922); Kinselle v. People, 75 Colo. 579, 227 P. 823 (1924); Dickson v. People, 82 Colo. 233, 259 P. 1038 (1927); Rumley v. People, 149 Colo. 132, 368 P.2d 197 (1962).

And refusal is not error. Where the court finds that there is no evidence of a certain matter, it is not error to refuse to instruct thereon. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

C. Defendant's Theory.

Accused in a criminal case is entitled to an instruction based on his theory of the case. Martinez v. People, 166 Colo. 524, 444 P.2d 641 (1968); Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972); People v. Montague, 181 Colo. 143, 508 P.2d 388 (1973); People v. Griego, 183 Colo. 419, 517 P.2d 460 (1973); People v. White, 632 P.2d 609 (Colo. App. 1981); People v. Anaya, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988); People v. Banks, 804 P.2d 203 (Colo. App. 1990).

An instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory, the rationale being the belief that it is for the jury and not the court to determine the truth of the defendant's theory. People v. Nunez, 841 P.2d 261 (Colo. 1992).

A trial court has an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court. People v. Nunez, 841 P.2d 261 (Colo. 1992).

Although an alibi defense not an affirmative defense so as to place on the People the burden of proof to rebut, and trial court did not err by refusing a theory of case instruction treating alibi as an affirmative defense, defendant was entitled to a properly worded instruction setting forth his theory of the case. People v. Nunez, 824 P.2d 54 (Colo. App. 1991).

As constitutional right. A defendant has a constitutional right to have a lucid, accurate, and comprehensive statement by the court to the jury of the law on the subject from his standpoint. Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965).

No matter how improbable or unreasonable the contention, a defendant is entitled to an appropriate instruction upon the hypothesis that it might be true. Johnson v. People, 145 Colo. 314, 358 P.2d 873 (1961); People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973); People v. Banks, 804 P.2d 203 (Colo. App. 1990); People v. Nunez, 841 P.2d 261 (Colo. 1992); People v. Gordon, 32 P.3d 575 (Colo. App. 2001).

Or poorly drafted. The fact that an instruction on the defendant's theory may be ineptly worded, grammatically incorrect, or inaccurate in some particular does not excuse the trial court from properly instructing on the theory of defense, assuming there is evidence to support such an instruction. People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973).

Failure to give instruction requires new trial. Where no instruction is given by the trial court embodying the theory of defendant, a new trial must be had. Johnson v. People, 145 Colo. 314, 358 P.2d 873 (1961).

Because the determination of the truth of defendant's theory is a jury function, it is error for the court to refuse to give defendant's instruction on the theory of his defense. People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973); Nora v. People, 176 Colo. 454, 491 P.2d 62 (1971).

No new trial required if erroneous instruction causes no prejudice. Where instruction implied that one nonessential factor was an element of the crime, but jury's finding on that point was immaterial to the verdict and defense counsel was not unfairly misled in formulating closing argument or prevented from arguing any meritorious defense, denial of defense's motion for mistrial was not an abuse of discretion. People v. Bastin, 937 P.2d 761 (Colo. App. 1996).

The failure to give a jury instruction on a defendant's theory of the case constitutes reversible error. People v. Nunez, 841 P.2d 261 (Colo. 1992).

Instruction must be grounded upon evidence and in proper form. A defendant under certain circumstances is entitled to an instruction based on his theory of the case, but it must be grounded upon the evidence and not a mere fanciful invention of counsel nor one involving an impossibility, and it must be in proper form. Marn v. People, 175 Colo. 242, 486 P.2d 424 (1971); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Defendant is entitled to an instruction on his theory of the case subject to two conditions: The instruction must be in proper form, and must be supported by evidence in the record. People v. Duran, 185 Colo. 359, 524 P.2d 296 (1974).

Defendant's jury instruction on his theory of the case must be in proper form and based on evidence in the record. People v. Griego, 183 Colo. 419, 517 P.2d 460 (1973).

A defendant is entitled to an instruction on his theory of the case, provided it is grounded in the evidence. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974).

A defendant is entitled to instructions consistent with his theory of the case if there is evidence to support it. People v. Nace, 182 Colo. 127, 511 P.2d 501 (1973); People v. Travis, 183 Colo. 255, 516 P.2d 121 (1973); People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974); People v. Shearer, 650 P.2d 1293 (Colo. App. 1982); People v. Banks, 804 P.2d 203 (Colo. App. 1990).

General instruction should be adapted to defendant's theory. When a general instruction does not particularly direct the jury's attention to defendant's theory, it is the duty of the court either to correct the tendered instruction or to give the substance of it in an instruction drafted by the court. Nora v. People, 176 Colo. 454, 491 P.2d 62 (1971).

Or supplementary instruction given. If a statutory instruction does not fit a particular case, or if it is given and yet other supplementary instructions are needed to state a defendant's position, then such, when properly worded and tendered, should be submitted to the jury. Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965).

No instruction where no theory other than denial set forth. When a tendered instruction does not set forth any theory of the case other than a general denial, is merely a restatement of defendant's evidence without any resultant theory, and is merely another attempt to reargue the case, the defendant is not entitled to have it reiterated in instructions given by the court. Marn v. People, 175 Colo. 242, 486 P.2d 424 (1971); People v. Cole, 926 P.2d 164 (Colo. App. 1996).

A defendant is not entitled to an instruction on a theory of the case that is simply a denial of the charges and a trial court may also refuse to give a tendered theory of the case instruction which contains argumentative matter or which is merely a restatement of the defendant's evidence. People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

Defendant not entitled to different instructions concerning same subject. Though a defendant is entitled to an instruction on his theory of the case, he is not entitled to different instructions, all concerning the same general subject, and each couched in only slightly different verbiage. Bennett v. People, 168 Colo. 360, 451 P.2d 443 (1969).

A properly worded instruction setting forth defendant's theory, when supported by the evidence, should always be given by a trial court unless the defendant's theory is encompassed in other instructions to the jury. People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973); People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974).

All that is required is that the theory of the case be accurately embodied in the instructions given by the court. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); People v. Montague, 181 Colo. 143, 508 P.2d 388 (1973).

The trial court properly rejected defendant's theory of defense instruction on the grounds that it was argumentative, did little more than summarize defendant's version of the incident, and was encompassed within the other instructions. People v. Lee, 18 P.3d 192 (Colo. App. 2000).

Once a principle is covered it is not error to refuse to repeat the instruction in other language. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); People v. Montague, 181 Colo. 143, 508 P.2d 388 (1973).

Instruction may be refused where jury otherwise adequately instructed. Where the jury is adequately instructed by the court and defendant's instructions would add nothing, it is not error to refuse to give instructions tendered by the defendant. Yerby v. People, 176 Colo. 115, 489 P.2d 1308 (1971); People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972); People v. Shearer, 650 P.2d 1293 (Colo. App. (1982); People v. Cole, 926 P.2d 164 (Colo. App. 1996); People v. Gordon, 32 P.3d 575 (Colo. App. 2001).

No error occurred when trial court refused to give instruction requested by defendant which merely restated points covered by other instructions and reiterated a general denial of guilt. People v. Anaya, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988); People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

No abuse of discretion by court in refusal to give defendant's proposed misidentification instructions when such instructions were repetitive, were substantially included in stock instructions, and placed undue emphasis on a single issue presented by the evidence. People v. Zapata, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989); People v. Harte, 131 P.3d 1180 (Colo. App. 2005).

Where tendered instructions do not contain a correct statement of the law, and the instructions given by the court adequately advise the jury of the refusal to submit defendant's tendered instructions, which are covered by those given by the trial court, is not error. Quintana v. People, 178 Colo. 213, 496 P.2d 1009 (1972).

Evidence of affirmative defense of ''treatment by spiritual means'' in criminal child abuse case was sufficient to require trial court to instruct the jury on such defense. Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Where the trial record contained substantial evidence to support the defendant's alibi theory of defense and the jury instructions set forth only the elements of the offense and the burden of proof and did not encompass or embody the defendant's defense of alibi, it was reversible error for the trial court to fail to correct the tendered alibi instruction or to incorporate an alibi instruction in the other jury instructions. People v. Nunez, 841 P.2d 261 (Colo. 1992).

III. FORM.

Object of rule. One object of this rule is that the jury may have all the instructions before them when they retire to consider their verdict, and in that view it can make but little difference whether instructions are given orally or read from a book, for, in either case, they would be equally liable to forget them. Gile v. People, 1 Colo. 60 (1867).

All instructions must be submitted to the jury in writing. Dorsett v. Crew, 1 Colo. 18 (1864); Gile v. People, 1 Colo. 60 (1867); Nieto v. People, 160 Colo. 179, 415 P.2d 531 (1966).

Failure to do so is error. Failure to submit instructions to the jury in writing has always been held to be an error. Dorsett v. Crew, 1 Colo. 18 (1864); Gile v. People, 1 Colo. 60 (1867); Nieto v. People, 160 Colo. 179, 415 P.2d 531 (1966).

Giving instructions orally not error if without prejudice. If a statement can be considered as an instruction as to the law, it being in favor of the plaintiff in error, giving it orally is at most an error without prejudice, and one that does not constitute a ground for reversal. Irving v. People, 43 Colo. 260, 95 P. 940 (1908); Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).

Instructions cannot be orally qualified or modified. Dorsett v. Crew, 1 Colo. 18 (1864).

But failure of counsel to object to oral clarifying comments made by the trial court in response to a request by the jury, particularly where counsel is a more or less active participant in this further instructing of the jury, amounts to a waiver of any rights afforded by this rule. Valley v. People, 165 Colo. 555, 441 P.2d 14, cert. denied, 393 U.S. 925, 89 S. Ct. 256, 21 L. Ed. 2d 260 (1968).

There is no restriction to the giving of additional written instructions to the jury by the court, in a proper case, after they have retired to consider their verdict. Davis v. People, 83 Colo. 295, 264 P. 658 (1928).

But should be given in presence of counsel. Good practice requires that the court, before giving such an instruction, should call the jury into the courtroom and read it to them in the presence of counsel for both sides, unless they waive this formality, inasmuch as trial courts should not communicate with the jury on matters affecting the rights of the parties except in open court and in the presence of counsel. Ray v. People, 147 Colo. 587, 364 P.2d 578 (1961).

If not, there must be prejudice for reversible error. While the giving of an additional instruction outside of the presence of counsel is bad procedure, it is not reversible error where it does not appear that it in any manner prejudices the rights of the defendant. Ray v. People, 147 Colo. 587, 364 P.2d 578 (1961).

Comments to jury are not instructions. Comments to the jury are advisory and in no respect binding upon the jury, hence they are not instructions, and therefore they need not precede the arguments nor be reduced to writing as provided in this rule. Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931).

Provided they do not modify or qualify instructions. The remarks of the trial court do not constitute an instruction within this rule where they are merely an oral direction which in no way modifies or qualifies an instruction given. Irving v. People, 43 Colo. 260, 95 P. 940 (1908).

"Instructions" to jury to revise verdicts not within rule. Where, upon verdict, the judge ''instructs'' the jury that the accused cannot be convicted of more than one offense and directs them to revise their verdict, these remarks are not instructions within the meaning of this rule. Bush v. People, 68 Colo. 75, 187 P. 528 (1920).

Nor court's answer to jury on what is charged. When the jury asks the court whether defendant is charged with a certain offense only or with that offense and another, the court's answer to the jury's question is not an instruction to the jury within the meaning of the provisions of this rule. Wiseman v. People, 179 Colo. 101, 498 P.2d 930 (1972).

Trial court's response to jury's question concerning instructions outside the presence of defense counsel was reversible error because it was a denial of the constitutional right to counsel. Such error is harmless only if so demonstrated beyond a reasonable doubt. If jury's question shows a fundamental misunderstanding of the instructions, it is prejudicial to the defendant. Leonardo v. People, 728 P.2d 1252 (Colo. 1986).

Three instructions on one page not error. Where trial court instructed jury by placing three instructions on one sheet of paper — instructions related to the burden of proof, the presumption of innocence, and reasonable doubt — and defendant contends the jury was thereby confused, but no contention is made that the instructions did not properly set forth the law, and defendant has totally failed to suggest how these three instructions, if given on three separate sheets of paper, would have resulted in greater clarity, nor does he explain how the placing of the instructions on one sheet of paper would confuse the jury, this claim of error is totally without merit. People v. Romero, 182 Colo. 50, 511 P.2d 466 (1973).

The court committed harmless error in failing to give the jury cautionary hearsay instructions after each hearsay witnesses' testimony. Three hearsay witnesses testified in sequence, the court gave the cautionary instruction following the testimony of the last hearsay witness and during the general charge to the jury, and the hearsay testimony corroborated the testimony of other witnesses. People v. Valdez, 874 P.2d 415 (Colo. App. 1994).

IV. CONTENT.

A. In General.

No instruction which is contradictory in itself is good. Magwire v. People, 77 Colo. 149, 235 P. 339 (1925).

Irreconcilable instructions require reversal. Where instructions given by the court are

irreconcilable, and it is impossible to say which the jury followed or what the verdict would have been but for the error, a reversal is imperative. Clair v. People, 9 Colo. 122, 10 P. 799 (1886); White v. People, 76 Colo. 208, 230 P. 614 (1924).

Erroneous instruction is not cured by another covering the same point which is correct. Mackey v. People, 2 Colo. 13 (1873); Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Cumulative effect of improper instruction with proper instruction was to provide the jury with mixed messages and did not dispel the potential for harm created by erroneous instruction. Lybarger v. People, 807 P.2d 570 (Colo. 1991).

All instructions are to be taken together, and what might mislead, when considered by itself, may be corrected by another passage of the charge. Forte v. People, 57 Colo. 450, 140 P. 789 (1914); Clarke v. People, 64 Colo. 164, 171 P. 69 (1918); Taylor v. People, 21 Colo. 426, 42 P. 652 (1895); Ausmus v. People, 47 Colo. 167, 107 P. 204 (1910).

Instructions in a case must be read and considered as a whole. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

In determining the effect of a particular instruction, it must be read in conjunction with the other instructions. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

Not error if jury adequately informed. Where the instructions, when read together, adequately inform the jury of the applicable law, there is no error. Blincoe v. People, 178 Colo. 34, 494 P.2d 1285 (1972).

If, taken as a whole, the instructions adequately inform the jury of the law, there is no reversible error. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

Even though one instruction is not proper. Where one instruction is not entirely proper, its use does not constitute reversible error when the instructions read as a whole adequately inform the jury on the law. People v. Olona, 180 Colo. 299, 505 P.2d 372 (1973).

Where the law of the case is clearly and explicitly set forth in one point of the charge, the effect of equivocal language elsewhere is thereby eliminated. LeMaster v. People, 54 Colo. 416, 131 P. 269 (1913).

An inadequate instruction is not deemed to constitute fundamental error although it does not fully instruct the jury as to the definition of the crime, nor follows the statutory definition, where, when it is read in conjunction with the other instructions, it appears that in substance the jury is told of the elements of the crime. Morehead v. People, 167 Colo. 287, 447 P.2d 215 (1968).

The omission from one instruction of the words ''from the evidence'' does not constitute reversible error when, by other instructions, the jury is told that its findings must be based upon the evidence, and that alone. Gorman v. People, 7 Colo. 596, 31 P. 335, 31 Am. St. R. 350 (1884); Boykin v. People, 22 Colo. 496, 45 P. 419 (1896).

Improper jury instructions not grounds for reversal on appeal where defendant did not object to such instructions at trial and failed to raise such issue in motion for new trial. People v. Quintana, 701 P.2d 1264 (Colo. App. 1985).

When reversal not required despite failure to instruct on element. Where the court fails to give an instruction on one element of a crime, reversal is not called for when the prima facie case established by the state stands unrebutted, the defendant offers no defense of which he is deprived by the failure to give the instruction, and he does not object to the instructions given nor request other instructions. Ruark v. People, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968).

It is not error to refuse cumulative instructions. Minich v. People, 8 Colo. 440, 9 P. 4 (1885).

Since requested instructions need not be given when covered by other instructions. It is not error for a trial court to fail to give a tendered instruction covering the same matter already dealt with in other instructions. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974); People v. Lee, 199 Colo. 301, 607 P.2d 998 (1980); People v. Garcia, 690 P.2d 869 (Colo. App. 1984).

Perhaps no point of law is more amply substantiated in Colorado than the rule that requested instructions which are covered by instructions given by the court are properly refused. Dougherty v. People, 1 Colo. 514 (1872); May v. People, 8 Colo. 210, 6 P. 816 (1885); Van Houton v. People, 22 Colo. 53, 43 P. 137 (1895); Benedict v. People, 23 Colo. 126, 46 P. 637 (1896); Thompson v. People, 26 Colo. 496, 59 P. 51 (1899); Covington v. People, 36 Colo. 183, 85 P. 832 (1960); O'Grady v. People, 42 Colo. 312, 95 P. 346 (1908); Campbell v. People, 55 Colo. 302, 133 P. 1043 (1913); De Rinzie v. People, 56 Colo. 249, 138 P. 1009 (1914); McKee v. People, 72 Colo. 55, 209 P. 632 (1922); Brindisi v. People, 76 Colo. 244, 230 P. 797 (1924); Roll v. People, 78 Colo. 589, 243 P. 641 (1926); Wilder v. People, 86 Colo. 35, 278 P. 594, 65 A.L.R. 1260 (1929); Abshier v. People, 87 Colo. 507, 289 P. 1081 (1930); Gould v. People, 89 Colo. 596, 5 P.2d 580 (1931); Farmer v. People, 90 Colo. 250, 7 P.2d 947 (1932); Jagger Prod. Co. v. Gylling, 90 Colo. 517, 10 P.2d 942 (1932); Updike v. People, 92 Colo. 125, 18 P.2d 472 (1933); Militello v. People, 95 Colo. 519, 37 P.2d 527 (1934).

Instructions for multiple offenses. It is error for court to instruct jury that it could convict if evidence showed crime occurred within 3 years prior to filing of information. Such instruction is only proper if evidence proves one act, but date of incident is in question. Woertman v. People, 804 P.2d 188 (Colo. 1991).

Because they tend to confuse jury. When a proposition of law is once clearly stated in the charge, a repetition thereof in the same or different language only tends to confuse the jury. Minich v. People, 8 Colo. 440, 9 P. 4 (1885).

Combining instructions not abuse of discretion. Combining in one instruction the instructions on presumption of innocence, burden of proof, and reasonable doubt does not amount to an abuse of discretion, where no prejudice is shown. People v. Sharpe, 183 Colo. 64, 514 P.2d 1138 (1973).

Particular portions of evidence should not be singled out and emphasized by special instructions. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968).

Special instruction unfair if not warranted by the evidence. Where the evidence does not warrant it, a special instruction is unfair and a basis for reversible error. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968).

When an instruction conceivably could be improved by rephrasing in certain particulars, yet it adequately states the basic requirements, then the jury is properly charged. Jorgensen v. People, 178 Colo. 8, 495 P.2d 1130 (1972).

Although an instruction may be unduly prolix, if it properly advises the jury it is not in error. Yerby v. People, 176 Colo. 115, 489 P.2d 1308 (1971).

Instruction interfering with jurors' deliberation is error. Where there is little doubt that the giving of an additional instruction interferes with the free and unbiased deliberation of the jurors, the trial court errs in acting, abusing its discretion. Mogan v. People, 157 Colo. 395, 402 P.2d 928 (1965).

A defendant's due process rights are violated when a trial court intrudes on the jury's deliberative process and deprives the jury of its fact-finding duty. People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

The court's response to the jurors' question effectively amounted to an impermissible directed verdict, where the primary contested issue at trial was the defendant's authority to borrow money from victim's account and that response left the jury with no alternative but to determine that defendant had no such authority. People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

Instruction may assume commission of a crime. In a prosecution where there was no dispute at all that a crime was committed and the only defense made is that it was done by another, that the defendants had no part in it, and that instead of encouraging or assisting the criminal they came to the rescue of the injured party, and instruction that "if you believe beyond a reasonable doubt from all the facts and circumstances and evidence in the case that these men aided, abetted and encouraged the offense then you may find them guilty as charged in this information", is not reversible error because it assumes the commission of the crime instead of requiring the jury to find such fact beyond a reasonable doubt from the evidence. Komrs v. People, 31 Colo. 212, 73 P. 25 (1903).

B. Statutory Language.

Instruction based on statute upheld. In a felony child abuse case, the court properly instructed the jury that if the prosecution proved beyond a reasonable doubt that a reason other than spiritual treatment existed demonstrating that the child was endangered, the defendant was not entitled to the affirmative defense of spiritual healing. In addition, an instruction referring to the statutory duty of a parent to provide medical care was proper. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

Trial court's decision to use instruction tracking deadly physical force language in § 18-1-704 instead of instruction containing specific language requested by defendant was not erroneous. People v. Phillips, 91 P.3d 476 (Colo. App. 2004).

It is a good rule to couch instructions in the language of a statute. Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965).

Objection to such instruction is not tenable. The objection that instructions in a criminal case are given in the language of a statute is not tenable. Kent v. People, 8 Colo. 563, 9 P. 852 (1885).

If the language is clear. Where an instruction is worded substantially in the language of the statute, no more is required if the language is clear. People v. Dago, 179 Colo. 1, 497 P.2d 1261 (1972); People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

Other instructions may be proper. An instruction couched in the language of a statute is not the only type of instruction that is proper. Bustamonte v. People, 157 Colo. 146, 401 P.2d 597 (1965).

Inclusion of inapplicable provisions not necessarily error. Even in cases where the inclusion verbatim of inapplicable subsections of statutes in instructions to the jury are said to be improper, the giving of such an instruction does not, in itself, constitute reversible error. Bodhaine v. People, 175 Colo. 14, 485 P.2d 116 (1971).

When there is a discrepancy between the statutory provision cited in the charging document and the jury instructions, thereby effecting a constructive amendment to the charging document, the error is plain and requires reversal. People v. Rediger, 2018 CO 32, 416 P.3d 893.

Mere acquiescence to a jury instruction does not constitute a waiver or invited error without some record evidence that the defendant intentionally relinquished a known right. People v. Rediger, 2018 CO 32, 416 P.3d 893.

Instruction based on statute upheld. Where instructions on specific intent are phrased in the language of a statute, such instructions are proper and will be upheld on review. Blincoe v. People, 178 Colo. 34, 494 P.2d 1285 (1972).

Jury instruction which is in conflict with the legislative intent of § 18-1-407 concerning affirmative defenses should not be used. People v. Rex, 689 P.2d 669 (Colo. App. 1984).

In instructing the jury on the issue of the voluntariness of a confession, the court need not define the term since the general understanding of the word is clear. Kwiatkowski v. People, 706 P.2d 407 (Colo. 1985).

Jury instruction providing supplemental definition of "knowing" for the purposes of second degree murder was unnecessary, but was not reversible error. The trial court's instruction did not pose a barrier to the jury in considering fully the defendant's affirmative defense. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

C. Particular Instructions.

Giving or refusal of cautionary instructions rests largely in the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion and resulting prejudice to the defendant the trial court's ruling will not be disturbed. Luna v. People, 170 Colo. 1, 461 P.2d 724 (1969).

Such as on weighing testimony of private detectives. The giving of instructions as to the caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law and rests largely in the discretion of the trial judge. O'Grady v. People, 42 Colo. 312, 95 P. 346 (1908).

Where the jury has been instructed to disregard tendered evidence, it must be presumed that the jury in the performance of its duty did so. People v. Goff, 187 Colo. 103, 530 P.2d 514 (1974).

Credibility of defendant's testimony. The jury may be instructed that in determining the credibility of the defendant in a criminal case testifying in his own behalf, they have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct during the trial. Minich v. People, 8 Colo. 440, 9 P. 4 (1884); Boykin v. People, 22 Colo. 496, 45 P. 419 (1896); O'Brien v. People, 42 Colo. 40, 94 P. 284 (1908).

Or of witness who has wilfully testified falsely. An instruction directing the jury that they are at liberty to disregard the entire testimony of a witness who has wilfully testified falsely to a material point is good. Minich v. People, 8 Colo. 440, 9 P. 4 (1885).

Only one instruction on credibility of witnesses necessary. The practice of giving two instructions on the creditibility of witnesses is not necessary, and is not the modern trend, for it is the better practice to give only one instruction as to credibility of witnesses. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

It is not error to deny a special instruction on credibility of eyewitnesses where a general instruction on credibility is given. People v. Ross, 179 Colo. 293, 500 P.2d 127 (1972); People v. Lopez, 182 Colo. 152, 511 P.2d 889 (1973).

Where the stock instruction on credibility includes language of caution to the jury applicable to the witnesses' testimony, it is not an abuse of the trial court's discretion to refuse another cautionary instruction. Luna v. People, 170 Colo. 1, 461, P.2d 724 (1969).

The failure of the court sua sponte to specially instruct the jury on an identification issue is not patently prejudicial where the jury is given an instruction concerning the credibility of witnesses which details the factors to be considered by them such as means of knowledge, strength of memory, and opportunities for observation. Fresquez v. People, 178 Colo. 220, 497 P.2d 1246 (1972).

But separate instruction on defendant's credibility not error. While it is unnecessary and poor practice to give the jury a separate instruction on the credibility of a defendant as a witness, the giving of such an instruction does not constitute reversible error. People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

The giving of separate instruction dealing with the credibility of defendant as witness was not reversible error, although the better procedure is to give only one integrated credibility instruction. Lamb v. People, 181 Colo. 446, 509 P.2d 1267 (1973).

Including in sanity trial. In a sanity trial, the court does not commit prejudicial error by instructing the jury specifically concerning the test of defendant's credibility as a witness, while a general instruction on the credibility of witnesses is also given. Elliott v. People, 176 Colo. 373, 490 P.2d 687 (1971).

Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the de-

fendant's guilt. Clair v. People, 9 Colo. 122, 10 P. 799, 97 Am. St. R. 780 (1886).

If in ruling upon the sufficiency or insufficiency of evidence in circumstantial evidence cases judges must follow the rule that the evidence must be consistent with guilt and inconsistent with innocence, it follows that the better practice is to so advise the jury. People v. Calise, 179 Colo. 162, 498 P.2d 1154 (1972).

No error if defendant is not prejudiced. Where an instruction conveys the essence of the law to be applied in regard to circumstantial evidence and when all the instructions are read as a whole the defendant is not prejudiced by this instruction which does not include the language that ''the circumstances relied upon must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence'', there is no error. People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

Circumstantial evidence held sufficient basis for instruction. Yerby v. People, 176 Colo. 115, 489 P.2d 1308 (1971).

Stock instruction on presumption of innocence held inappropriate. Renfrow v. People, 176 Colo. 160, 489 P.2d 582 (1971); Brown v. People, 177 Colo. 397, 494 P.2d 587 (1972).

For instruction on presumption of innocence recommended by supreme court, see Martinez v. People, 172 Colo. 82, 470 P.2d 26 (1970).

Trial court need not instruct jury to exclude every reasonable hypothesis of innocence where the evidence of defendant's guilt was primarily direct. People v. Lopez, 182 Colo. 152, 511 P.2d 889 (1973).

A court does not err in instructing the jury that they are ''not to search for a doubt''. People v. Sharpe, 183 Colo. 64, 514 P.2d 1138 (1973).

Where instruction on presumption of innocence was given prior to recommendation of supreme court that it be reworded to exclude objectionable language, giving of such instruction was not reversible error. People v. Pacheco, 180 Colo. 39, 502 P.2d 70 (1972).

The giving of a stock instruction on the presumption of innocence does not constitute reversible error just because of its historical use. Jorgensen v. People, 178 Colo. 8, 495 P.2d 1130 (1972).

Submitting erroneous instruction on presumption of innocence would ordinarily require reversal, but only if the defendant objected to the instruction. People v. Simmons, 182 Colo. 350, 513 P.2d 193 (1973).

Instruction that defendant not compelled to testify. It is error to refuse a tendered instruction that the defendant is not compelled to testify, and that the fact that he does not testify cannot be used as an inference of guilt and should not prejudice him in any way. People v. Crawford, 632 P.2d 626 (Colo. App. 1981).

Limiting instruction on prior convictions. When defendant's prior felony convictions are elicited during his testimony, a limiting instruction is required. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

Instructions where evidence of other crimes is used. When evidence from other crimes is used: First, the prosecutor should advise the trial court of the purpose for which he offers the evidence; secondly, if the court admits such evidence, it should then and there instruct the jury as to the limited purpose for which the evidence is being received and for which the jury may consider it; thirdly, the general charge should contain a renewal of the instruction on the limited purpose of such evidence; lastly, the offer of the prosecutor and the instructions of the court should be in carefully couched terms—they should refer to ''other transactions'', ''other acts'', or ''other conduct'' and should eschew such designations as ''similar offenses'', ''other offenses'', ''similar crimes'', and so forth. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Where evidence relating to other prior incidents of a similar nature between the defendant and the prosecuting witness is admitted, and the court gives an oral cautionary instruction to the jury on the limited relevance of similar act testimony at the conclusion of the prosecuting witness's testimony as well as a similar written instruction when the case is submitted to the jury, there is no reversible error. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

Even when defendant has not requested such. Where the trial judge instructs the jury on the limited purposes for which evidence of prior felony convictions is admitted when the defendant has not requested such an instruction, such action is proper inasmuch as the judge has a duty to instruct the jury on the limited purpose for which such evidence is admissible in his general instructions. Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969).

Evidence of former convictions used to attack credibility. Where testimony as to former convictions is elicited for the purpose of attacking the defendant's credibility, the court acts properly in so instructing the jury. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

When instructing a deadlocked jury deliberating a charge involving lesser offenses, the court should first ask whether there is a likelihood of progress towards a unanimous verdict upon further deliberation. If the jury indicates that a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses or, instead, whether the division centers only on the particular degree of guilt. People v. Lewis, 676 P.2d 682

(Colo. 1984); People v. Hayward, 55 P.3d 803 (Colo. App. 2002).

When a lesser offense involves elements that are not necessarily included in a greater offense, the additional instruction should set forth the nonincluded elements of the offense and should advise the jury that before the defendant can be found guilty of that particular offense each of the jurors must be satisfied beyond a reasonable doubt that the defendant acted in such a manner so as to satisfy all of the nonincluded elements. People v. Lewis, 676 P.2d 682 (Colo. 1984).

Instruction on lesser included offense limited. The rule that an instruction on a lesser included offense is required when requested is limited to those cases where there is evidence to support such an instruction. People v. Ross, 179 Colo. 293, 500 P.2d 127 (1972).

A defendant is entitled to an instruction on a lesser included offense, unless it is clear from the evidence that the defendant is guilty of the greater offense or nothing at all. Ortega v. People, 178 Colo. 419, 498 P.2d 1121 (1972).

Mere chance of the jury's rejection of uncontroverted testimony and conviction on a lesser charge does not necessitate an instruction on the lesser charge. People v. Campbell, 678 P.2d 1035 (Colo. App. 1983).

The giving of such instruction is not mandatory. Where the court already knew that a juror disagreed with the other jurors and felt pressured to issue a verdict against her conscience, court had reasonable concern that such an instruction could be perceived as coercive. People v. Barnard, 12 P.3d 290 (Colo. App. 2000).

Defendant was not entitled to special instruction concerning testimony of immunized witnesses where, considering circumstances of case, the standard credibility instruction given by trial court was sufficient. People v. Loggins, 709 P.2d 25 (Colo. App. 1985).

There must be evidence tending to establish lower grade. In a prosecution for a crime which includes within the charge lower grades of crime, where there is any evidence tending to establish a lower grade, the jury should be instructed as to such lower grade; but, where there is no evidence tending to establish a lower grade, such lower grade should not be submitted to the jury. Carpenter v. People, 31 Colo. 284, 72 P. 1072 (1903).

Lesser nonincluded offense. A defendant is entitled to an instruction on a lesser nonincluded offense when he requests such an instruction and there is evidence to support it. People v. Best, 665 P.2d 644 (Colo. App. 1983).

Trial court's refusal to give a lesser nonincluded offense instruction does not justify reversal if the court instructed on a comparable lesser nonincluded offense. People v. Rubio, 222 P.3d 355 (Colo. App. 2009).

The decision whether to request a lesser offense instruction is a matter to be decided by counsel after consultation with the defendant. Arko v. People, 183 P.3d 555 (Colo. 2008).

Instruction on reasonable doubt upheld. Minich v. People, 8 Colo. 440, 9 P. 4 (1885); People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972); People v. Focht, 180 Colo. 259, 504 P.2d 1096 (1972); People v. Rubio, 222 P.3d 355 (Colo. App. 2009).

An instruction to the jury that a reasonable doubt must be grounded upon irreconcilable evidence is incorrect, because the evidence may be insufficient to prove the charge. Mackey v. People, 2 Colo. 13 (1873).

Instruction on general intent upheld. People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972).

But inadequate for specific intent crime. An instruction on general intent is inadequate guidance for a jury deliberating specific intent crime. People v. Mingo, 181 Colo. 390, 509 P.2d 800 (1973).

Instruction on specific intent read in context with other instructions which made specific reference to specific intent, requiring proof of each element beyond a reasonable doubt, adequately informs the jury of the law. People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972).

Instruction omitting specific "animus" improper. An instruction which makes the question of guilt depend solely upon the intentional doing of an unlawful act constitutes prejudicial error in cases where the specific ''animus'' as a material element of the crime for which the accused is convicted is omitted. Gonzales v. People, 166 Colo. 557, 445 P.2d 74 (1968).

Instruction dealing with the effect of defendant's statement does not require for its submission that the defendant's statement reached the level of a confession or a direct admission of a crime. People v. Naranjo, 181 Colo. 273, 509 P.2d 1235 (1973).

Instruction on definition of confession held properly denied. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Instruction on weight given confession is improper comment on evidence. An instruction that tells a jury that a confession may be entitled to great weight is an improper comment upon the weight of the evidence. Fincher v. People, 26 Colo. 169, 56 P. 902 (1899).

Admonition does not cure erroneous admission of incriminating statement. An admonition or an instruction to the jury to disregard involuntary incriminating statements does not cure the erroneous admission of such statements. Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971).

Unless such is not an issue of significance. Where the admissions of the defendant in the nature of either extrajudicial statements or a

confession is not an issue of significance, the giving of an instruction on them is not grounds for relief. Yerby v. People, 176 Colo. 115, 489 P.2d 1308 (1971).

Instruction held not to be judicial comment on the evidence. People v. Olona, 180 Colo. 299, 505 P.2d 372 (1973).

Comments of counsel. Where the trial judge instructed the jury that comments of counsel were not evidence and should not be considered as such, in the absence of a showing to the contrary, it is presumed that the jury understood the instructions and heeded them. People v. Becker, 187 Colo. 344, 531 P.2d 386 (1975).

Instruction defining accomplice held not fatally erroneous. Komrs v. People, 31 Colo. 212, 73 P. 25 (1903).

Instruction on accomplice's testimony held proper. Wisdom v. People, 11 Colo. 170, 17 P. 519 (1887); People v. Small, 177 Colo. 118, 493 P.2d 15 (1972).

Instruction on evidence showing plan, scheme, and design held proper. Mays v. People, 177 Colo. 92, 493 P.2d 4 (1972).

Instruction on flight. Where there is evidence of flight as a deliberate attempt to avoid detection or arrest for a crime just committed, an instruction on flight is proper. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968); Nunn v. People, 177 Colo. 87, 493 P.2d 6 (1972).

Instruction on alibi held sufficient. McGregor v. People, 176 Colo. 309, 490 P.2d 287 (1971).

Instruction on alibi held liable to mislead jury and was therefore grounds for new trial. Wisdom v. People, 11 Colo. 170, 17 P. 519 (1887).

Instruction on negligence held valid. People v. Olona, 180 Colo. 299, 505 P.2d 372 (1973).

Instruction on complicity appropriate where evidence was sufficient to show that two or more persons were jointly engaged in the commission of a crime. People v. Phillips, 732 P.2d 1226 (Colo. App. 1986).

Instruction on defendant's denials and theory of case held error. Trial court's instruction that defendant's denials of charges and theory of case were issues but not evidence held incorrect statement of law and reversible error. People v. Herbison, 761 P.2d 263 (Colo. App. 1988).

State's pattern reasonable doubt jury instruction accurately describes proof beyond a reasonable doubt. People v. Alvarado-Juarez, 252 P.3d 1135 (Colo. App. 2010).

Where trial court should have given an additional clarifying instruction, its failure to do so did not constitute prejudicial error where conviction could not have been affected by the lack of response to jurors' inquiry. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Trial court's comment regarding whether defendant was the initial aggressor did not violate this rule and did not constitute error, much less plain error. With respect to a trial court's comments, questions, and demeanor, more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal. The record must clearly establish bias, and the test is whether the trial judge's conduct so departed from the required impartiality as to deny the defendant a fair trial. People v. Martinez, 224 P.3d 1026 (Colo. App. 2009), aff'd on other grounds, 244 P.3d 135 (Colo. 2010).

Court responded to defendant's objection to prosecutor's closing argument about self-defense by finding there was "some evidence" defendant was initial aggressor. Its ruling was on a matter of law, it did not invade the fact-finding province of the jury, and court immediately instructed jurors that they were to decide the facts. People v. Martinez, 224 P.3d 1026 (Colo. App. 2009), aff'd on other grounds, 244 P.3d 135 (Colo. 2010).

Failure to give curative instruction not reversible error. Failure to give a curative instruction, in the absence of a request by defense counsel, did not constitute reversible error. People v. Rogers, 187 Colo. 128, 528 P.2d 1309 (1974).

Curative jury instruction to disregard prior invalid conviction remedied any harm that may have resulted from reference to the invalid conviction. People v. McNeely, 68 P.3d 540 (Colo. App. 2002).

Instructions as a whole held to have adequately advised jury on premeditation. Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972).

Instruction reducing prosecutor's obligation prejudicial. Prejudice to the defendant is inevitable when the court instructs the jury in such a way as to reduce the prosecution's obligation to prove each element of its case beyond a reasonable doubt. People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974); Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Cumulative instructions containing erroneous statements of law and which were at odds with the standard jury instructions on affirmative defenses had the effect of relieving the prosecution of its burden of proof in regard to affirmative defenses. Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Trial court's additional instruction in response to jury's inquiry not error because defendant acceded to instruction and the inquiry did not show any misunderstanding or confusion on a matter of law central to the defendant's guilt or innocence. People v. Phillips, 91 P.3d 476 (Colo. App. 2004).

Giving of "Allen charge" prior to September 22, 1971, held not error. People v. Lovato, 181 Colo. 99, 507 P.2d 860 (1973).

But error when no confusion in jurors' minds on the law. Ordinarily a trial judge is within his rightful province when he urges agreement upon a jury at loggerheads with itself; but this process has its limits, and it is a specifically delicate matter to importune unanimity when there is no indication of confusion or misapprehension in the minds of the jurors on the law of the case. Mogan v. People, 157 Colo. 395, 402 P.2d 928 (1965).

"Time-fuse" instruction is plain error. The giving of a "time-fuse" instruction (which grants the jury a time limit to finish its deliberations, at the end of which the jury will be dismissed) constitutes plain error and requires reversal. Allen v. People, 660 P.2d 896 (Colo. 1983).

Instruction that the jury could consider defendant's voluntary absence from the trial as evidence of guilt was not error. The court had made reasonable inquiry as to the defendant's whereabouts before continuing the trial. People v. Tafoya, 833 P.2d 841 (Colo. App. 1992).

V. MOTION FOR NEW TRIAL.

Failure to comply with this rule will ordinarily result being precluded from raising an objection for the first time on motion for new trial. Arellano v. People, 177 Colo. 286, 493 P.2d 1362 (1972); Fresquez v. People, 178 Colo. 220, 497 P.2d 1246 (1972).

Where grounds specified in motion are not the same as before court. Where the "grounds so specified" before the trial court are not the same as are thereafter urged in a motion for new trial, then the grounds may not be considered raised for the first time in the motion for a new trial. Zeiler v. People, 157 Colo. 332, 403 P.2d 439 (1965).

VI. ON REVIEW.

A. In General.

Errors in instructions generally not basis for collateral attack. As a general rule, errors in jury instructions do not constitute fundamental error that would provide a basis for collateral attack. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

Assumption that jury followed instructions. The reviewing court must assume, in the absence of evidence to the contrary, that the jury followed the court's instructions. People v. Palmer, 189 Colo. 354, 540 P.2d 341 (1975); People v. Montoya, 709 P.2d 58 (Colo. App. 1985), rev'd on other grounds, 736 P.2d 1208 (Colo. 1987).

And that court properly instructed jury. On review, in the absence of all of the instructions, it will be assumed that the trial court properly instructed the jury on the law applicable to the facts and the issues. Luna v. People, 170 Colo. 1, 461 P.2d 724 (1969).

Error benefiting party not prejudicial. Where one is benefited by an error in submitting or failing to submit an instruction, he cannot claim prejudicial error. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

A party cannot complain when an instruction given is more favorable to him than the one refused. Lowdermilk v. People, 70 Colo. 459, 202 P. 118 (1921); Abshier v. People, 87 Colo. 507, 289 P. 1081 (1930).

Where a court errs in giving an instruction that prejudices the state rather than the defendant in that it increases the state's burden beyond that required, no grounds for reversal are created. Early v. People, 178 Colo. 167, 496 P.2d 1021 (1972).

No error where instructions support defendant's theory. Defendant cannot try the case on one theory and claim error on appeal where the trial court, in instructing the jury, acquiesced in that theory. People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974).

Or where approved by defense. Assignments of error based on instructions specifically approved by the defense will not be considered. Giacomozzi v. People, 72 Colo. 13, 209 P. 798 (1922).

No error where defendant acquitted. Where the requested instructions went only to the question of a charge of which the defendant was acquitted, the refusal to give the instructions is not subject to review. Hughes v. People, 175 Colo. 351, 487 P.2d 810 (1971).

Mere nondirection where no instruction is requested is not error. Brown v. People, 20 Colo. 161, 36 P. 1040 (1894); West v. People, 60 Colo. 488, 156 P. 137 (1915); Clarke v. People, 64 Colo. 164, 171 P. 69 (1918); Rowan v. People, 93 Colo. 473, 26 P.2d 1066 (1933).

In reviewing claims based on clerical errors in instructions, the court must assume that the jury took a common sense view of the instruction. People v. Turner, 730 P.2d 333 (Colo. App. 1986).

For court to determine the effect of particular instruction, it must be read in conjunction with the other instructions. People v. Zapata, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989).

Under the doctrine of invited error, a party cannot complain where he has been the instrument for injecting error in the case, and any error caused by the failure of the trial court to give the jury an instruction due to the defendant's objections is error injected by the defendant and cannot be complained of on appeal. People v. Collins, 730 P.2d 293 (Colo. 1986).

When a party injects or invites error in trial proceedings, he cannot later seek reversal on appeal because of that error. People v. Zapata,

759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989); People v. Jacobson, 2017 COA 92, __ P.3d __.

Defense counsel's failure to object to instructional errors does not amount to invited error. People v. Hoggard, 2017 COA 88, __ P.3d __.

Invited error does not apply when there is no plausible strategic motive for defense counsel's failure to object, therefore making it an oversight, not a strategy. People v. Hoggard, 2017 COA 88, __ P.3d __.

A claim of plain error relative to a jury instruction must be tested by examining the sufficiency of the instructions as a whole. People v. Turner, 730 P. 2d 333 (Colo. App. 1986).

The cumulative effect of improper jury instructions that contained erroneous statements of law which relegated to the jury the function of determining whether an affirmative defense was available in a case and which had the effect of relieving the prosecution of its burden of proof in regard to the affirmative defense was plain error even though a proper jury instruction was provided with the improper jury instruction. The proper jury instruction was insufficient to dispel the potential harm created by the erroneous jury instructions. Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Failure to instruct jury on element not necessarily structural, requiring reversal. If element uncontested, supported by overwhelming evidence, and jury verdict would have been same absent error, failure to instruct harmless. People v. Geisendorfer, 991 P.2d 308 (Colo. App. 1999).

A trial court commits constitutional error when it correctly instructs the jury regarding the elements of the crime but instructs the jury that, as a matter of law, the prosecution has satisfied its burden of proving one of the elements, thereby withdrawing that element from the jury's consideration. People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

B. Requirements.

Failure to object at trial bars review. Where appellants argue that certain of the instructions given were erroneous, but they failed to raise any objection to these instructions at trial, offered no alternative instructions, and then failed to raise the issue in their motion for a new trial, an appellate court will not ordinarily review the assignment of error. People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972). See Morehead v. People, 167 Colo. 287, 447 P.2d 215 (1968); Tanksley v. People, 171 Colo. 77, 464 P.2d 862 (1970).

Trial counsel must specify which instructions he is objecting to and tender correct instructions, and having failed to so object at trial, the issue cannot be raised on appeal. People v. Green, 183 Colo. 25, 514 P.2d 769 (1973).

Where defendant did not object to the jury instruction, nor offer a substitute, or include the asserted ground in his motion for new trial, consequently, it will not be considered for the first time on appeal. Lamb v. People, 181 Colo. 446, 509 P.2d 1267 (1973).

An appellate court ordinarily does not notice objections to instructions not raised at the trial court level. Keady v. People, 32 Colo. 57, 74 P. 892 (1903); Buschman v. People, 80 Colo. 173, 249 P. 652 (1926); Ruark v. People, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968).

Ordinarily, the supreme court will not take note of erroneous instructions in the absence of a contemporaneous objection which gives the trial court an opportunity to correct error in its proceedings. People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974).

Unless manifest prejudice amounting to plain error. Where the defendant does not object to an instruction given, or tender any alternate instruction which might more adequately set forth the law, his assignment of error is not valid unless there is manifest prejudice amounting to plain error. People v. Bercillio, 179 Colo. 383, 500 P.2d 975 (1972).

Where defendant did not tender his own instructions, nor did he object to the instructions given, nor did he raise objections to the instructions in his motion for a new trial, a reviewing court is not required to review the arguments raised for the first time, and would not do so unless fundamental error appears. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

Where a defendant failed to object to the adequacy of the jury instructions in his motion for a new trial, a judgment will not be reversed unless plain error occurred. People v. Frysig, 628 P.2d 1004 (Colo. 1981).

Where defendant only made a general objection to jury instructions, and failed to make a timely specific objection, supreme court will not consider argument by defendant that instructions were in error, absent plain error. People v. O'Donnell, 184 Colo. 104, 518 P.2d 945 (1974).

Where the defendant failed to make any objection prior to submission of the instructions, absent plain error, the court would not consider the defendant's arguments on review. People v. Tilley, 184 Colo. 424, 520 P.2d 1046 (1974); People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

Where defendant did not challenge the giving of the instruction at trial, only error so substantial as to constitute plain error requires reversal. People v. Turner, 730 P.2d 333 (Colo. App. 1986).

Within the meaning of rule 52. Review as to an alleged error not previously specified to

the trial court is precluded unless the alleged error be deemed ''plain error'' within the meaning of Crim. P. 52(b). People v. Brionez, 39 Colo. App. 396, 570 P.2d 1296 (1977).

"Plain error" rule must be read in harmony with this rule. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

Review confined to whether plain error present. Where an instruction issue is raised for the first time on appeal, review is confined to a consideration of whether the error falls within the definition of plain error. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972); People v. Zapata, 759 P.2d 754 (Colo. App. 1988), aff'd on other grounds, 779 P.2d 1307 (Colo. 1989); People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991); People v. Knight, 167 P.3d 141 (Colo. App. 2006); People v. Hoggard, 2017 COA 88, __ P.3d __.

Where instructions used by the trial court fail to define the statutory terms, failure to object to the tendered instructions or raise any constitutional objection to the statute at the trial court level raises the standard of review to one of ''plain error''. People v. Cardenas, 42 Colo. App. 61, 592 P.2d 1348 (1979).

Appellate court reviews only for plain error where defendant fails to make all objections to the jury instructions before the instructions are submitted to the jury. People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003).

No plain error where a reasonable jury would not interpret the instructions to permit two aggravated robbery convictions where defendant took property from only one victim during a single episode. People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003).

"Plain error" not found. Where an instruction is not objected to by defendant when tendered by the court, the defendant does not tender a ''proper'' instruction, and he does not mention the asserted error in instruction in a motion for new trial, there is no plain error. People v. Green, 178 Colo. 77, 495 P.2d 549 (1972).

Where from the court's review of all instructions it was satisfied that there was no ''plain error'' in the giving of the instruction which the defendant challenged for the first time on appeal, there was no need to discuss the several arguments advanced by the defendant. People v. Spinuzzi, 184 Colo. 412, 520 P.2d 1043 (1974).

Broad objection insufficient for review. An objection in broad coverage, giving no basis whatever to point up with some reasonable particularity the nature of any shortcoming, is no objection at all and is not entitled to consideration on review. Cruz v. People, 165 Colo. 495, 441 P.2d 22 (1968).

Where a great number of instructions are given, most of them dependent to some extent on each other, then, where they are full and fair to the defendant in a criminal case by stating the law correctly, an appellate court will not review them, or any part of them, upon a vague and general charge of error. Jones v. People, 6 Colo. 452, 45 Am. R. 526 (1882).

Where instructions are given as a general charge and the exceptions are only general in their character, the party excepting is not in position to urge his objection on appeal. Liggett v. People, 26 Colo. 364, 58 P. 144 (1899).

Refusal to give instruction not error if no prejudice. The court's refusal to give defendant's tendered instruction is not error where no prejudice to defendant is shown or apparent in record. Young v. People, 180 Colo. 62, 502 P.2d 81 (1972).

Jury instruction that if defendant was found to be the initial aggressor he was not entitled to benefit of self-defense was harmless error. There was no real possibility the jury was misled and the instruction was at most cumulative of another instruction concerning self-defense. People v. Manzanares, 942 P.2d 1235 (Colo. App. 1996).

Where record does not disclose any request during trial for the submission to the jury of a question, an appellate court declines to pass on the question of error in failure to submit. McClary v. People, 79 Colo. 205, 245 P. 491 (1926); McNulty v. People, 180 Colo. 246, 504 P.2d 335 (1972).

No error in trial court's instruction on deadly weapon or in court's response to jury's question on deadly weapon where defense did not object to the instruction or tender an alternative instruction or object to the court's referral to the instruction in answering the question, and, in some circumstances, fists may be considered a deadly weapon. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

Jury instruction providing supplemental definition of "knowing" for the purposes of second degree murder was unnecessary, but was not reversible error. The trial court's instruction did not pose a barrier to the jury in considering fully the defendant's affirmative defense. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

Rule 31. Verdict

(a) Submission and Finding. (1) **Forms of Verdict.** Before the jury retires the court shall submit to it written forms of verdict for its consideration.

(2) **Retirement of Jury.** When the jury retires to consider its verdict, the bailiff shall be sworn or affirmed to conduct the jury to some private and convenient place, and to the

best of his ability to keep the jurors together until they have agreed upon a verdict. The bailiff shall not speak to any juror about the case except to ask if a verdict has been reached, nor shall he allow others to speak to the jurors. When they have agreed upon a verdict, the bailiff shall return the jury into court. However, in any case except where the punishment may be death or life imprisonment, the court, upon stipulation of counsel for all parties, may order that if the jury should agree upon a verdict during the recess or adjournment of court for the day, it shall seal its verdict, to be retained by the foreman and delivered by the jury to the judge at the opening of the court, and that thereupon the jury may separate, to meet in the jury box at the opening of court. Such a sealed verdict may be received by the court as the lawful verdict of the jury.

(3) **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury. When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

ANNOTATION

I. GENERAL CONSIDERATION.

Jury's verdict must be allowed to stand if supported by substantial evidence. People v. Chavez, 182 Colo. 216, 511 P.2d 883 (1973).

Appellate courts cannot direct entry of directed verdicts of guilt. People v. Smith, 181 Colo. 203, 510 P.2d 315 (1973).

Applied in People v. Morris, 190 Colo. 215, 545 P.2d 151 (1976); People v. Ledman, 622 P.2d 534 (Colo. 1981).

II. SUBMISSION AND FINDING.

A. Forms of Verdict.

Where the crime charged can be committed in alternative ways, the written verdict form should not lump the ways together in the disjunctive or conjunctive, although the charge in the statute may be made in the disjunctive and the charge in the information may be made in the conjunctive. Hernandez v. People, 156 Colo. 23, 396 P.2d 952 (1964).

Separate verdicts should be submitted or else there should be a general verdict given as a counterpart of the not guilty verdict, since evidence of any of the alternative ways a crime can be committed will support a general verdict. Hernandez v. People, 156 Colo. 23, 396 P.2d 952 (1964).

B. Retirement of Jury.

All communications should be made in open court with the parties afforded an opportunity to make timely objections to any action by the court or jury which might be deemed irregular. Barriner v. District Court, 174 Colo. 447, 484 P.2d 774 (1971).

Informal communications improper. Informal communications between the court and jury via the bailiff are improper. Barriner v. District Court, 174 Colo. 447, 484 P.2d 774 (1971).

Prejudice required to set aside verdict for improper jury communication. In order to constitute grounds for setting aside verdict because of unauthorized or improper communication with the jury, the defendant must show that he was prejudiced thereby. People v. Davis, 183 Colo. 228, 516 P.2d 120 (1973).

Informal communication between court and jury must be examined in order to determine whether it is prejudicial. Ray v. People, 147 Colo. 587, 364 P.2d 578 (1961).

Determination of prejudice within court's discretion. The determination of whether prejudice has occurred because of unauthorized or improper communication with the jury is within the sound discretion of the trial court, and only

where that discretion has been abused will the verdict be set aside and a new trial ordered. People v. Davis, 183 Colo. 228, 516 P.2d 120 (1973).

Communication without prejudice not reversible error. Where the communication does not disclose that any prejudice whatever resulted to defendants, such communication between court and jury does not constitute reversible error. Ray v. People, 147 Colo. 587, 364 P.2d 578 (1961).

This rule must receive a reasonable construction as prohibiting only communications of an improper or unnecessary character. McLean v. People, 66 Colo. 486, 180 P. 676 (1919).

Ordinary physical necessities of jurors must be provided for. McLean v. People, 66 Colo. 486, 180 P. 676 (1919).

Where trial testimony is read to the jury at its request during its deliberations, it is essential that the court observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury, for this would be prejudicial abuse of discretion and constitute grounds for reversal. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Such reading is discretionary with trial court. The overwhelming weight of authority is that the reading of all or part of the testimony of one or more of the witnesses at trial, criminal or civil, at the specific request of the jury during its deliberations is discretionary with the trial court. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Court must determine whether jury is deadlocked. The trial court fails to exercise its power with that degree of caution which the circumstances demand where it fails to determine as a matter of fact that the jury is hopelessly deadlocked immediately before its discharge. Barriner v. District Court, 174 Colo. 447, 484 P.2d 774 (1971).

When "consent" to discharge deemed invalid. Defendant's ''consent'' to the discharge of the jury has no force or validity where the conditions and assumptions upon which the consent is based are never legally met, such as where defendant agreed to a future situation where the jury was ''hopelessly deadlocked'' when he had a right to anticipate that the court would follow the usual procedures in discharging a jury, and not the declaration of a mistrial based upon hearsay and procedural violations of the bailiff done totally off the record and out of court where no objection to the procedure was possible. Barriner v. District Court, 174 Colo. 447, 484 P.2d 774 (1971).

C. Return.

Verdict in a criminal case should be certain and devoid of ambiguity, though it need not follow strict rules of pleading or be otherwise technical. Yeager v. People, 170 Colo. 405, 462 P.2d 487 (1969).

Else conviction will not stand. When the language of the verdict permits reasonable uncertainty, defendant's conviction cannot be permitted to stand. Yeager v. People, 170 Colo. 405, 462 P.2d 487 (1969).

Sealed verdict must be returned the next juridical day. Where the parties stipulated that the court direct the jury to the effect that should they agree upon a verdict during the recess or adjournment of court for the day, the jury should seal their verdict and thereafter, in the absence of defendant and his counsel, and without their knowledge, the court instructed the jury to return verdict one week later instead of the next juridical day, as this rule contemplates, such practice was improper. Denny v. People, 106 Colo. 328, 104 P.2d 610 (1940).

Unanimity is required only with respect to the ultimate issue of defendant's guilt or innocence of the crime charged and not with respect to alternative means by which the crime was committed. People v. Taggart, 621 P.2d 1375 (Colo. 1981); People v. Vigil, 678 P.2d 554 (Colo. App. 1983).

Unanimity in a verdict does not require the jurors to be in agreement as to specific elements of the crime. People v. Lewis, 710 P.2d 1110 (Colo. App. 1985).

Where the intent of the jury can be ascertained from the verdict forms submitted, there is no reversible error as a result of the omission of a reference to conspiracy in the guilty verdict form. People v. Roberts, 705 P.2d 1030 (Colo. App. 1985).

Jury verdicts will not be reversed for inconsistency when the crimes charged required different elements of proof, and the jury could find from the very same evidence that the element of one crime was present while at the same time finding that the element of another charged crime was absent. People v. Powell, 716 P.2d 1096 (Colo. 1986).

No error in the trial court's decision to reassemble the jury for further deliberation and to enter judgment on the amended verdict where facts were insufficient to support a presumption that the jury was open to the influence of others after discharge and the defendant did not request that the jurors be questioned about their contact with others during the brief period after discharge. People v. Montanez, 944 P.2d 529 (Colo. App. 1996).

Court properly instructed jury to resume deliberations where juror's statements were ambiguous and equivocal as to her concurrence in the verdict. People v. Barnard, 12 P.3d 290 (Colo. App. 2000).

III. CONVICTION OF LESSER OFFENSE.

Lesser included offense defined. If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater. Sandoval v. People, 176 Colo. 414, 490 P.2d 1298 (1971).

"The offense charged" as used in section (c), encompasses any lesser included offense of the one charged. Hunter v. District Court, 184 Colo. 238, 519 P.2d 941 (1974).

Provisions of section (c) are embodiments of the rule at common law that the defendant was presumed to be on notice that he could be convicted of the crime charged or a lesser offense included therein. People v. Cooke, 186 Colo. 44, 525 P.2d 426 (1974).

Section (c) and all prior Colorado case law provide that one may be convicted of a lesser included offense of the crime charged. Hunter v. District Court, 184 Colo. 238, 519 P.2d 941 (1974).

If appellate court reverses a conviction as to a greater offense for insufficient evidence, it may direct entry of judgment on a lesser included offense supported by sufficient proof, even if jury was not instructed upon that lesser offense. People v. Valdez, 56 P.3d 1148 (Colo. App. 2002).

A criminal defendant who maintains his or her innocence at trial is not automatically barred from seeking jury instructions for a voluntary intoxication defense. If an instruction is given in that case, there must be a rational basis for it in the evidence presented at trial. After a review of the record, there was no rational basis in the evidence for the voluntary intoxication instruction. Brown v. People, 239 P.3d 764 (Colo. 2010).

Claim of innocence alone does not disentitle defendant to lesser included offense instruction. The instruction, however, must be supported by evidence at trial. There was no error in failing to instruct the jury on attempted first degree murder where victim's injuries were such that no rational jury could have found the shooter acted with anything but a premeditated intent to cause death. People v. Brown, 218 P.3d 733 (Colo. App. 2009), aff'd, 239 P.3d 764 (Colo. 2010).

IV. POLL OF JURY.

A court may declare a mistrial without further questioning the jury if the record supports the determination that the jury is unlikely to reach a unanimous verdict. Section (d) specifically applies "when a verdict is returned" and contains no direction to poll jurors prior to a verdict. Although the rule contemplates that a juror may disagree with a verdict, thereby permitting the court to direct further deliberations or to discharge the jury, the rule contains no provision for the situation where the jury reports that it cannot, and likely will not, reach a verdict. People v. Rivers, 70 P.3d 531 (Colo. App. 2002).

A jury poll ordinarily requires each juror to assent in the verdict. However, the right to a jury poll is not absolute, and matters relating to the manner of conducting a jury poll are generally committed to the discretion of the trial court. People v. Phillips, 91 P.3d 476 (Colo. App. 2004).

Trial court properly refused defendant's request to poll the jury. If a single charge includes multiple degrees of offenses, the trial court may not conduct a partial verdict inquiry as to the offenses included within the charge. People v. Richardson, 184 P.3d 755 (Colo. 2008).

Where no contemporaneous objection is made to an asserted defect occurring during the polling of the jury, review on appeal is limited to whether the defect rises to the level of ordinary plain error. Because the jurors in the case orally informed the court of their unanimous verdict and the record did not show a lack of unanimity, the court perceived no plain error where twelfth juror inexplicably not polled. People v. Phillips, 91 P.3d 476 (Colo. App. 2004).

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Presentence or Probation Investigation.

(1) When Investigation and Report Required.

(I) In General. The probation officer must make a presentence investigation and written report to the court before the imposition of sentence or granting of probation:

(a) In any case in which the defendant is to be sentenced for a felony and the court has discretion as to the punishment, or

(b) When the court so orders in any case in which the defendant is to be sentenced for a misdemeanor.

(II) Waiver. The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence investigation and report unless a presentence report is required by statute, including but not limited to the requirements of section 16-11-102(1)(b), C.R.S.

(2) Court May Order Examination. The court, upon its own motion or upon the petition of the probation officer, may order any defendant who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

(3) Delivery of Report Copies. The probation officer must provide copies of the presentence report, including any recommendations as to probation, to the prosecuting attorney and to defense counsel or the defendant if unrepresented. The copies must be provided:

(I) At least 72 hours before the sentencing hearing, or

(II) At least 7 days before the sentencing hearing if either the prosecuting attorney, defense counsel, or the defendant if unrepresented, so requests of the court within 7 days of the time the court sets the date for the sentencing hearing. If the probation department informs the court it cannot provide the report copies at least 7 days before the sentencing hearing, the court must grant the probation department additional time to complete the report and must reset the sentencing hearing so that it is held at least 7 days after the probation department provides the report copies.

(b) Sentence and Judgment.

(1) Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf, and to present any information in mitigation of punishment. The state also shall be given an opportunity to be heard on any matter material to the imposition of sentence. Alternatives in sentencing shall be as provided by law. When imposing sentence, the court shall consider restitution as required by section 18-1.3-603(1), C.R.S.

(2) Upon conviction of guilt of a defendant of a class 1 felony, and after the sentencing hearing provided by law, the trial court shall impose such sentence as is authorized by law. At the time of imposition of a sentence of death, the trial court shall enter an order staying execution of the judgment and sentence until further order of the Supreme Court.

(3) Judgment.

(I) A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, the finding of the amount of presentence confinement, and costs, if any are assessed against the defendant, the finding of the amount of earned time credit if the defendant had previously been placed in a community corrections program, an order or finding regarding restitution as required by section 18-1.3-603, C.R.S., and a statement that the defendant is required to register as a sex offender, if applicable.

(II) If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(III) All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.

(c) Advisement.

(1) Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

(2) Where judgment of conviction has been entered following a plea of guilty or nolo contendere, the court shall, after passing sentence, inform the defendant that the defendant may in certain circumstances have the right to appellate review of the sentence, of the time limits for filing a notice of appeal, and that the defendant may have a right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

(3) When the court imposes a sentence, enters a judgment, or issues an order that obligates a defendant to pay any monetary amount, the court shall instruct the defendant as follows:

(I) If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount;

(II) If the defendant lacks the present ability to pay the monetary amount due without undue hardship to the defendant or the defendant's dependents, the court shall not jail the defendant for failure to pay; and

(III) If the defendant has the ability to pay the monetary amount as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to the terms of this section.

(d) Withdrawal of Plea of Guilty or Nolo Contendere. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended.

If the court decides that the final disposition should not include the charge or sentence concessions contemplated by a plea agreement, as provided in Rule 11(f) of these Rules, the court shall so advise the defendant and the district attorney and then call upon the defendant to either affirm or withdraw the plea of guilty or nolo contendere.

(e) Criteria for Granting Probation. The court in its discretion may grant probation to a defendant unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public.

The conditions of probation shall be as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

(f) Proceedings for Revocation of Probation.

(1) At the first appearance of the probationer in court, or at the commencement of the hearing, whichever is first in time, the court shall advise the probationer as provided in Rule 5(2)(I) through (VI) of these Rules insofar as such matters are applicable, except that there shall be no right to a trial by jury in proceedings for revocation of probation.

(2) At or prior to the commencement of the hearing, the court shall advise the probationer of the charges against the probationer and the possible penalty or penalties therefor, and shall require the probationer to admit or deny the charges.

(3) At the hearing, the prosecution shall have the burden of establishing by a preponderance of the evidence the violation of a condition or conditions of probation, except that the commission of a criminal offense must be established beyond a reasonable doubt unless the probationer has been convicted thereof in a criminal proceeding. The court may, when it appears that the alleged violation of conditions of probation consists of an offense with which the probationer is charged in a criminal proceeding then pending, continue the probation revocation hearing until the termination of such criminal proceeding. Any evidence having probative value shall be received regardless of its admissibility under the exclusionary rules of evidence if the defendant is accorded a fair opportunity to rebut the evidence.

(4) If the probationer is in custody, the hearing shall be held within 14 days after the filing of the complaint, unless delay or continuance is granted by the court at the instance or request of the probationer or for other good cause found by the court justifying further delay.

(5) If the court determines that a violation of a condition or conditions of probation has been committed, it shall within 7 days after the said hearing either revoke or continue the probation. In the event probation is revoked, the court may then impose any sentence, including probation which might originally have been imposed or granted.

(g) Proceedings in the Event of Failure to Pay. When a defendant fails to pay a monetary amount imposed by the court, the court shall follow the procedures set forth in section 18-1.3-702(3), C.R.S.

Source: (a)(2), (b) to (e), and (f)(2) amended and adopted September 7, 2006, effective January 1, 2007; (a)(1) amended and effective October 18, 2007; (f)(4) and (f)(5) amended and adopted December 14, 2011, effective July 1, 2012; (a), (b)(1), (b)(3), and (c) amended and (g) added and effective May 22, 2015; IP(c)(3), (c)(3)(I), (c)(3)(II) amended and (c)(3)(III) added, effective March 14, 2019.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Insanity and the Law'', see 39 Dicta 325 (1962). For article, ''Colorado Felony Sentencing'', see 11 Colo. Law. 1478 (1982). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses a case relating to increased sentences after retrial, see 15 Colo. Law. 1604 (1986).

This rule is not unconstitutional because notice of a right to review is given to criminal defendants except in cases where judgment of conviction has been entered following a plea of guilty or nolo contendere. The reasonableness of the classification of defendants who have entered guilty pleas has been upheld in cases dealing with the federal counterpart. People v. Smith, 190 Colo. 449, 548 P.2d 603 (1976).

A violation of this rule does not entitle defendant to a late appeal in the absence of prejudice. In order for the defendant to bring a claim alleging he or she was deprived of the right to appeal because the court failed to comply with this rule, the defendant must bring a timely postconviction action under Crim. P. 35(c) and request a remedy of a new appeal. People v. Boespflug, 107 P.3d 1118 (Colo. App. 2004).

Applied in McClendon v. People, 175 Colo. 451, 488 P.2d 556 (1971); People v. Banks, 190 Colo. 295, 545 P.2d 1356 (1976); People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976); People v. Houpe, 41 Colo. App. 253, 586 P.2d 241 (1978); People v. Palmer, 42 Colo. App. 460, 595 P.2d 1060 (1979); People v. Baca, 44 Colo. App. 167, 610 P.2d 1083 (1980); People v. Horton, 628 P.2d 117 (Colo. App. 1980); People v. Quintana, 634 P.2d 413 (Colo. 1981), overruled on other grounds in People v. Porter, 2015 CO 34, 348 P.3d 922; People v. Lawson, 634 P.2d 1019 (Colo. App. 1981); Hafelfinger v. District Court, 674 P.2d 375 (Colo. 1984); People v. Anderson, 703 P.2d 650 (Colo. App. 1985).

II. PRESENTENCE OR PROBATION INVESTIGATION.

Even where evidence has been illegally seized, its use in a presentence hearing following a guilty plea is not error. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

III. SENTENCE.

Equal protection requirements. In the context of sentencing for criminal offenses, equal protection requires only that those who have committed the same offense shall be subject to the same criminal sanctions in effect at the time the offense was committed. People v. Arellano, 185 Colo. 280, 524 P.2d 305 (1974).

Imposition of sentence requires judicial discretion. The imposition of a criminal sentence in each individual case requires the exercise of judicial judgment, and it includes consideration of mitigating and aggravating circumstances, the power to impose an indeterminate sentence, and the right to suspend sentence, or the discretion to grant probation in appropriate cases. People v. Jenkins, 180 Colo. 35, 501 P.2d 742 (1972).

Which does not deny equal protection. The exercise of the judge's discretionary power in sentencing does not deny an accused equal protection of the law. People v. Jenkins, 180 Colo. 35, 501 P.2d 742 (1972).

Substance of American Bar Association standards deemed "authorized by law". The substance of the principles articulated in the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 3.5, insofar as they are consistent with the stated general purposes of the Colorado code of criminal procedure, may be deemed to be ''authorized by law'' within the meaning of section (b). People v. Lewis, 193 Colo. 203, 564 P.2d 111 (1977).

Nothing requires court to assign reasons for imposing a sentence. People v. Pauldino, 187 Colo. 61, 528 P.2d 384 (1974).

A sentencing court is required to state on the record the basic reasons for the imposition of sentence. The failure to do so creates a burdensome obstacle to effective and meaning-

ful appellate review. People v. Luu, 983 P.2d 15 (Colo. App. 1998).

A judgment of conviction is not final until sentence is imposed. Absent a specific finding that the victim did not suffer a pecuniary loss, restitution is a mandatory part of a sentence. Thus, absent such a finding, sentencing is not final until restitution is ordered. People v. Rosales, 134 P.3d 429 (Colo. App. 2005).

Discretion to impose concurrent or consecutive sentence. A sentencing court has discretion to impose a sentence to be served concurrently with or consecutively to a sentence already imposed upon the defendant. People v. Garcia, 658 P.2d 1383 (Colo. App. 1983); People v. Cullen, 695 P.2d 750 (Colo. App. 1984).

Delaying final sentencing on non-capital convictions until after sentencing on class 1 felony is appropriate where a court must sentence both for a class 1 felony and for other felonies. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Six-year delay between defendant's conviction and legal sentencing did not divest court of jurisdiction or cause unreasonable delay, where the sentence was promptly imposed following defendant's conviction, but subsequent appeal and the defendant's election to invoke the discretionary procedure under the Sex Offender's Act of 1968 delayed the proceedings. People v. Wortham, 928 P.2d 771 (Colo. App. 1996).

A six-month and seven-day sentencing delay is not presumptively prejudicial since it is substantially less than a year. The delay was not ''unreasonable'' under section (b) because the trial court imposed the delay for a legally justifiable reason, namely, to further the general assembly's intent to require trial courts to sentence recidivist offenders within an aggravated range. Trial court's sentencing delay did not violate defendant's claimed constitutional right to speedy sentencing because defendant failed to demonstrate presumptive prejudice. People v. Sandoval-Candelaria, 2014 CO 21, 321 P.3d 487.

Single sentence for more than one conviction does not constitute reversible error, although the preferable practice is to have a separate sentence for each conviction. People v. Pleasant, 182 Colo. 144, 511 P.2d 488 (1973).

Reliance by court on probation report at time sentence imposed does not abuse the defendant's rights. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973).

Judge may consider truthfulness of voluntary statements. It is not a denial of due process for a judge, in connection with sentencing procedure, to consider the truthfulness of voluntary statements made by the defendant at a presentence hearing. People v. Quarles, 182 Colo. 321, 512 P.2d 1240 (1973).

Deferred prosecution is relevant consideration in determining the sentence. People v. Lichtenwalter, 184 Colo. 340, 520 P.2d 583 (1974).

There is no difference between plea of nolo contendere and plea of guilty for sentencing purposes. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973).

There is no requirement that codefendants be given equal sentences. People v. Martin, 670 P.2d 22 (Colo. App. 1983).

Sentencing court should tailor sentence to defendant, keeping in mind past record, potential for rehabilitation, and protection of the public as well. People v. Alvarez, 187 Colo. 290, 530 P.2d 506 (1975).

Sentencing court should attempt to tailor the sentence to the defendant. To achieve this goal, the court should be aware of defendant's entire record including his past encounters with the criminal justice system. People v. Lichtenwalter, 184 Colo. 340, 520 P.2d 583 (1974).

Defendant must be notified when sentence will be pronounced. He has a right to be present in the court with legal counsel at that time, and he has a right of allocution before sentence is handed down which cannot be withheld from him. The failure of the court to properly insure these rights of a defendant renders invalid a sentence pronounced under those circumstances. People v. Emig, 177 Colo. 174, 493 P.2d 368 (1972).

No right to evidentiary hearing. During a discretionary sentencing proceeding, rule does not require an evidentiary hearing on the validity of any prior conviction contained in a presentence report. People v. Padilla, 907 P.2d 601 (Colo. 1995).

Prior to sentencing, the court must grant the defendant an opportunity to make a statement on his or her own behalf. The proper remedy for failing to allow the defendant to make a statement is resentencing. People v. Marquantte, 923 P.2d 180 (Colo. App. 1995); People v. Smalley, 2015 COA 140, 369 P.3d 737.

Failure to afford defendant an opportunity to speak amounts to plain error where a court does not directly address the defendant or personally invite him or her to speak. People v. Smalley, 2015 COA 140, 369 P.3d 737.

The court's inquiry whether ''other people in the court'' wanted to speak was clearly directed to the nonparties in attendance, not to the defendant. People v. Smalley, 2015 COA 140, 369 P.3d 737.

Effect of denial of allocution limited. Denial of the right of allocution under section (b) has no effect on the validity of the jury's deter-

mination of guilt. People v. Doyle, 193 Colo. 332, 565 P.2d 944 (1977).

Relief from denial is resentencing. The defendant's relief from a denial of the right of allocution under section (b) is resentencing after being afforded his right to allocution. People v. Doyle, 193 Colo. 332, 565 P.2d 944 (1977); People v. Smalley, 2015 COA 140, 369 P.3d 737.

Where the presentence report is issued to counsel immediately prior to sentencing, and the trial court's refusal to continue the sentencing hearing to another day unduly abridges the defendant's rights to present evidence in rebuttal to the information and recommendations contained in the report, his sentence must be vacated and the case remanded for resentencing after a full sentencing hearing. People v. Wright, 672 P.2d 518 (Colo. 1983).

However, the right of allocution is a statutory right, not a constitutional one, and reversal is not required if the failure to provide the defendant an opportunity to make a statement prior to sentencing is harmless. If a trial court imposes the minimum sentence permitted and does not have discretion to impose a lesser sentence, the lack of statement in allocution does not affect the sentence and is harmless. People v. Martinez, 83 P.3d 1174 (Colo. App. 2003).

Sentencing must occur without unreasonable delay. Although the general assembly has prescribed no specific time within which sentence must be imposed, section (b) requires that sentencing occur without unreasonable delay. People ex rel. Gallagher v. District Court, 632 P.2d 1009 (Colo. 1981).

Although sentencing was delayed for eight years, delay was excusable because the majority of it was attributable to defendant's own actions. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Although resentencing was delayed for 29 months, delay was excusable because of the timely imposition of defendant's original sentence, the substantial reduction of the original sentence upon resentencing, the consequent lack of prejudice resulting from the sentence imposed on remand, and the fact that all of the period of delay would be credited against the present sentence. People v. Luu, 983 P.2d 15 (Colo. App. 1998).

Despite six-year delay, state had no duty to set defendant's probation revocation hearing until after termination of defendant's incarceration in another jurisdiction. People v. Smith, 183 P.3d 726 (Colo. App. 2008).

One-year deferral of sentence imposition is unreasonable delay. Absent a legally justifiable reason, a one-year deferral of imposition of sentence constitutes an unreasonable delay in sentencing contrary to section (b). People ex rel. Gallagher v. District Court, 632 P.2d 1009 (Colo. 1981).

Sentence imposed within statutory limits will not be disturbed. Ordinarily if a sentence imposed is within limits fixed by statute, it will not be disturbed on review. People v. Lutz, 183 Colo. 312, 516 P.2d 1132 (1973).

Choice of place of confinement is within the sound discretion of the court. People v. Weihs, 187 Colo. 124, 529 P.2d 317 (1974).

Length of term of imprisonment is within the discretion of the court. People v. Weihs, 187 Colo. 124, 529 P.2d 317 (1974).

Sentencing judge is empowered to set the minimum sentence. Guerin v. Fullerton, 154 Colo. 142, 389 P.2d 84 (1964).

Parole board has no authority to refuse to carry out the plain meaning of a sentence legally imposed by the sentencing judge. Guerin v. Fullerton, 154 Colo. 142, 389 P.2d 84 (1964).

There is no constitutional right to credit of presentence jail time against sentence imposed. People v. Coy, 181 Colo. 393, 509 P.2d 1239 (1973); People v. Nelson, 182 Colo. 1, 510 P.2d 441 (1973).

Presumption that court gave credit for presentence confinement. It will be conclusively presumed that the trial court gave credit for presentence time spent in confinement where the sentence imposed plus the prior time in confinement do not exceed the maximum possible sentence. Larkin v. People, 177 Colo. 156, 493 P.2d 1 (1972).

Or otherwise acted properly. Where sentencing judge states only that he is taking time spent in jail prior to sentencing into consideration and thereafter gives the maximum, it must be presumed that he acted properly; that is, that he took the time spent into consideration and determined, as he had the right to do, not to grant the credit. People v. Nelson, 182 Colo. 1, 510 P.2d 441 (1973).

But "giving credit" without applying it to sentence improper. Where the trial court in sentencing gives credit to the defendant for his presentence jail time but does not apply it to the maximum sentence, the court is, in fact, extending the sentence beyond the statutory limits. People v. Regan, 176 Colo. 59, 489 P.2d 194 (1971).

Credit should be reflected in record. Trial judges would be well advised to follow the practice of causing the actual time spent by the defendant in jail prior to the imposition of sentence to be reflected in the record at the time sentence is imposed. People v. Jones, 176 Colo. 61, 489 P.2d 596 (1971).

Cancellation of deferred sentence does not affect conviction. Where the trial court withdrew or cancelled the imposition of the deferred sentence, its order affected only the sentence, and did not touch the conviction. People v.

Peretsky, 44 Colo. App. 270, 616 P.2d 170 (1980).

Defendant's absence from the state was by virtue of his own conduct and was justifiable reason for delay in sentencing. Defendant was incarcerated in another state for a probation violation. People v. Gould, 844 P.2d 1273 (Colo. App. 1992).

Two-and-one-half month delay in sentencing following defendant's return to state was not unreasonable. People v. Gould, 844 P.2d 1273 (Colo. App. 1992).

IV. JUDGMENT.

Intent of section (c). The intent behind section (c) is to establish some minimum guarantee that knowledge of the appellate process will be conveyed to defendants. People v. Boivin, 632 P.2d 1038 (Colo. App. 1981).

Burden to show that defendant was advised of appellate rights. Once there is sufficient reason to believe that the trial court has not advised a defendant of his appellate rights, including the special rights of an indigent defendant, the burden falls upon the state to demonstrate that he was so advised. People v. Boivin, 632 P.2d 1038 (Colo. App. 1981).

No "finality" standard for double jeopardy purposes. Section (c) does not provide a standard of ''finality'' for purposes of the constitutional prohibition against being twice placed in jeopardy for the same offense. People v. District Court, 663 P.2d 616 (Colo. 1983).

For purposes of retroactive application of a new rule of law, a judgment of conviction in Colorado cannot be considered final so long as a defendant may directly appeal the conviction or sentence. People v. Sharp, 143 P.3d 1047 (Colo. App. 2005).

Oral order does not become final judgment until order signed and entered in the judgment record. People v. Ganatta, 638 P.2d 268 (Colo. 1981).

When judgment final for purposes of appeal. The final judgment was entered, for purposes of appeal, when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal, taken more than 30 days after sentencing was proper. People v. Fisher, 189 Colo. 297, 539 P.2d 1258 (1975).

For purposes of § 16-5-402 and post-conviction review, a conviction occurs when the trial court enters judgment and sentence is imposed, if there is no appeal. The limitations of § 16-5-402 are applicable to a proportionality review of a sentence imposed pursuant to the habitual criminal statutes. People v. Talley, 934 P.2d 859 (Colo. App. 1996).

Judgment in a criminal case is not final until after sentencing. Hellman v. Rhodes, 741 P.2d 1258 (Colo. 1987).

An order of restitution becomes part of the sentence which, in accordance with section (c) of this rule, is part of the judgment of conviction. When a court orders a defendant, over his objection, to pay restitution to the victim or the victim's family as part of the judgment of conviction for a felony, the order of restitution is appealable pursuant to the statutory procedures applicable to the appellate review of a felony sentence. People v. Johnson, 780 P.2d 504 (Colo. 1989).

Restitution component satisfied once ordered, even though specific amount not set until two years after sentence imposed. Once restitution ordered, although not set, judgment of conviction became final and appealable, even though district court retained jurisdiction to determine restitution amount. Sanoff v. People, 187 P.3d 576 (Colo. 2008).

After the criminal court has lost the power to order restitution, it cannot alter the specific amount set while it still maintained the power to do so. In the absence of statutory authorization to determine the specific amount of restitution, notwithstanding a judgment of conviction as defined by section (b)(3), the sentencing court lacks the power to increase restitution beyond the previously set amount. Meza v. People, 2018 CO 23, 415 P.3d 303; People v. Belibi, 2018 CO 24, 415 P.3d 301.

Post-final judgment orders void when court denied defendant's motion for new trial and imposed valid sentence. People v. Campbell, 738 P.2d 1179 (Colo. 1987).

Constitutionality of imposing liability for costs. Statutes imposing liability for costs on a convicted defendant have been uniformly held to be constitutional. People v. Fisher, 189 Colo. 297, 539 P.2d 1258 (1975).

For effect of rule on habitual criminal act, see Swift v. People, 174 Colo. 259, 488 P.2d 80 (1971).

V. WITHDRAWAL OF PLEA OF GUILTY OR NOLO CONTENDERE.

A. In General.

There is no ambiguity in this rule. Glaser v. People, 155 Colo. 504, 395 P.2d 461 (1964).

No right to withdraw guilty plea. One may not, as a matter of right, have his plea of guilty withdrawn or changed. Maes v. People, 155 Colo. 570, 396 P.2d 457 (1964); McConnell v. People, 157 Colo. 235, 402 P.2d 75 (1965).

Defendant does not have an absolute right to withdraw his guilty plea at any time before the court imposes sentence. People v. Riley, 187 Colo. 262, 529 P.2d 1312 (1975).

Defendant not permitted to withdraw plea of nolo contendere. Defendant's assertion of innocence at the time his plea of nolo

contendere was entered does not force the court to permit him to withdraw his plea of nolo contendere. People v. Canino, 181 Colo. 207, 508 P.2d 1273 (1973).

Section (d) does not apply to request to withdraw plea of not guilty by reason of insanity. Section (d) plainly states that only a guilty plea and a nolo contendere plea can be withdrawn. People v. Laeke, 2018 COA 78, 431 P.3d 667.

Withdrawal of plea with court's discretion. An application for the withdrawal or change of such plea is addressed to the discretion of the trial court. Maes v. People, 155 Colo. 570, 396 P.2d 457 (1964); Bradley v. People, 175 Colo. 146, 485 P.2d 875 (1971).

And court's ruling on such an application will not be reversed, except where there is a clear abuse of discretion. Maes v. People, 155 Colo. 570, 396 P.2d 457 (1964); Bradley v. People, 175 Colo. 146, 485 P.2d 875 (1971); People v. Miller, 685 P.2d 233 (Colo. App. 1984).

Showing required to permit change of plea. To warrant the exercise of discretion favorable to a defendant concerning a change of plea, there must be some showing that justice will be subverted by a denial thereof, such as where a defendant may have been surprised or influenced into a plea of guilty when he had a defense, or where a plea of guilty was entered by mistake or under a misconception of the nature of the charge, or where such plea was entered through fear, fraud, or official misrepresentation, or where it was made involuntarily for some reason. Maes v. People, 155 Colo. 570, 396 P.2d 457 (1964); Crumb v. People, 230 P.3d 726 (Colo. 2010).

Defendant is entitled to withdraw plea of guilty where, at time plea was entered, neither court nor counsel was aware of defendant's parole status so defendant was improperly advised as to the minimum sentence, and where defendant promptly moved to withdraw guilty plea when parole status became known. People v. Chippewa, 751 P. 607 (Colo. 1988).

Court should not consider sentence it intends to impose as a reason for denying motion to withdraw a guilty plea where plea was entered when neither court nor counsel was aware of defendant's parole status so that defendant was improperly advised as to minimum sentence. People v. Chippewa, 751 P.2d 607 (Colo. 1988).

Defendant's motion to withdraw guilty plea must be granted where trial judge participated in plea negotiations. Because trial judge stepped out of his role as a neutral and impartial arbiter of justice by advising defendant and making other inappropriate remarks to influence defendant to agree to plea bargain, defendant has a fair and just reason to withdraw his plea. Crumb v. People, 230 P.3d 726 (Colo. 2010).

Defendant was entitled to a hearing on motion to withdraw guilty plea where court understated minimum sentence that could be imposed and defendant's plea agreement was not in evidence. On remand, defendant must establish that his asserted belief that he would receive a sentence below the minimum sentence stated by the court was objectively reasonable. People v. Hodge, 205 P.3d 481 (Colo. App. 2008).

Right to allocution not denied where extensive pretrial inquiry did not support defendant's last minute assertion of inability to speak in English at sentencing hearing. People v. Garcia, 752 P.2d 570 (Colo. 1988).

When a defendant enters a plea agreement that includes a recommendation for a particular sentence, the fact that the sentence is rejected by the court removes the basis upon which the defendant entered his guilty plea and draws into question the voluntariness of the plea. Chae v. People, 780 P.2d 481 (Colo. 1989).

Case must be remanded to allow defendant the opportunity to affirm or withdraw his guilty plea where the trial court's rejection of the sentence recommendation contained in the plea agreement calls into question the voluntariness of that plea and the defendant had no opportunity to affirm or withdraw that plea. People v. Walker, 46 P.3d 495 (Colo. App. 2002).

When a defendant enters into a plea agreement that includes as a material element a recommendation for an illegal sentence and the illegal sentence is in fact imposed on the defendant, the guilty plea is invalid and must be vacated because the basis on which the defendant entered the plea included the impermissible inducement of an illegal sentence. Chae v. People, 780 P.2d 481 (Colo. 1989).

Where there is a valid plea agreement but an illegal sentence imposed to enforce the valid and legal plea, the proper remedy is to modify the sentence to effect the intent of the plea agreement. People v. Antonio-Antimo, 29 P.3d 298 (Colo. 2000).

It is not an abuse of the court's discretion to deny a motion pursuant to this rule even though the defendant is influenced by alcohol at the time of entry of a plea of guilty if the court finds that the defendant still has the mental capacity to understand the entry of a plea of guilty. People v. Lewis, 849 P.2d 855 (Colo. App. 1992).

For a court to permit a defendant to withdraw his or her plea, there must be a fair and just reason. In this case, defendant's allegation of sentence misapprehension was contradicted by the record and the testimony of counsel, so there was no abuse of discretion in prohibiting defendant from withdrawing his plea. People v.

Allen, 310 P.3d 83 (Colo. App. 2010), aff'd, 2013 CO 44, 307 P.3d 1102.

A claim of ineffective assistance of counsel that is conclusory or contradicted by the record is not a fair and just reason for withdrawing a guilty plea. People v. Lopez, 12 P.3d 869 (Colo. App. 2000).

Fair and just reason for withdrawal of guilty plea is established where, immediately upon learning of the potential deportation consequences, the defendant filed a motion to withdraw his guilty plea before sentencing and where prosecution did not allege any prejudice arising from the withdrawal. People v. Luna, 852 P.2d 1326 (Colo. App. 1993).

Defendant's motion to withdraw his guilty plea prior to sentencing without a hearing was duly denied, where defendant's expectation of a deferred sentence and judgment was merely a ''wish and hope'' that his counsel was unable to effectuate. People v. DiGuglielmo, 33 P.3d 1248 (Colo. App. 2001).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it related to the quality of his counsel was properly denied as successive under Crim. P. 35(c)(3)(VII), where lengthy evidentiary hearing was held on defendant's motion under section (d) of this rule, claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. People v. Vondra, 240 P.3d 493 (Colo. App. 2010).

Court lacks jurisdiction to award relief under section (d) where a defendant has completed his deferred sentence and the withdrawal of his guilty plea has already been granted. This rule does not contemplate relief in a case in which a deferred judgment has been successfully completed. People v. Espino-Paez, 2014 COA 126M, 410 P.3d 548, aff'd, 2017 CO 61, 395 P.3d 786.

A defendant may challenge a deferred judgment under section (d) when the deferred judgment is in effect and the defendant has not yet been sentenced. People v. Figueroa- Lemus, 2018 COA 51, __ P.3d __.

A magistrate has jurisdiction to consider a juvenile's motion to withdraw a previously entered guilty plea based on ineffective assistance of counsel. It is a matter of jurisdiction, not the review of magistrate orders pursuant to C.R.M. 7, and thus the Children's Code prevails, authorizing the juvenile-court-appointed magistrate to hear any case under the court's jurisdiction, including a section (d) motion to withdraw a plea. People in Interest of J.D., 2017 COA 156, __ P.3d __.

The plain terms of section (d) require a plea to exist in order for it to be withdrawn. When defendant successfully completed a deferred judgment, defendant's plea was withdrawn and the charge was dismissed with prejudice pursuant to § 18-1.3-102 (2). Because defendant's plea had already been withdrawn and the case dismissed, there was no plea to be withdrawn. People v. Corrales-Castro, 2017 CO 60, 395 P.3d 778; Espino-Paez v. People, 2017 CO 61, 395 P.3d 786; Zafiro-Guillen v. People, 2017 CO 62, 395 P.3d 781; People v. Roman, 2017 CO 63, 395 P.3d 799.

A defendant may under section (d) challenge a guilty plea involving a deferred judgment that is still in effect. People v. Figueroa-Lemus, 2018 COA 4, __ P.3d __.

This rule allows a defendant to move for withdrawal of a guilty plea before sentence is imposed or imposition of sentence is suspended. Kazadi v. People, 2012 CO 73, 291 P.3d 16; People v. Figueroa-Lemus, 2018 COA 4, __ P.3d __.

Court has jurisdiction to review a district court's order denying a section (d) motion to withdraw a guilty plea involving a deferred judgment that is still in effect. People v. Figueroa-Lemus, 2018 COA 4, __ P.3d __.

B. Sentence Concessions.

Section (e) of this rule implements § 16-7-302 (2). People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Rule not limited to court-approved concessions. This rule, by its terms, is not limited to those situations where the court has first concurred in, or approved of, the sentence concessions. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

A sentence recommendation is a sentence concession whether or not the court approves or concurs. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

It is true that the district attorney has no authority to determine the sentence. However, sentence concessions must be equated with sentence recommendations; to hold otherwise would render the reference to sentence concessions in section (e) meaningless. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

The district attorney's agreement to recommend probation was a sentence concession contemplated by the plea agreement. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

But not all sentence concessions by the prosecution are sentence recommendations. People v. Dawson, 89 P.3d 447 (Colo. App. 2003).

"Sentence concessions" must refer only to the prosecution's making or not opposing favorable recommendations due to specific reference to Crim. P. 11(f). Prosecutor's agree-

ment not to seek a sentence in the aggravated range does not constitute a sentence concession. People v. Dawson, 89 P.3d 447 (Colo. App. 2003).

Court must comply with section (e). Merely informing the defendant, pursuant to Crim. P. 11(b)(5) that the court will not be bound by any recommendation or representation by anyone concerning sentencing or probation does not obviate the necessity of its complying with section (e). People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

Court is not bound by a recommendation; in its discretion it may refuse to grant the district attorney's sentence concession. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

When plea bargain rejected, plea is not voluntary. When the trial judge rejects the plea bargain he removes it as the basis for the sentence. When this occurs, the plea can hardly be characterized as voluntary. People v. Wright, 38 Colo. App. 271, 559 P.2d 249 (1976), aff'd, 194 Colo. 448, 573 P.2d 551 (1978).

And defendant may withdraw plea. A defendant is permitted to withdraw his guilty plea where the trial court chooses not to follow the prosecutor's sentence recommendation, regardless of whether the prosecution has promised that the court will follow the recommendation. People v. Wright, 194 Colo. 448, 573 P.2d 551 (1978).

VI. REVOCATION OF PROBATION.

Power to alter sentence at time of revocation of probation is explicitly recognized in subsection (f)(5) of this rule, Crim. P. 35(a), and § 16-11-206 (5). People v. Jenkins, 40 Colo. App. 140, 575 P.2d 13 (1977).

Review of probation revocation order. Probation revocation orders are not reviewable only via Crim. P. 35, but may be reviewed by direct appeal. People v. Carr, 185 Colo. 293, 524 P.2d 301 (1974).

Issue preclusion does not apply to bar the right of a defendant to a trial where defendant had been charged with the crime of driving with a revoked license, which constituted both a violation of his probation and a new criminal act. Defendant did not have a full and fair opportunity to litigate the issue in the probation revocation hearing. A determination of guilt or innocence in a probation revocation hearing would undermine the function of the criminal trial process. Byrd v. People, 58 P.3d 50 (Colo. 2002).

Probation revocation hearings are held for different purposes, governed by different procedures, and do not protect a defendant's rights as does a criminal trial. Byrd v. People, 58 P.3d 50 (Colo. 2002).

Rule 32.1. Death Penalty Sentencing Hearing

(a) Purpose and Scope. The purpose of this rule is to establish a uniform, expeditious procedure for conducting death penalty sentencing hearings in accordance with section 18-1.3-1201, 6 C.R.S.

(b) Statement of Intention to Seek Death Penalty. In any class 1 felony case in which the prosecution intends to seek the death penalty, the prosecuting attorney shall file a written statement of that intention with the trial court no later than 63 days (9 weeks) after arraignment and shall serve a copy of the statement on the defendant's attorney of record or the defendant if appearing pro se.

(c) Date of Sentencing Hearing. After a verdict of guilt to a class 1 felony, the trial judge shall set a date for the sentencing hearing. The sentencing hearing shall be held as soon as practicable following the trial.

(d) Discovery Procedures for Sentencing Hearing. The following discovery provisions shall apply to the death penalty sentencing hearing:

(1) **Aggravating Factors.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant, and file with the court a list of the aggravating factors enumerated at section 18-1.3-1201(5), 6 C.R.S., and that the prosecuting attorney intends to prove at the hearing.

(2) **Prosecution Witnesses.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant a list of the witnesses whom the prosecuting attorney may call at the sentencing hearing and shall promptly furnish the defendant with written notification of any such witnesses who subsequently become known or the materiality of whose testimony subsequently becomes known. Along with the name of the witness, the prosecuting attorney shall furnish the witness' address and date of birth, the subject matter of the witness' testimony, and any written or recorded statement of that witness, including notes.

(3) **Prosecution Books, Papers, Documents.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall provide to the defendant a list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the prosecuting attorney may introduce at the sentencing hearing and shall promptly furnish the defendant written notification of additional such items as they become known.

(4) **Prosecution Experts.** As soon as practicable but not later than 63 days (9 weeks) before trial, the prosecuting attorney shall provide to the defendant any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any experts whom the prosecuting attorney intends to call as a witness at the sentencing hearing and shall promptly furnish the defendant additional such items as they become available.

(5) **Material Favorable to the Accused.** Not later than 21 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall make available to the defendant any material or information within the prosecuting attorney's possession or control that would tend to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing, and the prosecuting attorney shall promptly make available to the defendant any such material or information that subsequently comes into the prosecuting attorney's possession or control.

(6) **Prosecution's Rebuttal Witnesses.** Upon receipt of the information required by subsection (7), the prosecuting attorney shall notify the defendant as soon as practicable but not later than 14 days before trial of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(7) **Defendant's Disclosure.**

(A) Subject to constitutional limitations, the defendant shall provide the prosecuting attorney with the following information and materials not later than 35 days before trial:

(I) A list of witnesses whom the defendant may call at the sentencing hearing. Along with the name of the witness, the defendant shall furnish the witness's address and date of birth, the subject matter of the witness's testimony, and any written or recorded statement of that witness, including notes, that comprise substantial recitations of witness statements and relate to the subject matter of the testimony;

(II) A list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the defendant may introduce at the sentencing hearing;

(III) Any reports, recorded statements, and notes of any expert whom the defendant may call as a witness during the sentencing hearing, including results of physical or mental examinations and scientific tests, experiments, or comparisons.

(B) Any material subject to this subsection (7) that the defendant believes contains self-incriminating information that is privileged from disclosure to the prosecution prior to the sentencing hearing shall be submitted by the defendant to the trial judge under seal no later than 49 days before trial. The trial judge shall review any material submitted under seal pursuant to this paragraph (B) to determine whether it is in fact privileged.

(I) Any material submitted under seal pursuant to this paragraph (B) that the judge finds to be privileged from disclosure to the prosecution prior to the sentencing hearing shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(II) If the trial judge finds any of the material submitted under seal pursuant to this paragraph (B) to be not privileged from disclosure to the prosecution prior to the sentencing hearing, the trial judge shall notify the defense of its findings and allow the defense 7 days after such notification in which to seek a modification, review or stay of the court's order requiring disclosure.

(III) The trial judge may excise information it finds privileged from information it finds not privileged in order to disclose as provided in (II) above.

(8) **Regulation of Discovery and Sanctions.** No party shall be permitted to rely at the sentencing hearing upon any witness, material, or information that is subject to disclosure pursuant to this rule until it has been disclosed to the opposing party. The trial court, upon a showing of good cause, may grant an extension of time to comply with the requirements

of this rule. If it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may enter an order against such party that the court deems just under the circumstances, and which is consistent with constitutional limitations, including but not limited to an order to permit the discovery or inspection of materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials, or impose sanctions against the offending party.

Source: Entire rule adopted and effective September 1, 1995; (f) to (h) amended and effective January 14, 1999; (f)(6)(III) corrected, effective March 2, 1999; IP(f)(6) corrected, effective March 31, 1999; entire rule amended and adopted March 11, 2004, effective July 1, 2004; (b) and (d)(1) to (d)(7) amended and adopted December 14, 2011, effective July 1, 2012; (d)(7)(B)(I) corrected and effective November 2, 2012.

Rule 32.2. Death Penalty Post-Trial Procedures

(a) Purpose and Scope. The purpose of this rule is to establish a fair, just and expeditious procedure for conducting trial court review of any post-trial motions and of any post-conviction motions, and for conducting appellate review of direct appeal and post-conviction review appeal in class one felony cases in which a sentence of death is imposed, as directed by section 16-12-201, et seq.

(b) Trial Court Procedure.

(1) **Stay of Execution.** The trial judge, upon the imposition of a death sentence, shall set the time of execution pursuant to section 18-1.3-1205 and enter an order staying execution of the judgment and sentence until receipt of an order from the supreme court. The trial court shall immediately mail to the supreme court a copy of the judgment, sentence, and mittimus.

(2) **Motions for New Trial.** The defendant may file any post-trial motions, pursuant to Crim. P. 33, no later than 21 days after the imposition of sentence. The trial court, in its discretion, may rule on such motion before or after the sentencing hearing, but must rule no later than 91 days (13 weeks) after the imposition of sentence.

(3) **Advisement and Order.** Within 7 days after the imposition of a sentence of death, the court shall hold a hearing (advisement date) and shall advise the defendant pursuant to sections 16-12-204 and 205. On the advisement date, the court shall:

(I) Appoint new counsel to represent the defendant concerning direct appeal and post-conviction review matters absent waiver by the defendant;

(II) Make specific findings as to whether any waiver by the defendant of the right to post-conviction review, direct appeal, or the appointment of new counsel is made knowingly, voluntarily and intelligently;

(III) Order the prosecuting attorney to deliver to counsel for the defendant within 7 days of the advisement date one copy of all material and information in the prosecuting attorney's possession or control that is discoverable under Crim. P. 16 or pertains to punishment, unless such material and information has been previously provided to that counsel. Costs of copying and delivery of such material and information shall be paid by the prosecuting attorney;

(IV) If new counsel is appointed for the defendant, order defendant's trial counsel, at his or her cost, to deliver a complete copy of trial counsel's file to new counsel within 7 days of the advisement date;

(V) Direct that any post-conviction review motions be filed within 154 days (22 weeks) of the advisement date; and

(VI) Order the production of three copies of a certified transcript of all proceedings in the case: one for the supreme court, one for the prosecution and one for the defense. Transcripts that are completed by the advisement date will be immediately provided to the prosecution and to defense counsel to the extent that counsel does not already possess those transcripts. All other transcripts shall be completed and delivered within 21 days of the advisement date or within 21 days of any subsequent hearing.

(4) **Resolution of Post-conviction Motions.** The court, upon receipt of any motion raising post-conviction review issues, as described in section 16-12-206, shall promptly

determine whether an evidentiary hearing is necessary, and if so, shall schedule the matter for hearing within 63 days (9 weeks) of the filing of such motions and enter its order on all motions within 35 days of the hearing. If no evidentiary hearing is required, the trial court shall rule within 35 days of the last day for filing the motions.

(5) **Record on Appeal.** In an appeal under this rule, the trial court shall designate the entire trial court record as the record on appeal. Within 21 days of the filing of the unitary notice of appeal, the trial court shall deliver to the supreme court any portion of the record not previously delivered under subsection (b)(3)(VI) of this rule.

(6) **Extension of Time.** Upon a showing of extraordinary circumstances that could not have been foreseen and prevented, the court may grant an extension of time with regard to the time requirements of sections (b)(2), (3), (4) and (5) of this rule.

(c) Appellate Procedure.

(1) **Unitary Notice of Appeal.** The notice of appeal for the direct appeal and the notice of appeal for all post-conviction review shall be filed by unitary notice in the supreme court within 7 days after the trial court's order on post-conviction review motions, or within 7 days after the expiration of the deadline for filing post-conviction review motions if none have been filed. The unitary notice of appeal need conform only to the requirements of sections (1), (2), (6) and (8) of C.A.R. 3(g).

(2) **Briefs.** Counsel for defendant shall file an opening brief no later than 182 days (26 weeks) after the filing of the notice of appeal. The prosecution shall file an answer brief no later than 126 days (18 weeks) after filing of the opening brief. Counsel for defendant may file a reply brief no later than 63 days (9 weeks) after filing of the answer brief. Extensions of time will not be granted except on a showing of extraordinary circumstances that could not have been foreseen and prevented. The opening brief may not exceed 250 pages or, in the alternative, 79, 250 words; the answer brief may not exceed 250 pages or, in the alternative, 79, 250 words; and the reply brief may not exceed 100 pages or, in the alternative, 31,700 words. The Supreme Court may approve extensions not to exceed 75 pages or, in the alternative, 23,775 words for the opening and answer briefs, and 50 pages or 15, 850 words for the reply brief upon a showing of compelling need.

(3) **Consolidation.** Any direct appeal, any appeal of post-conviction review proceedings, and the review required by section 18-1.3-1201 (6) (a), shall be consolidated and resolved in one proceeding before the supreme court.

(4) **Further Proceedings.**

(I) After the supreme court resolves the appeal, ineffective assistance of counsel on direct appeal may only be raised by a petition for rehearing filed in the supreme court, pursuant to section 16-12-204;

(II) Any notice of appeal concerning a trial court decision entered pursuant to section 16-12-209 or concerning any second or subsequent request for relief filed by the defendant, shall be filed in the supreme court within 35 days of the entry of the trial court's order. Such appeal shall be governed by the Colorado appellate rules as may be modified by the supreme court in case-specific orders designed to expedite the proceedings.

(d) Sanctions. The trial court and the supreme court may impose sanctions on counsel for willful failure to comply with this rule.

This rule shall apply to class one felony offenses committed on or after January 1, 1998 for which a sentence of death is imposed.

Source: Entire rule approved and adopted October 28, 1997, effective January 1, 1998; entire rule amended and adopted March 11, 2004, effective July 1, 2004; (c)(2) amended and effective April 3, 2008; (b)(2), IP(b)(3), (b)(3)(III), (b)(3)(IV), (b)(3)(V), (b)(4), (c)(1), (c)(2), and (c)(4)(II) amended and adopted December 14, 2011, effective July 1, 2012; (c)(1) amended and adopted June 21, 2012, effective July 1, 2012.

ANNOTATION

Section 16-12-208 (3) does not impose an absolute two-year time limit on presenting a unitary appeal to the supreme court. Rather the statute directs the supreme court to create the limit in court rules. An absolute two-year time extension prohibition does not exist either

in statute or rule. This rule implements the legislature's direction by imposing a series of highly specific time limits designed to meet the two-year goal when it can be accomplished without violating the defendant's constitutional rights or the legislature's expressly articulated goals. People v. Owens, 228 P.3d 969 (Colo. 2010).

Rule 33. New Trial

(a) Motions for New Trial or Other Relief Optional. The party claiming error in the trial of any case may move the trial court for a new trial or other relief. The party, however, need not raise all the issues it intends to raise on appeal in such motion to preserve them for appellate review. If such a motion is filed, the trial court may dispense with oral argument on the motion after it is filed.

(b) Motions for New Trial or Other Relief Directed by the Court. The court may direct a party to file a motion for a new trial or other relief on any issue. The failure of the party to file such a motion when so ordered shall preclude appellate review of the issues ordered to be raised in the motion. The party, however, need not raise all the issues it intends to raise on appeal in such motion to preserve them for appellate review.

(c) Motion; Contents; Time. The court may grant a defendant a new trial if required in the interests of justice. The motion for a new trial shall be in writing and shall point out with particularity the defects and errors complained of. A motion based upon newly discovered evidence or jury misconduct shall be supported by affidavits. A motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the defendant, but if a review is pending the court may grant the motion only on remand of the case. A motion for a new trial other than on the ground of newly discovered evidence shall be filed within 14 days after verdict or finding of guilt or within such additional time as the court may fix during the 14-day period.

(d) Appeal by Prosecution. The order of the trial court granting the motion is a final order reviewable on appeal.

Source: Entire rule amended March 15, 1985, effective July 1, 1985; (a) amended October 29, 1987, effective January 1, 1989; (d) added April 20, 2000, effective July 1, 2000; (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For note, ''The Criminal Jury and Misconduct in Colorado'', see 36 U. Colo. L. Rev. 245 (1964). For article, ''Criminal Procedure'', which discusses a Tenth Circuit decision dealing with a motion for a new trial based on recanted testimony, see 62 Den. U. L. Rev. 189 (1985).

Prior to April 1974 motion for new trial not required. Prior to April 1974 there was no express language in any of the rules of criminal procedure or appellate rules that required a motion for new trial. People v. Martinez, 190 Colo. 507, 549 P.2d 758 (1976).

Motion does not bar double jeopardy protection against retrial. A motion for a new trial does not relinquish the right to invoke double jeopardy guarantees against retrial of the charge upon which no verdict was returned. Ortiz v. District Court, 626 P.2d 642 (Colo. 1981).

Federal court will deny "habeas corpus" where defendant fails to exhaust remedies under this rule. Tanksley v. Warden of State Penitentiary, 429 F.2d 1308 (10th Cir. 1970).

Granting or denying motion for new trial does not constitute an appealable final judgment. People v. Jones, 690 P.2d 866 (Colo. App. 1984).

Applied in People v. Pearson, 190 Colo. 313, 546 P.2d 1259 (1976); People v. Coca, 39 Colo. App. 264, 564 P.2d 431 (1977); People v. Vigil, 39 Colo. App. 371, 570 P.2d 13 (1977); People v. Davis, 194 Colo. 466, 573 P.2d 543 (1978); People v. Scott, 41 Colo. App. 66, 583 P.2d 939 (1978); People v. Reyes, 42 Colo. App. 73, 589 P.2d 1385 (1979); People v. Am. Health Care, Inc., 42 Colo. App. 209, 591 P.2d 1343 (1979); People v. Swain, 43 Colo. App. 343, 607 P.2d

396 (1979); People v. Rael, 199 Colo. 201, 612 P.2d 1095 (1980); People v. Glenn, 200 Colo. 416, 615 P.2d 700 (1980); People v. Smith, 620 P.2d 232 (Colo. 1980); People v. Trujillo, 624 P.2d 924 (Colo. 1980); People v. Dillon, 631 P.2d 1153 (Colo. App. 1981); People v. Holder, 632 P.2d 607 (Colo. App. 1981); People v. Dillon, 633 P.2d 504 (Colo. App. 1981); People v. Harris, 633 P.2d 1095 (Colo. App. 1981); People v. Allen, 636 P.2d 1329 (Colo. App. 1981); People v. Brassfield, 652 P.2d 588 (Colo. 1982); People v. Matthews, 662 P.2d 1108 (Colo. App. 1983); People v. Anderson, 703 P.2d 650 (Colo. App. 1985).

II. NO REVIEW UNLESS MOTION MADE.

Lack of contemporaneous objection is waiver. Lack of contemporaneous objection to testimony at time of trial constitutes waiver of new trial, and issue cannot be raised on appeal. People v. Routa, 180 Colo. 386, 505 P.2d 1298 (1973).

Where defendant failed to object to an identification procedure at his preliminary hearing, and he made no objection to victim's testimony concerning the preliminary hearing identification at the trial or in his motion for new trial, defendant could not assert this objection for the first time on appeal. People v. Horne, 619 P.2d 53 (Colo. 1980).

Appellate review is generally limited to errors presented to trial court for its consideration by a motion for new trial. Vigil v. People, 196 Colo. 522, 587 P.2d 1196 (1978).

Only matters contained in the motion for new trial will be considered on appeal. Quintana v. People, 152 Colo. 127, 380 P.2d 667, cert. denied, 375 U.S. 863, 84 S. Ct. 132, 11 L. Ed. 2d 89 (1963); Cook v. People, 129 Colo. 14, 266 P.2d 776 (1954); Rueda v. People, 141 Colo. 502, 348 P.2d 957, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed. 2d 744 (1960); Wilson v. People, 143 Colo. 544, 354 P.2d 588 (1960); Dyer v. People, 148 Colo. 22, 364 P.2d 1062 (1961); Peterson v. People, 153 Colo. 23, 384 P.2d 460 (1963); Brown v. People, 158 Colo. 561, 408 P.2d 981 (1965); Lucero v. People, 158 Colo. 568, 409 P.2d 278 (1965).

Failure to raise an issue in the motion for a new trial deprives the appellate court of jurisdiction to consider it unless the issue is one involving plain error affecting the substantial rights of the defendant. People v. Peterson, 656 P.2d 1301 (Colo. 1983).

Failure to file a motion for new trial precludes consideration of issues raised on appeal. People v. Hallman, 44 Colo. App. 530, 624 P.2d 347 (1980); People v. Ullerich, 680 P.2d 1306 (Colo. App. 1983).

Matters which counsel intends to raise on appeal must be preserved in a motion for a new trial. Diebold v. People, 175 Colo. 96, 485 P.2d 900 (1971).

When errors alleged with regard to the admission of testimony were not raised during the trial or in the defendant's motion for a new trial, they need not be considered on appeal. Ortega v. People, 178 Colo. 419, 498 P.2d 1121 (1972).

Absent a properly filed and acted on motion for new trial, appellate review is precluded. People v. Nisted, 653 P.2d 60 (Colo. App. 1980).

Filing notice of appeal divests court of power to grant motion. Once the notice of appeal is filed, the trial court is left powerless to grant a motion for a new trial. People v. Dillon, 655 P.2d 841 (Colo. 1982).

Motion prerequisite for review of probation revocation. A motion for new trial is a prerequisite for appellate review of a revocation of probation except when the propriety of a sentence is being appealed as provided in Rule 4(c), C.A.R. People v. Hallman, 44 Colo. App. 530, 624 P.2d 347 (1980).

And motion required for review of revocation of deferred sentence. Compliance with the motion for a new trial requirement of section (a) is a prerequisite for appellate review of a trial court's judgment revoking a deferred sentence, and imposing a sentence. Hallman v. People, 652 P.2d 173 (Colo. 1982).

Reasons need not be set forth in denial of motion. When a motion for a new trial is denied, reasons need not be set forth, because the motion is the basis and foundation for review of the judgment on appeal. Losavio v. District Court, 182 Colo. 186, 512 P.2d 264 (1973).

But where there is a claim that the trial court committed plain error which was prejudicial to substantial rights of the defendant, appellate review may be had without the issue being raised in a new trial motion. People v. Ullerich, 680 P.2d 1306 (Colo. App. 1983).

III. MOTION, CONTENTS, TIME.

A. In General.

Purpose of a motion for a new trial is to accord the trial judge a fair opportunity to consider and correct, if necessary, any erroneous rulings, and to acquaint him with the specific objection to those rulings. Losavio v. District Court, 182 Colo. 186, 512 P.2d 264 (1973).

The only purpose of requiring a motion for a new trial is to correct the trial court's own errors. Haas v. People, 155 Colo. 371, 394 P.2d 845 (1964).

Timely motion for new trial is not jurisdictional in the sense that without it the court would lack authority to adjudicate the subject matter. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Unlike cases governed by the rules of civil procedure, in a criminal case the timely filing of

a motion for new trial is not a jurisdictional prerequisite to the appeal of a judgment of conviction. People v. Masamba, 39 Colo. App. 197, 563 P.2d 382 (1977).

An untimely filed motion for new trial does not divest an appellate court of jurisdiction to consider the issues raised on appeal which are also presented in the motion. People v. Hallman, 44 Colo. App. 530, 624 P.2d 347 (1980).

Trial court may grant extension of filing time. In contrast to the provisions of the rules of civil procedure governing motions for new trial, upon a showing of excusable neglect the trial court is authorized under the criminal rules of procedure to grant an extension of time for filing the motion for new trial after the original 10 days had expired, or, after the expiration of any extended date granted by the trial court. People v. Masamba, 39 Colo. App. 197, 563 P.2d 382 (1977).

Trial court may grant extensions to file a motion for a new trial that is filed after the initial 15-day period if the motion to extend is filed within time period of the previous extension granted by the court. People v. Clark, 2015 COA 44, 370 P.3d 197.

Defendant may show excusable neglect for late filing. Where the prosecution objects to the late filing of a motion for new trial prior to the time of hearing on the motion, the defendant is afforded the opportunity to show, pursuant to Rule 45(b)(2), Crim. P., that the late filing was due to excusable neglect. People v. Masamba, 39 Colo. App. 197, 563 P.2d 382 (1977).

Timeliness issue held waived. The prosecution, by failing to object to the trial court's hearing and deciding the new trial motion, waived their right to raise the timeliness issue on appeal. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Where there was no affirmative showing in the record on appeal that the prosecution objected to the late filing of defendant's motion for new trial prior to the time it was ruled upon by the trial court, that objection was deemed waived, and the prosecution was estopped to raise it for the first time on appeal. People v. Masamba, 39 Colo. App. 197, 563 P.2d 382 (1977).

Granting of motion is in court's discretion. Where an error is called to the court's attention for the first time in a motion for new trial, the question of whether a new trial should be granted involves the exercise of the court's discretion. Abeyta v. People, 145 Colo. 173, 358 P.2d 12 (1960).

Such as for misconduct of counsel. The question of whether a new trial should be granted for misconduct of counsel in his remarks to the jury rests in the sound judicial discretion of the trial court. Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969).

And this discretion will not be interfered with on appeal unless it manifestly appears that such discretion has been abused. Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969).

But this rule includes mandatory provision that motion based on newly discovered evidence be supported by affidavits, and this provision is impervious to judicial discretion. People ex rel. J.P.L., 214 P.3d 1072 (Colo. App. 2009).

The standard by which to judge a court's grant of a new trial under this rule is whether the court abused its discretion. People v. Jones, 942 P.2d 1258 (Colo. App. 1996).

Motion for new trial after trial on merits preserves errors alleged in sanity trial. A motion for a new trial after trial on the merits is sufficient to preserve for appeal errors alleged in the sanity trial, because the judgment declaring the defendant sane is not final for appeal purposes until defendant is found guilty of the crime charged. People v. Osborn, 42 Colo. App. 376, 599 P.2d 937 (1979).

For differing considerations governing effect of time limitations in criminal cases and in civil cases, see People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

In order for a new trial to be granted on the basis of a prosecutor's remarks, in the absence of a contemporaneous objection, they must be particularly egregious. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

No basis in the record to conclude the jury's review of a silent videotape during deliberations was in any way prejudicial and the trial court therefore properly denied defendant's motion for a mistrial or new trial on this basis. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

For purposes of section (c), "entry of judgment" includes both a verdict or finding of guilt and defendant's sentencing. If defendant has not been sentenced, a motion filed under section (c) is timely. People v. Bueno, 2013 COA 151, 411 P.3d 53, aff'd, 2018 CO 4, 409 P.3d 320.

B. Contents.

Points of error must be raised with particularity. This rule requires the filing of a motion for new trial in which points of error must be raised with particularity. Feldstein v. People, 159 Colo. 107, 410 P.2d 188 (1966). See Jobe v. People, 158 Colo. 571, 408 P.2d 972 (1965); Cruz v. People, 165 Colo. 495, 441 P.2d 22 (1968).

Attention should be drawn specifically to the alleged objectionable rulings in a motion for a new trial, and general objections and assignments of error fall far short of calling to the court's attention any specific error made in con-

nection with its rulings. Losavio v. District Court, 182 Colo. 186, 512 P.2d 264 (1973).

To give guidance to court. When the motion for a new trial does not set forth with particularity the reason that a new trial is required, a vacuum exists which leaves the trial judge without direction and without guidance as to how the new trial should be conducted. Losavio v. District Court, 182 Colo. 186, 512 P.2d 264 (1973).

Testimony treated as substance of affidavit. A witness's testimony on direct examination may be treated as constituting the substance of the affidavit required for a new trial. Hernandez v. People, 175 Colo. 155, 486 P.2d 24 (1971).

C. Based on Newly Discovered Evidence.

Motion regarded with disfavor. A motion for new trial on grounds of newly discovered evidence is regarded with disfavor. People v. Gallegos, 187 Colo. 6, 528 P.2d 229 (1974); People v. Jones, 690 P.2d 866 (Colo. App. 1984); People v. Phillips, 732 P.2d 1226 (Colo. App. 1986); People v. Williams, 827 P.2d 612 (Colo. App. 1992); People v. Leonard, 872 P.2d 1325 (Colo. App. 1993); People v. Graham, 876 P.2d 68 (Colo. App. 1994).

A motion for new trial based on newly discovered evidence is generally not looked upon with great favor because to do otherwise would encourage counsel to neglect to gather all available evidence for the first trial and, if unsuccessful, then to become diligent in securing other evidence to attempt to reverse the outcome on a second trial. People v. Mays, 186 Colo. 123, 525 P.2d 1165 (1974); People v. Scheidt, 187 Colo. 20, 528 P.2d 232 (1974).

Motion addressed to court's discretion. A motion for new trial based upon newly discovered evidence is addressed to the sound discretion of the trial court. People v. Gallegos, 187 Colo. 6, 528 P.2d 229 (1974).

And unless an abuse of discretion is affirmatively shown, the denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal. People v. Gallegos, 187 Colo. 6, 528 P.2d 229 (1974); People v. Jones, 690 P.2d 866 (Colo. App. 1984); People v. Phillips, 732 P.2d 1226 (Colo. App. 1986); People v. Leonard, 872 P.2d 1325 (Colo. App. 1993).

The denial of a motion for a new trial based upon newly discovered evidence will not be overturned unless there has been shown a clear abuse of the trial court's discretion. People v. Scheidt, 187 Colo. 20, 528 P.2d 232 (1974).

Trial court did not abuse its discretion in denying motion for new trial due to newly discovered evidence because the evidence probably would not have resulted in an acquittal on retrial. People v. Leonard, 872 P.2d 1325 (Colo. App. 1993).

To succeed on motion for new trial based upon newly discovered evidence, the defendant should show that the evidence was discovered after the trial; that defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; that the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching; and that on retrial the newly discovered evidence would probably produce an acquittal. People v. Scheidt, 187 Colo. 20, 528 P.2d 232 (1974); People v. Jones, 690 P.2d 866 (Colo. App. 1984); People v. Williams, 827 P.2d 612 (Colo. App. 1992); People v. Gee, 2015 COA 151, 371 P.3d 714.

Showing of diligent search and inquiry is a cardinal prerequisite of a new trial based upon newly discovered evidence. Isbell v. People, 158 Colo. 126, 405 P.2d 744 (1965); Pieramico v. People, 173 Colo. 276, 478 P.2d 304 (1970); People v. Jones, 690 P.2d 866 (Colo. App. 1984).

When defense was aware of the possibility that someone else committed the crime but didn't pursue the theory and instead chose to rely on alibi witness, the motion for new trial was properly denied. People v. Stephens, 689 P.2d 666 (Colo. App. 1984).

Else motion will be denied. Where the newly discovered evidence was cumulative in nature and could, with the exercise of due diligence, have been discovered before trial, motion for new trial was properly denied. People v. Mays, 186 Colo. 123, 525 P.2d 1165 (1974).

When evidence could have been discovered with reasonable diligence and the result of the trial would probably not have been changed if the evidence had been presented, the trial court properly denied the motion for a new trial. People v. Phillips, 732 P.2d 1226 (Colo. App. 1986).

Denial for motion for new trial based upon newly discovered evidence was proper where the asserted newly discovered evidence was either merely cumulative or impeaching and was neither material to the issues involved nor would it have probably produced a verdict of acquittal on retrial. People v. Williams, 827 P.2d 612 (Colo. App. 1992); People v. Graham, 876 P.2d 68 (Colo. App. 1994).

Evidence must be of character to probably bring about acquittal. Newly discovered evidence must be of such a character as to probably bring about an acquittal verdict if presented at another trial. People v. Scheidt, 187 Colo. 20, 528 P.2d 232 (1974); People v. Jones, 690 P.2d 866 (Colo. App. 1984).

As where codefendant is induced. Where the motion for new trial sets forth as newly discovered evidence the fact that following de-

fendant's conviction the charge against a codefendant is dismissed, and that this casts grave doubt as to the truth of his testimony that no promise had been made to him, then the ends of justice require that the court conduct a hearing with the additional consideration of any probative evidence on the question of whether there was any inducement to procure the codefendant's testimony, the extent and nature thereof, if so, and then grant or deny the motion. Mitchell v. People, 170 Colo. 117, 459 P.2d 284 (1969).

Evidence showing verdict influenced by false testimony sufficient. If newly discovered evidence is of such a character as to make it appear that the verdict was probably influenced by false or mistaken testimony and that upon another trial the result would probably, or might, be different, or even doubtful, then a new trial should be granted. Cheatwood v. People, 164 Colo. 334, 435 P.2d 402 (1967); Baker v. People, 176 Colo. 99, 489 P.2d 196 (1971); DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

But cumulative evidence insufficient. Where the newly discovered evidence was cumulative in nature and could, with the exercise of due diligence, have been discovered before trial, and the outcome of the case on retrial would probably be the same, motion for new trial was properly denied. People v. Mays, 186 Colo. 123, 525 P.2d 1165 (1974).

Evidence to discredit expert testimony insufficient. Newly discovered evidence that would merely tend to discredit or impeach expert testimony would not be grounds for a new trial. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Evidence held not newly discovered as contemplated by this rule. Steward v. People, 179 Colo. 31, 498 P.2d 933 (1972).

Evidence within the defendant's knowledge before trial does not constitute newly discovered evidence as a basis for a new trial. People v. Gallegos, 187 Colo. 6, 528 P.2d 229 (1974).

Where defendant filed a motion for a new trial based on newly discovered evidence, such evidence being that defendant was threatened with death if he testified in his own behalf and such threat was made without the knowledge of his attorney, the motion was properly denied since this was not a case of newly discovered evidence as the evidence presented consisted of facts which obviously were known to the defendant at the time of his trial. People v. Drumright, 189 Colo. 26, 536 P.2d 38 (1975).

Magistrate did not abuse his discretion in denying motion for a new trial where movant failed to file mandatory supporting affidavits with the motion and magistrate denied motion based on this deficiency. People ex rel. J.P.L., 214 P.3d 1072 (Colo. App. 2009).

A defendant who has pled guilty is not entitled to request a new trial under this rule because the defendant has been convicted not after trial but upon his or her own admissions. People v. Ambos, 51 P.3d 1070 (Colo. App. 2002).

D. Based on Other Grounds.

Trial court did not abuse discretion by denying motion for a new trial without a hearing where several hearings were set that had to be continued because of defendant's hostility and unwillingness to cooperate with counsel. People v. Eckert, 919 P.2d 962 (Colo. App. 1996).

Trial court did not err in denying defendant a hearing on his motion for a new trial based on ineffective assistance of counsel where defendant failed to allege any acts or omissions of defense counsel that deprived him of a defense. In the absence of particularized facts supporting defendant's assertion of ineffective assistance of counsel, it was within the trial court's discretion to deny defendant a hearing on the motion. People v. Esquivel-Alaniz, 985 P.2d 22 (Colo. App. 1999).

Motion alleging ineffective assistance of counsel was properly denied without a hearing. Defendant elected to raise ineffective assistance of counsel claim in a motion under this rule and is bound by the standards of review for that motion under this rule and not those of Crim. P. 35. Denial of a motion under this rule without a hearing is reviewed for an abuse of discretion. People v. Lopez, 2015 COA 45, 399 P.3d 129.

Motion denied where defendant received fair, although not perfect, trial. Although defendant did not receive a perfect trial, he did receive a fair trial, and because the law of Colorado entitles him to nothing more, his motion for a new trial was denied. People v. Scheidt, 182 Colo. 374, 513 P.2d 446 (1973).

Fact that jury deliberates less than 45 minutes does not warrant the granting of a new trial. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

Evidence which is cumulative or corroborative will normally not support the granting of a motion for new trial. People v. Gallegos, 187 Colo. 6, 528 P.2d 229 (1974).

Discovery of evidence unlikely to change verdict insufficient. A new trial is not required whenever a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. Sandoval v. People, 180 Colo. 180, 503 P.2d 1020 (1972).

New trial on basis of prosecution asking improper questions denied. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

In order to justify a new trial based on a tainted jury, the defendant must show evidence

of prejudice. People v. Barger, 732 P.2d 1225 (Colo. App. 1986).

Prejudice occurring during jury sequestration. The determination of whether prejudice has occurred during jury sequestration is within the sound discretion of the trial court and only where that discretion has been abused will a new trial be ordered. People v. Mackey, 185 Colo. 24, 521 P.2d 910 (1974).

Presence of armed uniformed officers in courtroom insufficient. The court did not abuse its discretion in overruling defendant's motion for a new trial where defendant asserted that the presence of two armed uniformed officers in the courtroom constituted prejudicial error. People v. Romero, 182 Colo. 50, 511 P.2d 466 (1973).

Phone call by juror insufficient, absent showing of prejudice. It is not error to fail to grant a new trial because a juror allegedly makes a phone call out of the bailiff's presence, which is not shown to be prejudicial to the defendant. People v. Peery, 180 Colo. 161, 503 P.2d 350 (1972).

Improper communications to jury are presumptively prejudicial, especially if the communications deal with the punishment or sentencing of a defendant. People v. Cornett, 685 P.2d 224 (Colo. App. 1984).

Juror misconduct. Defendant must establish the truth of the allegations on which he bases his motion for a new trial and produce evidence of the alleged juror misconduct. People v. Stephens, 689 P.2d 666 (Colo. App. 1984).

Allegations on which motion based must be supported by evidence. Mere hearsay allegations in an affidavit will warrant denial of motion. People v. Hernandez, 695 P.2d 308 (Colo. App. 1984).

Failure to establish the truth of hearsay allegations contained in an affidavit will warrant denial of a motion for a new trial based on alleged juror misconduct. People v. Rogers, 706 P.2d 1288 (Colo. App. 1985).

Misconduct of juror in sleeping through defense counsel's closing argument sufficiently prejudiced defendant to warrant a new trial. People v. Evans, 710 P.2d 1167 (Colo. App. 1985).

Untruthful answers on voir dire concerning material matters do not entitle a party to a new trial per se. Under some circumstances, however, a juror's nondisclosure of information during jury selection may be grounds for a new trial. Allen v. Ramada Inn, Inc., 778 P.2d 291 (Colo. App. 1989).

Only undisclosed information material to defendant's theory of the case and which might have affected the outcome of the trial will mandate reversal. People v. Rogers, 706 P.2d 1288 (Colo. App. 1985).

Jurors learning of a co-defendant's guilty plea and capture of another co-defendant through the media insufficient absent a showing of prejudice. People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986).

Rule 34. Arrest of Judgment

The court shall arrest judgment if the indictment or information, complaint, or summons and complaint does not charge an offense, or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 14 days after verdict or finding of guilt or within such further time as the court may fix during the 14-day period. A motion in arrest of judgment may be set forth alternatively as a part of a motion for a new trial.

Source: Entire rule amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Sufficiency of information may be raised after trial by motion. The sufficiency of an information is a matter of jurisdiction, which may be raised after trial by a motion in arrest of judgment. People v. Garner, 187 Colo. 294, 530 P.2d 496 (1975).

Denial of motion held correct. People v. Ingersoll, 181 Colo. 1, 506 P.2d 364 (1973).

Rule 35. Postconviction Remedies

(a) Correction of Illegal Sentence. The court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is

imposed, or (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) Other Remedies.

(1) If, prior to filing for relief pursuant to this paragraph (1), a person has sought appeal of a conviction within the time prescribed therefor and if judgment on that conviction has not then been affirmed upon appeal, that person may file an application for postconviction review upon the ground that there has been a significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

(2) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the grounds hereinafter set forth. Such an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(I) That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state;

(II) That the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(III) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(IV) Repealed.

(V) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(VI) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(VII) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(3) One who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside on one or more of the grounds enumerated in section (c)(2) of this Rule may file a motion in the court which imposed the sentence to vacate, set aside, or correct the sentence, or to make such order as necessary to correct a violation of his constitutional rights. The following procedures shall apply to the filing and hearing of such motions:

(I) Any motion filed outside of the time limits set forth in § 16-5-402, 6 C.R.S., shall allege facts which, if true, would establish one of the exceptions listed in § 16-5-402 (2), 6 C.R.S.

(II) Any motion filed shall substantially comply with the format of Form 4 and shall substantially contain the information identified in Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). See Appendix to Chapter 29.

(III) If a motion fails to comply with Subsection (II) the court shall return to the defense a copy of the document filed along with a blank copy of Form 4 and direct that a motion in substantial compliance with the form be filed within 49 days.

(IV) The court shall promptly review all motions that substantially comply with Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). In conducting this review, the court should consider, among other things, whether the motion is timely pursuant to § 16-5-402, whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds

that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue. If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion. The court shall complete its review within 63 days (9 weeks) of filing or set a new date for completing its review and notify the parties of that date.

(V) If the court does not deny the motion under (IV) above, the court shall cause a complete copy of said motion to be served on the prosecuting attorney if one has not yet been served by counsel for the defendant. If the defendant has requested counsel be appointed in the motion, the court shall cause a complete copy of said motion to be served on the Public Defender. Within 49 days, the Public Defender shall respond as to whether the Public Defender's Office intends to enter on behalf of the defendant pursuant to § 21-1-104(1)(b), 6 C.R.S. In such response, the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and add any claims the Public Defender finds to have arguable merit. Upon receipt of the response of the Public Defender, or immediately if no counsel was requested by the defendant or if the defendant already has counsel, the court shall direct the prosecution to respond to the defendant's claims or request additional time to respond within 35 days and the defendant to reply to the prosecution's response within 21 days. The prosecution has no duty to respond until so directed by the court. Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law. At the hearing, the court shall take whatever evidence is necessary for the disposition of the motion. The court shall enter written or oral findings either granting or denying relief within 63 days (9 weeks) of the conclusion of the hearing or provide the parties a notice of the date by which the ruling will be issued.

If the court finds that defendant is entitled to postconviction relief, the court shall make such orders as may appear appropriate to restore a right which was violated, such as vacating and setting aside the judgment, imposing a new sentence, granting a new trial, or discharging the defendant. The court may stay its order for discharge of the defendant pending appellate court review of the order. If the court orders a new trial, and there are witnesses who have died or otherwise become unavailable, the transcript of testimony of such witnesses at the trial which resulted in the vacated sentence may be used at the new trial.

(VI) The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant, except the following:

(a) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

(b) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied retroactively by the United States Supreme Court or Colorado appellate courts.

(VII) The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought except the following:

(a) Any claim based on events that occurred after initiation of the defendant's prior appeal or postconviction proceeding;

(b) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

(c) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review;

(d) Any claim that the sentencing court lacked subject matter jurisdiction;

(e) Any claim where an objective factor, external to the defense and not attributable to the defendant, made raising the claim impracticable.

(VIII) Notwithstanding (VII) above, the court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.

(IX) The order of the trial court granting or denying the motion is a final order reviewable on appeal.

Source: (c)(3) amended and adopted September 4, 1997, effective January 1, 1998; (c)(3) amended and committee comment added January 7, 1999, effective July 1, 1999; entire section amended and adopted and committee comment repealed January 29, 2004, effective July 1, 2004; (c)(3)(VIII) corrected May 25, 2004, nunc pro tunc January 29, 2004, effective July 1, 2004; (c)(3)(I), (c)(3)(II), (c)(3)(IV), and (c)(3)(V) corrected June 25, 2004, nunc pro tunc January 29, 2004, effective July 1, 2004; (c)(3)(II) and (c)(3)(III) amended and effective December 11, 2008; (b), (c)(3)(III), (c)(3)(IV), (3)(c)(V) 1st paragraph amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment on Madrid v. People, 148 Colo. 149, 365 P.2d 39 (1961), appearing below, see Rocky Mtn. L. Rev. 400 (1962). For note, ''Habeas Corpus Procedure'', see 41 Den. L. Ctr. J. 111 (1964). For comment on Hackett v. People, 158 Colo. 304, 406 P.2d 331 (1965), appearing below, see 38 U. Colo. L. Rev. 417 (1966). For note, ''Federal Habeas Corpus Confronts the Colorado Courts: Catalyst or Cataclysm?'', see 39 U. Colo. L. Rev. 83 (1966). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev. 551 (1968). For note, ''Defects in Ineffective Assistance Standards Used by State Courts'', see 50 U. Colo. L. Rev. 389 (1979). For article, ''Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike'', see 11 Colo. Law. 1225 (1982). For article, ''Crim. P. 35(c): Colorado Law Regarding Postconviction Relief'', see 22 Colo. Law. 729 (1993).

Defendant not entitled to relief where sentence legal and constitutional. Where the sentence is within statutory limits and does not infringe upon the defendant's constitutional rights, he is not entitled to relief under this rule. People v. Mieyr, 176 Colo. 90, 489 P.2d 327 (1971).

Previously, this rule provided in resentencing for credit for time already served. Stafford v. People, 165 Colo. 328, 438 P.2d 696 (1968).

And made filing a motion under this rule a prerequisite to habeas corpus. Ralston v. People, 161 Colo. 523, 423 P.2d 326 (1967).

This rule establishes postconviction remedies and is not an appropriate means to challenge rulings made in extradition proceedings. Hodges v. Barry, 701 P.2d 1240 (Colo. 1985).

A habeas corpus petition seeking relief available under section (c) should be treated as a section (c) motion. Leske v. Golder, 124 P.3d 863 (Colo. App. 2005).

Article II, § 16, of the Colorado Constitution does not create a constitutional right to counsel in a hearing under this rule. People v. Duran, 757 P.2d 1096 (Colo. App. 1988).

The district court was not obliged to consider a subsequent motion that plainly treated the same issues as the original motion filed pursuant to section (c). People v. Adams, 905 P.2d 17 (Colo. App. 1995).

A defendant may not use a proceeding under this rule to relitigate issues that were fully and finally resolved in an earlier appeal. People v. Johnson, 638 P.2d 61 (Colo. 1981); People v. Reali, 950 P.2d 645 (Colo. App. 1997).

A handwritten letter that does not assert any claims for defendant's section (c) motion does not toll the time limit in § 16-5-402. People v. Stovall, 2012 COA 7M, 284 P.3d 151.

Defendant needs only "assert", not necessarily "establish", a right to be released be-

fore being entitled to relief under section (c). People v. Gallegos, 975 P.2d 1135 (Colo. App. 1998).

Defendant does not have a constitutional right to counsel in a postconviction proceeding under this rule but does have a limited statutory right to counsel. An attorney appointed to assist defendant with a proceeding under this rule who determines that defendant's claims are without merit may inform the court that he or she believes the claims are without merit and request permission to withdraw. If counsel is permitted to withdraw, defendant is not entitled to appointment of new counsel. People v. Starkweather, 159 P.3d 665 (Colo. App. 2006).

A limited statutory right to counsel exists for a hearing pursuant to §§ 21-1-103 and 21-1-104 and the waiver of such right to counsel must be made voluntarily but need not be knowingly and intelligent. People v. Duran, 757 P.2d 1096 (Colo. App. 1988).

No constitutional right to postconviction counsel exists; however, a limited statutory right exists. The statutory right to postconviction counsel is neither automatic nor unlimited. It is limited to cases where a defendant's section (c) petition is not wholly unfounded and has arguable merit, as determined by the court and the state public defender's office. Silva v. People, 156 P.3d 1164 (Colo. 2007).

If postconviction counsel is required according to the limited statutory right, that counsel must provide effective assistance as measured by the two-pronged test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Silva v. People, 156 P.3d 1164 (Colo. 2007).

Defendant has constitutional right to counsel at resentencing hearing resulting from order granting section (a) motion based on an illegal sentence. Defendant has right to counsel at all critical stages of a criminal proceeding, and a sentencing hearing is a critical stage. There was no doubt that the purpose of the hearing was to resentence the defendant; this was not merely a clerical error. However, the error was harmless because defendant was represented by privately retained counsel at the resentencing hearing. People v. Fritts, 2014 COA 103, __ P.3d __.

"Collateral attack" as used in § 16-5-402 includes relief sought pursuant to this rule. People v. Robinson, 83 P.2d 832 (Colo. App. 1992).

Collateral attack on an adjudication of habitual criminality includes relief sought under this rule. People v. Hampton, 876 P.2d 1236 (Colo. 1994).

Defendant is not precluded from filing both a timely section (b) motion and a section (c) motion after conclusion of the direct appeal. People v. Metcalf, 979 P.2d 581 (Colo. App. 1999).

The limitation period cannot commence until there is a right to pursue a collateral attack. People v. Manzanares, 85 P.3d 604 (Colo. App. 2003).

Petitioner not entitled to appointed counsel when asserted claim for relief is wholly unfounded. Brinklow v. Riveland, 773 P.2d 517 (Colo. 1989); People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Plain error occurs if waiver of statutory right to counsel in postconviction proceeding is involuntary. People v. Duran, 757 P.2d 1096 (Colo. App. 1988).

Without alleging specific facts in a section (c) motion that might appear in record to substantiate general allegations, defendant not entitled to have trial record provided to him at correctional facility. People v. Manners, 878 P.2d 71 (Colo. App. 1994).

Trial court has no authority to retain jurisdiction over a defendant after sentencing for the reason that the law may be changed by a subsequent court decision even though the court, at the time of sentencing, is aware of a case appealed to the state supreme court which may change the interpretation of statute regarding credit against the sentence for presentence confinement. People v. Mortensen, 856 P.2d 45 (Colo. App. 1993).

Motions under this rule are subject to statutory limitations in § 16-5-402. People v. Robinson, 833 P.2d 832 (Colo. App. 1992); People v. Wiedemer, 852 P.2d 424 (Colo. 1993); People v. Wiedemer, 852 P.2d 449 (Colo. 1993); People v. Rodriguez, 914 P.2d 230 (Colo. 1996); People v. Ambos, 51 P.3d 1070 (Colo. App. 2002); People v. Collier, 151 P.3d 668 (Colo. App. 2006).

The time limits in § 16-5-402 (1) are specifically categorized by level of offense, so, in a case in which defendant is convicted of a class 1 felony and other felonies, the time limit for the class 1 felony does not control the time limit for all of the convictions that are not class 1 felonies. Defendant's challenges to the non-class 1 felonies in a section (c) motion were subject to the three-year statute of limitations. People v. Stovall, 2012 COA 7M, 284 P.3d 151.

Statutory limitations in § 16-5-402 do not usurp the supreme court's rulemaking authority. While the statute has an incidental effect on judicial procedure, it is primarily an expression of public policy, and therefore it prevails over terms of section (c)(3) of this rule stating that motion may be filed ''at any time''. People v. Robinson, 833 P.2d 832 (Colo. App. 1992).

Justifiable excuse or excusable neglect would be established if the public defender's conflict of interest was the reason for not filing a motion for post-conviction relief on behalf of

defendant. People v. Chang, 179 P.3d 240 (Colo. App. 2007).

Justifiable excuse or excusable neglect would be established if the public defender's failure to file a motion for post-conviction relief on behalf of defendant was the result of ineffective counsel. People v. Chang, 179 P.3d 240 (Colo. App. 2007).

No justifiable excuse or excusable neglect where defendant waited to file his section (c) motion until he could accumulate an "unassailable mass" of research studies. The studies cited by defendant, unapplied academic theories, did not constitute evidence, let alone new evidence, for purposes of his motion. People v. Bonan, 2014 COA 156, 357 P.3d 231.

In a hearing pursuant to this rule, the burden rests on the defendant to show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense of the defendant. People v. Duran, 757 P.2d 1096 (Colo. App. 1988); People v. Valdez, 789 P.2d 406 (Colo. 1990).

Evidentiary hearing was required on defendant's claim of ineffective assistance of counsel, although not every such motion requires an evidentiary hearing. People v. Thomas, 867 P.2d 880 (Colo. 1994).

Defendant could not be deprived of opportunity to prove counsel's choices lacked sound strategic motive unless the existing record clearly established otherwise or those choices could not have been prejudicial in any event. Ardolino v. People, 69 P.3d 73 (Colo. App. 2003).

Defendant entitled to evidentiary hearing as long as the allegations of his motion, in light of the existing record, were not clearly insufficient to undermine confidence in the outcome of the trial by demonstrating a reasonable probability that but for counsel's challenged conduct, the defendant would not have been convicted. Ardolino v. People, 69 P.3d 73 (Colo. App. 2003).

A second section (c) motion cannot be used procedurally to raise mere ineffective assistance of counsel in a prior section (c) proceeding. The ineffectiveness of appointed postconviction counsel does not constitute a statutory violation, because a defendant has no statutory right to such counsel. People v. Silva, 131 P.3d 1082 (Colo. App. 2005).

Rule does not provide a method for reviewing the punishment assessed in a punitive contempt proceeding. In order to seek relief under this rule, a person must have been convicted of a crime. Conduct that results in punitive sanctions being imposed for contempt is not a common law or statutory crime. Benninghoven v. Dees, 849 P.2d 906 (Colo. App. 1992).

Section (c)(3) requires a hearing and the entry of findings of fact and conclusions of law where defendant who was mistakenly released from custody before serving second sentence sought credit for time spent at liberty. People v. Stark, 902 P.2d 928 (Colo. App. 1995).

Failure to review motion within 60 days as required by section (c)(3)(IV) does not entitle defendant to relief nor deprive the court of subject matter jurisdiction. The time limit is properly categorized as directory rather than jurisdictional. People v. Osorio, 170 P.3d 796 (Colo. App. 2007).

Requirement that a copy of a motion be served on public defender is triggered when the court finds it necessary to consider matters outside of the motion, files, and record of the case. People v. Davis, 2012 COA 14, 272 P.3d 1167.

The district court is required to make findings of fact and conclusions of law in every determination of a motion made pursuant to section (c)(3). People v. Breaman, 939 P.2d 1348 (Colo. 1997).

A defendant cannot bring an illegal sentence claim under section (a) if the sentence is consistent with the statutory scheme but imposed in an unconstitutional manner. Instead, the defendant must bring the claim under section (c)(2)(I). People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006).

Prosecution may file a section (a) motion to correct illegal sentence. People v. White, 179 P.3d 58 (Colo. App. 2007).

The court simply stating, in denying a motion made pursuant to section (c)(3), that it "accepted appointed counsel's status report" was contrary to the requirement that the court make its own finding of facts and conclusions of law. People v. Breaman, 939 P.2d 1348 (Colo. 1997).

Motion for post-conviction relief was timely when filed less than three years after the final decision on defendant's appeal. People v. Rivera, 964 P.2d 561 (Colo. App. 1998).

For purposes of the time limit within which a section (c) motion must be filed, a defendant's conviction is final when his or her appeal rights have been exhausted. More specifically, it is final when the supreme court denies defendant's petition for a writ of certiorari and the mandate issues. People v. Stanley, 169 P.3d 258 (Colo. App. 2007).

Trial court did not err in denying a section (c) motion as untimely where defendant did not raise a direct appeal or collateral attack of his Virginia conviction until almost 14 years after his conviction had entered. People v. Landis, 9 P.3d 1165 (Colo. App. 2000).

A defendant cannot use this rule to relitigate matters fully and finally resolved in an earlier appeal. Moreover an argument will be precluded if its review is nothing more than a second appeal on the same issues on some

recently contrived constitutional theory. People v. Rodriguez, 914 P.2d 230 (Colo. 1996); People v. Martinez, 36 P.3d 201 (Colo. App. 2001); Leske v. Golder, 124 P.3d 863 (Colo. App. 2005).

A properly filed section (b) motion tolls the one-year limitation period in § 2244(d)(1) of the federal Antiterrorism and Effective Death Penalty Act of 1996. Robinson v. Golder, 443 F.3d 718 (10th Cir.), cert. denied, 549 U.S. 867, 127 S. Ct. 166, 166 L. Ed. 2d 118 (2006).

Pro se defendant's failure to file a section (c) motion on form 4 does not deprive the trial court of subject matter jurisdiction. Section (c)(3)(II) requires only that pro se motions substantially comply with form 4. People v. Stanley, 169 P.3d 258 (Colo. App. 2007).

Appeal permitted of subsequent motion under section (a) raising same issues as prior motion. Although the state has an important interest in the finality of criminal convictions, section (a) does not contain the limiting language in section (c)(3)(IV) that bars relief for claims raised and resolved in prior postconviction proceedings. People v. Jenkins, 2013 COA 76, 305 P.3d 420.

Criminal defendant not barred by section (c)(3)(VII) from pursuing a statute of limitations claim in the postconviction proceeding because a claimed statute of limitations violation in a criminal case implicates the court's subject matter jurisdiction. People v. Butler, 2017 COA 117, 431 P.3d 643.

Section (a) does not entitle a defendant to resentencing on counts with legal sentences when the court is resentencing on a count with an illegal sentence. Hunsaker v. People, 2015 CO 46, 351 P.3d 388.

But, if a sentence is subject to correction on one count, section (b) authorizes the court to reconsider and reduce the legal sentences on the other counts after it has corrected the entire sentence. Hunsaker v. People, 2015 CO 46, 351 P.3d 388.

Applied in Sides v. Tinsley, 333 F.2d 1002 (10th Cir. 1964); Sepulveda v. Colo., 335 F.2d 581 (10th Cir. 1964); Watson v. Patterson, 358 F.2d 297 (10th Cir.), cert. denied, 385 U.S. 876, 87 S. Ct. 153, 17 L. Ed. 2d 103 (1966); Terry v. Patterson, 372 F.2d 480 (10th Cir. 1967); Ralston v. People, 161 Colo. 523, 423 P.2d 326 (1967); Roberts v. People, 169 Colo. 115, 453 P.2d 793 (1969); Neighbors v. People, 171 Colo. 349, 467 P.2d 804 (1970); Ward v. People, 172 Colo. 244, 472 P.2d 673 (1970); Sawyer v. People, 173 Colo. 351, 478 P.2d 672 (1970); People ex rel. Wyse v. District Court, 180 Colo. 88, 503 P.2d 154 (1972); People v. Seymour, 182 Colo. 262, 512 P.2d 635 (1973); People v. Griswold, 190 Colo. 136, 543 P.2d 1251 (1975); People v. Taylor, 190 Colo. 144, 544 P.2d 392 (1975); People v. Martinez, 192 Colo. 388, 559 P.2d 228 (1977); People v. Lewis, 193 Colo. 203, 564 P.2d 111 (1977); People v. Mendoza, 195 Colo. 19, 575 P.2d 403 (1978); People v. Lipinski, 196 Colo. 50, 580 P.2d 1243 (1978); Carr v. Barnes, 196 Colo. 70, 580 P.2d 803 (1978); People v. Houpe, 41 Colo. App. 253, 586 P.2d 241 (1978); People v. McKnight, 41 Colo. App. 372, 588 P.2d 886 (1978); Mullins v. Evans, 473 F. Supp. 132 (D. Colo. 1979); Noe v. Dolan, 197 Colo. 32, 589 P.2d 483 (1979); People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979); People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979); People v. Jones, 198 Colo. 578, 604 P.2d 679 (1979); People v. Medina, 199 Colo. 1, 604 P.2d 682 (Colo. 1979); People v. Calloway, 42 Colo. App. 213, 591 P.2d 1346 (1979); People v. West, 42 Colo. App. 217, 592 P.2d 22 (1979); People v. Quintana, 42 Colo. App. 477, 601 P.2d 637 (1979); People v. Hardin, 199 Colo. 229, 607 P.2d 1291 (1980); Wiggins v. People, 199 Colo. 341, 608 P.2d 348 (1980); People v. McKenna, 199 Colo. 452, 611 P.2d 574 (1980); People v. Peretsky, 44 Colo. App. 270, 616 P.2d 170 (1980); People v. Horne, 619 P.2d 53 (Colo. 1980); People v. Aragon, 44 Colo. App. 550, 622 P.2d 579 (1980); Godbold v. Wilson, 518 F. Supp. 1265 (D. Colo. 1981); People v. Loggins, 628 P.2d 111 (Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Trujillo, 631 P.2d 146 (Colo. 1981); People v. Small, 631 P.2d 148 (Colo. 1981); People v. Macias, 631 P.2d 584 (Colo. 1981); People v. District Court, 636 P.2d 689 (Colo. 1981); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Cushon, 631 P.2d 1164 (Colo. App. 1981); People v. Boivin, 632, P.2d 1038 (Colo. App. 1981); People v. Lawson, 634 P.2d 1019 (Colo. App. 1981); People v. Moore, 636 P.2d 1290 (Colo. App. 1981); People v. Martinez, 640 P.2d 255 (Colo. App. 1981); People v. Mascarenas, 643 P.2d 786 (Colo. App. 1981); People v. Lowery, 642 P.2d 515 (Colo. 1982); People v. Aragon, 643 P.2d 43 (Colo. 1982); People v. Gallegos, 644 P.2d 920 (Colo. 1982); People v. Montoya, 647 P.2d 1203 (Colo. 1982); People v. Cushon, 650 P.2d 527 (Colo. 1982); People v. Coyle, 654 P.2d 815 (Colo. 1982); People v. Peterson, 656 P.2d 1301 (Colo. 1983); People v. Turman, 659 P.2d 1368 (Colo. 1983); People v. Chavez, 659 P.2d 1381 (Colo. 1983); People v. Martinez, 660 P.2d 1292 (Colo. 1983); People v. McCall, 662 P.2d 178 (Colo. 1983); People v. Giles, 662 P.2d 1073 (Colo. 1983); People v. Brandt, 664 P.2d 712 (Colo. 1983); People v. Lesh, 668 P.2d 1362 (Colo. 1983); People v. Smith, 827 P.2d 577 (Colo. App. 1991); People v. Collier, 151 P.3d 668 (Colo. App. 2006).

II. CORRECTION OF ILLEGAL SENTENCE.

When an original sentence is illegal, resentencing does not constitute double jeopardy even if the subsequent sentence is longer than the original, and even though the defendant has begun serving the original sentence. People v. District Court, 673 P.2d 991 (Colo. 1983).

Court may correct an error in sentencing, and double jeopardy is not implicated when trial court corrects a sentencing error and imposes a longer sentence. People v. White, 179 P.3d 58 (Colo. App. 2007).

Where sentence is illegal, sentencing court may correct it at any time. People v. Bradley, 169 Colo. 262, 455 P.2d 199 (1969); Mulkey v. Sullivan, 753 P.2d 1226 (Colo. 1988); Downing v. People, 895 P.2d 1046 (Colo. 1995).

The imposition of an illegal sentence may be reviewed and corrected at any time. People v. Favors, 42 Colo. App. 263, 600 P.2d 78 (1979).

When an illegal sentence is corrected pursuant to section (a), it renews the three-year deadline for collaterally attacking the original judgment of conviction pursuant to section (c). Leyva v. People, 184 P.3d 48 (Colo. 2008).

When original judgment of conviction contains an illegal sentence on one count, the entire sentence is illegal. Leyva v. People, 184 P.3d 48 (Colo. 2008); People v. Bassford, 2014 COA 15, 343 P.3d 1003.

The sentence is therefore subject to correction and the judgment of conviction is subject to amendment, making the judgment of conviction not final or fully valid. Leyva v. People, 184 P.3d 48 (Colo. 2008).

Court has right and duty to set aside void sentence at any time. People v. Emig, 177 Colo. 174, 493 P.2d 368 (1972).

So long as court retains jurisdiction. Where a trial court has jurisdiction of a person of the defendant and of the subject matter, and has imposed a sentence in error, the court retains jurisdiction to correct the sentence. Conversely, if the original sentence is a valid one, the trial court loses jurisdiction to change the sentence. Smith v. Johns, 187 Colo. 388, 532 P.2d 49 (1975).

And where statutory provision changes erroneous sentence automatically, court loses jurisdiction. There is no irreconcilable inconsistency between § 16-11-303 which deals with a person wrongfully sentenced to a definite term in the state reformatory, and section (a) of this rule. Section 16-11-303, changes the erroneous sentence automatically and a court, in altering the original sentence, acts in excess of jurisdiction. Smith v. Johns, 187 Colo. 388, 532 P.2d 49 (1975).

The term "illegal sentence" no longer appears in section (a). That sentence was replaced with ''a sentence that was not authorized by law''. Under the current version of section (a), the only circumstance in which a sentence is ''not authorized by law'' is when it is inconsistent with the statutory scheme outlined by the legislature. People v. Wenzinger, 155 P.3d 415 (Colo. App. 2006); People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Illegal sentence is a sentence not in full compliance with sentencing statutes. Delgado v. People, 105 P.3d 634 (Colo. 2005); People v. White, 179 P.3d 58 (Colo. App. 2007).

The sentence included an illegal parole term, therefore, it was an illegal sentence in its entirety. The imposition of an illegal sentence does not commence the 120-day deadline for filing a section (b) motion; only legal sentences trigger the rule's timeliness requirement. Delgado v. People, 105 P.3d 634 (Colo. 2005).

Because an illegal sentence represents a type of jurisdictional defect, the trial court retains the authority to correct its own error. The 120-day time limit applies only if the court is asked to ''correct a sentence imposed in an illegal manner''. If the sentence itself is illegal, the court may act at any time. People v. White, 179 P.3d 58 (Colo. App. 2007).

Defendant's claim that he was not given complete range of testing required by statute prior to sentencing is, in essence, a claim that the sentence was imposed in an illegal manner under section (a), and should have been asserted within 120 days of sentencing. People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Jurisdiction of appellate court. Where the district attorney claims that the trial court improperly considered the presumptive sentencing law and the defendant's conduct in prison as factors in evaluating a motion under section (b) for reduction of sentence, and that the trial court gave no consideration to the aggravated nature of the crimes for which the defendant was convicted, these claims are questions of law implicating the propriety of the proceeding itself and are sufficient to invoke appellate jurisdiction. People v. Bridges, 662 P.2d 161 (Colo. 1983).

Matter of illegal sentence need not be raised on appeal. There is no requirement contained in this rule that the matter of an illegal sentence must be raised on appeal from the conviction or be thereafter waived. People v. Bradley, 169 Colo. 262, 455 P.2d 199 (1969).

Successive postconviction motions under section (a) subject to law of the case doctrine. Under law of the case doctrine, where appropriate, a court may overlook the doctrine and grant relief where manifest injustice would result. People v. Tolbert, 216 P.3d 1 (Colo. App. 2007).

Sentence to mandatory parole for attempted sexual assault committed between July 1, 1996 and July 1, 2002 is illegal. People v. Tolbert, 216 P.3d 1 (Colo. App. 2007).

Action of judge in changing sentence without notice and hearing improper. The action of the sentencing judge in changing an original sentence without notice to the defendant and without opportunity for a hearing is improper, for while this rule permits a judge to correct a sentence of his own motion, where proper grounds exist, it does not permit him to do so without notice to the prisoner and an opportunity afforded for a hearing. Guerin v. Fullerton, 154 Colo. 142, 389 P.2d 84 (1964).

Inmate had a protected liberty interest in a suspended sentence where his original sentence mandated a 10-year suspension when and if defendant could show successful completion of sex offender treatment. Defendant was entitled to due process protections before the trial court could modify the sentence. The court's order vacating the 10-year sentence reduction, sua sponte, denied defendant due process of law. The court erred in denying defendant's section (a) motion to correct the illegal sentence. People v. Sisson, 179 P.3d 193 (Colo. App. 2007).

Upon defendant commencing sentence, judge cannot change sentence upon parole board's recommendation. The sentencing judge does not have the authority on the recommendation of the parole board to change a sentence he imposed upon a defendant after he commences serving his sentence, for such authority is present only when the sentence is erroneous or void under section (a), and not where the original sentence imposed is legal. Guerin v. Fullerton, 154 Colo. 142, 389 P.2d 84 (1964).

And trial court cannot alter or amend commuted sentence imposed by the governor, because he has the exclusive power to grant reprieves, commutations, and pardons after conviction under § 7 of art. IV, Colo. Const. People ex rel. Dunbar v. District Court, 180 Colo. 107, 502 P.2d 420 (1972).

Where several sentences concurrent, argument that some of sentences invalid falls. Where the defendant assumes that his sentences for several crimes are to run consecutively, but the governing judgments made the serving of all the sentences concurrent, the argument that some, but not all, sentences are invalid falls. Santistevan v. People, 177 Colo. 329, 494 P.2d 75 (1972).

Sentence illegal where defendant not afforded benefit of amendatory legislation. A sentence imposed by the trial court which does not afford the defendant the benefit of amendatory legislation is not a valid and legal sentence. As such, it was subject to correction by the trial court at any time. People v. Jenkins, 40 Colo. App. 140, 575 P.2d 13 (1977).

But defendant convicted of theft by receiving does not receive ameliorative benefit when retroactive application of amendatory legislation is clearly not intended by its own terms. Legislation that amended theft by receipt statute to provide that amendment shall apply to acts committed on or after July 1, 1985 makes it clear that amendment is to be applied prospectively only. People v. McCoy, 764 P.2d 1171 (Colo. 1988).

Court may correct sentence to conform to "nolo contendere" plea. Error is harmless where after a court corrects a sentence it conforms to the advisement given a defendant pursuant to a plea of "nolo contendere". People v. Baca, 179 Colo. 156, 499 P.2d 317 (1972).

Sentence in error because extraordinary aggravating circumstances not found. Judge erred in sentencing a 19-year-old beyond the presumptive range because extraordinary aggravating circumstances justifying the sentence were not found even though the defendant was accused of committing five felonies in a nine-month period, including an arrest while on probation. People v. Jenkins, 674 P.2d 981 (Colo. App. 1983), rev'd on other grounds, 687 P.2d 455 (Colo. 1984).

An unlawful sentence may be corrected by a sentencing court at any time. People v. Reynolds, 907 P.2d 670 (Colo. App. 1995).

Court may correct the mittimus where the trial court neglected to specify that its sentence included a mandatory period of parole. People v. Mayes, 981 P.2d 1106 (Colo. App. 1999).

Post-conviction motions that challenge the manner in which a plea is taken, such as whether the person was properly advised about the plea, are not challenges to the legality of the sentence and are properly brought pursuant to section (c), not section (a). People v. Green, 36 P.3d 125 (Colo. App. 2001); People v. Salinas, 55 P.3d 268 (Colo. App. 2002).

Post-conviction motion challenging revocation of probation without a determination of ability to pay restitution should be brought under section (c), not section (a). People v. Shepard, 151 P.3d 580 (Colo. App. 2006).

There is no constitutional right to credit of presentence jail time against sentence imposed. People v. Coy, 181 Colo. 393, 509 P.2d 1239 (1973).

There is no constitutional right to credit for time spent in jail before sentence. People v. Nelson, 182 Colo. 1, 510 P.2d 441 (1973).

But credit for presentence jail time presumed. Wherever it is possible, as a matter of mechanical calculation, that credit could have been given for presentence jail time, it will be conclusively presumed that it was given. This means that where the actual sentence imposed plus the time spent in jail prior to sentence do not exceed the maximum sentence which could be imposed, it will be conclusively presumed that the sentencing court gave the defendant credit for the presentence time spent in confine-

ment. Maciel v. People, 172 Colo. 8, 469 P.2d 135 (1970).

Where sentencing judge states only that he is taking time spent in jail prior to sentencing into consideration and thereafter gives the maximum, it must be presumed that he acted properly; that is, that he took the time spent into consideration and determined, as he had the right to do, not to grant the credit. People v. Nelson, 182 Colo. 1, 510 P.2d 441 (1973).

And such rule outweighs any possible unfairness. The problems and expenditure of resources which would be caused by allowing each prisoner to attempt to demonstrate that in his particular case credit for presentencing confinement was not given outweighs any possible unfairness. Maciel v. People, 172 Colo. 8, 469 P.2d 135 (1970).

Defendants found not entitled to credit for presentence jail time. People v. Puls, 176 Colo. 71, 489 P.2d 323 (1971).

Use of polygraph results precluded at hearing to correct sentence. A jury determination of a defendant's guilt, which is upheld on appeal, precludes the use of the results of a polygraph examination on the issue of the defendant's guilt at a hearing to correct a sentence. People v. Reynolds, 638 P.2d 43 (Colo. 1981).

Department of corrections may not intervene in a criminal case in order to file a motion to correct an illegal sentence. People v. Ham, 734 P.2d 623 (Colo. 1987).

Appellate review precluded by the failure of the people to object at the sentencing hearing to the imposition of a sentence within the presumptive range when the defendant was convicted of possession of contraband while in a correctional institution, or to request the trial court, pursuant to this rule, to correct the sentence. People v. Gallegos, 764 P.2d 76 (Colo. 1988).

If court determines sentence must be vacated, if original sentence was based at least in some important part upon the testimony of witnesses at original sentencing hearing, and if original sentencing judge unavailable, there must be a new evidentiary hearing granted before a new sentence can be imposed. People v. Chetelat, 833 P.2d 771 (Colo. App. 1991).

Rule does not provide a method for reviewing the punishment assessed in a punitive contempt proceeding. In order to seek relief under this rule, a person must have been convicted of a crime. Conduct that results in punitive sanctions being imposed for contempt is not a common law or statutory crime. Benninghoven v. Dees, 849 P.2d 906 (Colo. App. 1992).

Claim that trial court's amended judgment and mittimus unlawfully increased defendant's sentence should have been brought as a motion to correct an illegal sentence. Graham v. Cooper, 874 P.2d 390 (Colo. 1994) (decided prior to 2004 amendment).

A claim that the trial court aggravated a sentence in violation of Apprendi v. New Jersey, 530 U.S. 466 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403(2004), is cognizable under section (c) and not section (a). People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Court order that changed sentence by eliminating suspended portion of it constituted an imposition of a sentence within the meaning of section (a) of this rule. Defendant was entitled, therefore, to proceed under section (a) to obtain relief. People v. Sisson, 179 P.3d 193 (Colo. App. 2007).

Where defendant's challenge alleges that department of corrections (DOC) sentenced him under the wrong discretionary parole statute, section (a) does not give the trial court the authority to decide the issues raised in the defendant's motion because defendant's challenge was not to his sentence, but rather to an act of the DOC. People v. Huerta, 87 P.3d 266 (Colo. App. 2004).

Because section (b) provides a mechanism for the reduction of a sentence rather than for the correction of an illegal sentence, the court erred in attempting to correct an illegal sentence by modifying rather than reducing it under section (b). People v. Bassford, 2014 COA 15, 343 P.3d 1003.

The court properly corrected illegal sentence, pursuant to a motion under section (c), but preserved provisions of valid and legal plea agreement. People v. Antonio-Antimo, 29 P.3d 298 (Colo. 2000).

By entering into a plea agreement, defendant waives his or her Apprendi right to have any fact (the crime of violence charge) that increases the penalty beyond the prescribed maximum submitted to a jury and proved beyond a reasonable doubt. The plea agreement stated defendant waived his right to a jury trial and the right to have every element proven beyond a reasonable doubt. Thus, by pleading guilty the defendant waived the right to a factual basis for the charge and in effect admitted beyond a reasonable doubt the elements of the offense. People v. Munkus, 60 P.3d 767 (Colo. App. 2002); People v. Andracki, 68 P.3d 526 (Colo. App. 2002).

In the case of the defendant's plea agreement, the term "illegal sentence" should be given its plain and ordinary meaning. Defendant's plea agreement did not use that term in the sense that it is used in this rule. In interpreting a plea agreement, the court focuses on the meaning a reasonable person would have attached to the agreement at the time the agreement was entered into. A reasonable person

would understand the term ''illegal sentence'' as used in defendant's plea agreement to mean a sentence that is unlawful in some way. Defendant did not violate her plea agreement because the agreement did not waive her right to raise a challenge under Blakely to her aggravated sentence on appeal. Because defendant did not violate her plea agreement, the prosecution cannot withdraw from it. People v. Barton, 174 P.3d 786 (Colo. 2008).

Failure to consider and fix amount of restitution at sentencing results in illegal sentence. People v. Dunlap, 222 P.3d 364 (Colo. App. 2009).

Finality of judgment of conviction not affected by illegal sentence due to failure to consider and fix restitution at time of sentencing in circumstances where defendant has already directly appealed conviction and lost and, likewise, has failed to obtain postconviction relief from trial court and review by appellate court. Defendant may neither appeal anew from original conviction or the denial of a postconviction motion, nor may defendant seek application of cases announced after the conclusion of the direct appeal. People v. Dunlap, 222 P.3d 364 (Colo. App. 2009).

Exclusion of DNA evidence not required. Where DNA evidence was obtained from defendant as a condition of probation as part of a plea bargain that resulted in an illegal sentence, the case does not implicate the judicially created exclusionary rule: (1) Constitutional error did not involve the police; and (2) the conduct failed the ''assessment of flagrancy'' test in that the conduct was not sufficiently deliberate that exclusion could meaningfully deter it. People v. Glasser, 293 P.3d 68 (Colo. App. 2011).

Defendant's claim that the trial court erred in determining the amount of restitution is timed barred. Defendant is neither challenging the statutory basis for the award of restitution nor the court's subject matter jurisdiction to enter the order, but the manner in which the restitution hearing was conducted. A claim that the sentence was imposed in an illegal manner must be brought within 120 days. People v. Bowerman, 258 P.3d 314 (Colo. App. 2010).

Defendant's motion was not time barred because the order to correct the illegal sentence renewed the three-year deadline to file a collateral attack pursuant to section (c). People v. Baker, 2017 COA 102, __ P.3d __.

Guilty verdicts for both attempted after deliberation first degree murder and attempted extreme indifference first degree murder did not require inconsistent findings of fact; therefore, the sentences were not illegal. The information alleged different victims for the different charges, so it is not inconsistent to conclude that defendant had the specific intent to take the life of the specific targets and also showed an extreme indifference to life in general to the other persons. People v. Stovall, 2012 COA 7M, 284 P.3d 151.

Defendant has constitutional right to counsel at resentencing hearing resulting from order granting section (a) motion based on an illegal sentence. Defendant has right to counsel at all critical stages of a criminal proceeding, and a sentencing hearing is a critical stage. There was no doubt that the purpose of the hearing was to resentence the defendant; this was not merely a clerical error. However, the error was harmless because defendant was represented by privately retained counsel at the resentencing hearing. People v. Fritts, 2014 COA 103, 411 P.3d 842.

III. REDUCTION OF SENTENCE.

A. In General.

Rule constitutional. Section (b) is a valid procedural rule promulgated pursuant to the rule-making power of the supreme court under § 21 of art. VI, Colo. Const., and it does not encroach upon the governor's exclusive power of commutation under § 7 of art. IV, Colo. Const. People v. Smith, 189 Colo. 50, 536 P.2d 820 (1975).

As section (b), which suspends the finality of the conviction for a period of 120 days from the time sentence is imposed, or for 120 days after final disposition on appeal, to allow the filing of a motion for a reduction of sentence in the trial court, suspends the concept of finality of a criminal judgment of conviction, the rule does not offend the separation of powers doctrine under art. III, Colo. Const., nor the executive power of commutation. The court retains jurisdiction during the 120-day period for the filing of a motion for reduction of sentence. People v. Smith, 189 Colo. 50, 536 P.2d 820 (1975).

Rule allows court to reconsider, in interests of justice, the sentence previously imposed, in the light of all relevant and material factors in the particular case which may or may not have been initially considered by the court and, in its sound discretion, to resentence the defendant to a lesser term within the statutory limits. People v. Smith, 189 Colo. 50, 536 P.2d 820 (1975); People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980).

This rule provides the trial court an opportunity to reconsider, in the interest of justice, a sentence previously imposed. Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977).

The purpose of section (b) is to permit the trial court to reexamine the propriety of a sentence previously imposed. People v. Lyons, 44 Colo. App. 126, 618 P.2d 673 (1980).

But section (b) cannot expand the trial court's authority in resentencing beyond that which it had initially. Death penalty statute, as it

existed in 1993, mandated that a death sentence shall be binding unless the court, pursuant to the statute, determines the verdict was clearly erroneous. The trial court's determination that the sentence was not clearly erroneous, therefore, precludes granting postconviction relief under section (b) of this rule. People v. Dunlap, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

But failure to appeal initial sentence forecloses later challenge. A defendant who fails to appeal an initial sentence is foreclosed from challenging that sentence later by means of motion under section (b). People v. Boykin, 631 P.2d 1149 (Colo. App. 1981) (but see Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980)); Swainson v. People, 712 P.2d 479 (Colo. 1986).

More than one sentence reduction is not permitted by former § 16-11-309 when read in conjunction with this rule. Although multiple sentence reductions are permitted under this rule if the sentence is reduced to a term within statutory limits, more than one sentence reduction under former § 16-11-309 would be outside the statutory limits. People v. Belgard, 58 P.3d 1077 (Colo. App. 2002).

Jurisdiction to modify sentence retained only until conviction final. A trial court retains jurisdiction to take a ''second look'' at a sentence previously imposed only before the judgment of conviction underlying the sentence has become final. People v. Lyons, 44 Colo. App. 126, 618 P.2d 673 (1980); Swainson v. People, 712 P.2d 479 (Colo. 1986).

If an illegal sentence is imposed, the time for filing a Crim. P. 35(b) motion does not start to run. The time period is triggered only by the imposition of a legal sentence. People v. Dean, 894 P.2d 13 (Colo. App. 1994).

And conviction final 120 days after sentence imposed or appellate process concluded. For purposes of the rule's sentence reduction provisions, a conviction is final 120 days after the imposition of sentence when that conviction is not appealed, and 120 days after the conclusion of the appellate process if the conviction or sentence is directly appealed. People v. Lyons, 44 Colo. App. 126, 618 P.2d 673 (1980); Swainson v. People, 712 P.2d 479 (Colo. 1986).

Where the defendant does not appeal his conviction but, some years later, challenges his conviction by a motion under section (c), which motion is denied by the trial court, the court of appeals' affirmance of the trial court's denial is not a ''judgment'' of that court ''having the effect of upholding a judgment of conviction'' and, thus, does not trigger a new 120-day period for filing a section (b) motion for reduction of sentence. People v. Akins, 662 P.2d 486 (Colo. 1983).

Timely filing of a section (b) motion suspends finality of sentence while the court reconsiders the original sentence. There is no support for the view that a sentence is final once a mandate is received. Ghrist v. People, 897 P.2d 809 (Colo. 1995).

Framework for review of motions under section (b). First, the reviewing court must determine the timeliness of the motion, considering both when it is filed and when it is heard. The defendant's motivation for any delay attributable to the defendant is relevant to this determination, but delays that result from the court's inability to hear the matter should not be assessed against the defendant. Second, the court may consider all evidence presented at the hearing. Ghrist v. People, 897 P.2d 809 (Colo. 1995).

Section (b) of this rule does not limit the evidence the trial court may consider. Ghrist v. People, 897 P.2d 809 (Colo. 1995).

Decision to reduce a sentence is entrusted to the sound discretion of the trial court. Ghrist v. People, 897 P.2d 809 (Colo. 1995).

Defendant required to file motion for reduction of sentence within 120 days after the date of successful completion of regimented inmate training program. This rule provides a 120-day time limitation for the filing of a motion for reduction of sentence, and § 17-27.7-104 requires that a motion to reduce sentence must be brought pursuant to section (b). People v. Campbell, 75 P.3d 1151 (Colo. App. 2003).

Jurisdiction retained after 120 days. If the defendant was unconstitutionally deprived of the opportunity to file his motion because of ineffective assistance of counsel, the trial court would have jurisdiction 120 days after the sentence is imposed and could extend the time limit for filing. Swainson v. People, 712 P.2d 479 (Colo. 1986).

Therefore, it was error for the district court to dismiss defendant's motion without making any factual findings, on his claim of ineffective assistance of counsel. Swainson v. People, 712 P.2d 479 (Colo. 1986).

One hundred twenty days to file a motion is not extended by Crim. P. 45 based upon family considerations or lack of knowledge of the law. The only excusable neglect recognized for extending the time to file a rule 35 motion is ineffective assistance of counsel. People v. Delgado, 83 P.3d 1144 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 634 (Colo. 2005).

Defendant should not be penalized for pursuing his right of appeal, or for any delay in deciding that matter. Ghrist v. People, 897 P.2d 809 (Colo. 1995).

But change in parole board policy not grounds for modification of defendant's sentence under section (c)(2)(v), and section (b) does not provide basis for review of a sentence if motion filed beyond 120-day time period re-

quired by rule. People v. Sorenson, 824 P.2d 38 (Colo. App. 1991).

When defendant has filed a motion for reduction of sentence within 120 days after the imposition of sentence, this rule vests the court with jurisdiction to rule on the motion for a reasonable period of time after the expiration of the 120-day filing period. If the court fails to rule within a reasonable period of time, and the defendant fails to take reasonable efforts to secure an expeditious ruling on the motion, the motion may be deemed abandoned. People v. Fuqua, 764 P.2d 56 (Colo. 1988); People v. Cagle, 807 P.2d 1233 (Colo. App. 1991); Herr v. People, 198 P.3d 108 (Colo. 2008).

Delay for the purpose of establishing a record of good behavior in the department of corrections is impermissible. A section (b) motion is not a license to wait and reevaluate the sentencing decision in the light of subsequent developments. People v. Piotrowski, 855 P.2d 1 (Colo. App. 1992); Ghrist v. People, 897 P.2d 809 (Colo. 1995).

Burden of going forward with motion pursuant to section (b) is on the defendant and a delay of 532 days is unreasonable and indicates that defendant abandoned the motion. Mamula v. People, 847 P.2d 1135 (Colo. 1993).

Appeal of final judgment terminates trial court jurisdiction and does not restore it until the events described in sections (b)(2) and (b)(3) take place. People v. District Court, 638 P.2d 65 (Colo. 1981).

Executive branch authorized to modify sentence after conviction final. The executive branch of government, not the judiciary, has the sole authority to modify a legally imposed criminal sentence after the conviction upon which it is based has become final. People v. Lyons, 44 Colo. App. 126, 618 P.2d 673 (1980).

Power to alter sentence at time of revocation of probation is explicitly recognized in § 16-11-206 (5), Crim. P. 32(f)(5), and section (b) of this rule. People v. Jenkins, 40 Colo. App. 140, 575 P.2d 13 (1977) (decided prior to 1979 amendment of this rule).

Court obligated to exercise discretion in deciding whether to modify previously imposed sentence. The court has an affirmative obligation to exercise judicial discretion in deciding whether to modify the sentence previously imposed and to base the decision on relevant evidence, not personal whim. Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977); People v. Culbertson, 198 Colo. 153, 596 P.2d 1200 (1979); People v. Dunlap, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

Implicit in a proceeding pursuant to section (b) is the duty of the trial court to use its discretion when considering the defendant's motion. Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980); People v. Ellis, 873 P.2d 22 (Colo. App. 1993).

Where evidence in support of defendant's section (b) motion was nearly identical to that presented at the sentencing hearing, trial court effectively considered all relevant evidence, and the findings it made at the sentencing hearing were sufficient to support its later exercise of discretion in denying defendant's motion. People v. Busch, 835 P.2d 582 (Colo. App. 1992); People v. Dunlap, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).

And is trial court's duty to consider all relevant and material factors, including new evidence, as well as facts known at the time the original sentence was pronounced. Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977); People v. Culbertson, 198 Colo. 153, 596 P.2d 1200 (1979); People v. Ellis, 873 P.2d 22 (Colo. App. 1993).

The trial court in proceedings pursuant to section (b) must consider all relevant and material factors which may affect the decision on whether to reduce the original sentence. Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980).

But judicial discretion is not personal discretion. Judicial discretion cannot be distorted to camouflage or insulate from appellate review a decision based on the judge's personal caprice, hostility, or prejudice. Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977).

Personal whim, hostility, or prejudice must not be basis for trial court's decision. People v. Culbertson, 198 Colo. 153, 596 P.2d 1200 (1979).

Court considering a motion for reduction of sentence filed pursuant to § 17-27.7-104 must give complete consideration to all pertinent information provided by the offender, the offender's attorney, and the district attorney. People v. Smith, 971 P.2d 1056 (Colo. 1999).

Trial court properly exercised judicial discretion under this section and complied with requirements of § 17-27.7-104 where, after careful review of case file, pre-sentence report, recommendation from regimented training program, and documents submitted by defendant, defendant's attorney, and prosecution, the court concluded that crime of vehicular assault was serious enough to warrant denial of motion for sentence reduction after completion of regimented inmate training program under § 17-27.7-103. People v. Ellis, 873 P.2d 22 (Colo. App. 1993).

Trial court gave complete consideration to defendant's section (b) motion even though the record did not contain any information provided by defendant, his attorney, or the district attorney after defendant's acceptance into the regimented inmate training program. The court should not be precluded from ruling on defen-

dant's motion simply because none of those entitled to provide additional information to the court chose to do so. People v. Morales-Uresti, 934 P.2d 856 (Colo. App. 1996).

Defendant's argument that his denial for sentence reduction was based on race was without merit. Although defendant alleged that because he was African-American, he had been treated more harshly than a Caucasian inmate whose sentence had been modified, the two offenders were convicted of different offenses. People v. Ellis, 873 P.2d 22 (Colo. App. 1993).

District attorney may withdraw from plea agreement when judge modifies sentence imposed. If a trial judge in the exercise of his discretion under this rule modifies or reduces a sentence imposed pursuant to a plea agreement, the district attorney must be permitted, in his discretion, to withdraw from the plea agreement, reinstate the charges which were dismissed, and proceed to trial as though no agreement had been made. People ex rel. VanMeveren v. District Court, 195 Colo. 34, 575 P.2d 4 (1978).

But district attorney not permitted to withdraw from plea agreement when sentence reduced pursuant to the regimented inmate training program in § 17-27.7-104. Because the plea agreement did not foreclose the future possibility of a reduction in sentence, the court-ordered sentence reduction could not amount to a substantial and material breach of the agreement between the parties. Keller v. People, 29 P.3d 290 (Colo. 2000).

Generally, ruling on section (b) motion deemed final judgment, reviewable on appeal. When the trial court rules on a defendant's motion, filed pursuant to section (b), it is a final judgment as to the issue raised, and such ruling, except where the issue is propriety of sentence, is reviewable on appeal to the appropriate court. People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980).

There is no right of appeal as to a trial court's denial of a motion for reduction of sentence under this rule when the issue presented to and resolved by the court concerns the propriety of the sentence. People v. Busch, 835 P.2d 582 (Colo. App. 1992).

Standard of review of sentencing by trial court is whether court abused discretion. People v. Mikkleson, 42 Colo. App. 77, 593 P.2d 975 (1979), rev'd on other grounds, 199 Colo. 314, 618 P.2d 1101 (1980); People v. Hudson, 709 P.2d 77 (Colo. App. 1985).

And decision not reversed on appeal absent abuse. Absent an abuse of discretion, the decision of the reviewing court on a motion for the reduction of sentence under this rule will not be reversed. People v. Sundstrom, 638 P.2d 831 (Colo. App. 1981).

American bar association standards relating to appellate review of sentences were used by court of appeals to review sentence imposed by trial court. People v. Hudson, 709 P.2d 77 (Colo. App. 1985).

Disjunctive provisions of section (b) intended to recognize the different times at which a sentence might become final. People v. Cagle, 807 P.2d 1233 (Colo. App. 1991).

Defendant cannot appeal motion's denial where issue one of propriety of sentence. A defendant has no right to appeal a denial of his motion filed pursuant to section (b) where the issue before the appellate court is the propriety of his sentence. People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980); McKnight v. People, 199 Colo. 313, 607 P.2d 1007, cert. denied, 449 U.S. 873, 101 S. Ct. 214, 66 L. Ed. 2d 94 (1980); People v. Kerns, 629 P.2d 102 (Colo. 1981).

Where the intrinsic fairness of defendants' sentence is reviewed by the trial court in proceedings pursuant to section (b), those determinations are not reviewed again on appeal. People v. Lopez, 624 P.2d 1301 (Colo. 1981).

An argument challenging the intrinsic fairness of the sentence imposed and not the sentencing procedure utilized by the trial court will not be reconsidered on appeal to the supreme court. People v. Nemnich, 631 P.2d 1121 (Colo. 1981).

There is no right of appeal to the denial by a trial court of a section (b) motion where the issue presented and resolved concerns the propriety of the sentence. People v. Dennis, 649 P.2d 321 (Colo. 1982).

Or where issue treated as such. An appeal of the trial court's reduction of the defendant's sentence pursuant to this rule, seeking a further reduction of the sentence, is treated as an appeal of the ''denial'' of a section (b) motion raising the issue of the ''propriety of the sentence'', and is therefore dismissed. People v. Foster, 200 Colo. 283, 615 P.2d 652 (1980).

Because sex offender registration is not part of a sentence, a trial court cannot reconsider a sexually violent predator designation under section (b) of this rule. People v. Brosh, 2012 COA 216M, 297 P.3d 1024.

Court may not sua sponte treat section (b) proceeding as section (c) proceeding. People v. Guitron, 191 Colo. 284, 552 P.2d 304 (1976).

Failure of trial court to exercise any discretion renders proceeding defective. The failure of a trial court to exercise any discretion at all in reviewing a section (b) motion in effect renders the proceeding itself defective, and an appeal therefrom directly raises the issue of the propriety of that proceeding. Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980).

Such as where court refuses to consider mitigation information or make findings. It is only in such situations where the trial court has refused to consider any information in mitigation and does not make findings in support of its

decision, that an error in denying a section (b) motion is sufficient to invoke appellate jurisdiction. Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980).

Where trial judge acts arbitrarily or capriciously, judgment vacated. Where the trial court exercises its discretion arbitrarily or capriciously, basing its decision to deny the petitioner's motion under section (b) on personal considerations rather than on the evidence, the trial court's judgment is vacated, and the motion is remanded for a prompt hearing before a different trial judge. Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977).

Facts constituting abuse of discretion regarding court denial of work-release program. People v. Morrow, 197 Colo. 244, 591 P.2d 1026 (1979).

Court may not increase an offender's original sentence unless it was erroneously imposed or is void. Downing v. People, 895 P.2d 1046 (Colo. 1995).

Term of imprisonment that was longer than offender's original sentence constituted an increase in the sentence for purposes of section (b), regardless of whether the sentence was served in a community corrections facility under less severe conditions. Downing v. People, 895 P.2d 1046 (Colo. 1995).

Since the granting of probation greatly reduces the level of restraint imposed on defendant, essentially allowing him to remain at liberty while complying with the terms of his probation, it does constitute a reduction under section (b), even when the length of the sentence increased. People v. Santana, 961 P.2d 498 (Colo. App. 1997).

B. Proportionality Review.

Proportionality determinations are reviewed de novo on appeal, because an appellate court is not bound by a trial court's conclusions of law. People v. Medina, 926 P.2d 149 (Colo. App. 1996).

Three-part test adopted by U.S. supreme court in Solem v. Helm applies when reviewing proportionality of sentences under habitual-criminal statutes: (1) The gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. People v. Cisneros, 855 P.2d 822 (Colo. 1993).

Request for proportionality review alleging that sentence violates the eighth amendment to the U.S. constitution is subject to the limitation period set forth in § 16-5-402. People v. Moore-El, 160 P.3d 393 (Colo. App. 2007).

Concurrent life sentences held disproportionate where underlying crimes were relatively minor, none posed a major threat to society, and although defendant had a lengthy record, approval of a life sentence under the circumstances would drastically lower the "grave and serious" threshold. People v. Medina, 926 P.2d 149 (Colo. App. 1996).

IV. OTHER POSTCONVICTION REMEDIES.

A. General Purpose and Scope of Postconviction Review.

Postconviction relief is founded upon constitutional principles. People v. Bucci, 184 Colo. 367, 520 P.2d 580 (1974).

Rule is concerned with the validity of a sentence and judgment. Saiz v. People, 156 Colo. 43, 396 P.2d 963 (1964).

A request for return of property is not within the scope of this rule, which is limited to challenges to a defendant's conviction or sentence. People v. Wiedemer, 692 P.2d 327 (Colo. App. 1984); People v. Chavez, 2018 COA 139, __ P.3d __.

Court may not sua sponte treat section (b) proceeding as section (c) proceeding. Where the proceeding is simply a proceeding under section (b) for the reduction of sentence, it is not within the province of the court, sua sponte, to treat it as a proceeding under section (c) and pass upon whether the defendant's guilty plea should be set aside, even though it is argued that the reduction was a part of a plea bargaining. People v. Guitron, 191 Colo. 284, 552 P.2d 304 (1976).

Unless motion clearly raises section (c) issues. Where the defendant's motion seeks relief under section (b), but in substance it clearly raises issues and seeks relief available under section (c), the motion should be considered a motion for postconviction relief under section (c). People v. Ivery, 44 Colo. App. 511, 615 P.2d 80 (1980).

Section (c) authorizes a trial court to vacate a conviction for a motion filed only by a defendant, not the prosecution. People v. Wood, 2016 COA 134, 434 P.3d 663, rev'd on other grounds, 2019 CO 7, 433 P.3d 585.

Rule sets forth standards and procedure for postconviction relief. This rule sets the applicable standards and procedure required of a court when a motion to vacate, set aside, or correct a sentence is filed. Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965).

And this rule similar to federal provision. Section (c) of this rule provides a method for postconviction relief to those sentenced by state courts in Colorado which is substantially the same as that of 28 U.S.C. § 2255. Henry v. Tinsley, 344 F.2d 109 (10th Cir. 1965); Ruark v. Tinsley, 350 F.2d 315 (10th Cir. 1965); Saxton v. Patterson, 370 F.2d 112 (10th Cir. 1966); Breckenridge v. Patterson, 374 F.2d 857 (10th

Cir. 1967), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967).

Section (c) of this rule authorizes postconviction relief without regard to time limitations for any sentence that ''exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law''. People v. Emig, 676 P.2d 1156 (Colo. 1984).

Rule creates entirely new postconviction remedy. Section (c) of this rule is intended to fill the void created by the narrowness of the Colorado concept of ''habeas corpus'' by creating an entirely new postconviction remedy. Peters v. Dillon, 227 F. Supp. 487 (D. Colo. 1964), aff'd, 341 F.2d 337 (10th Cir. 1965).

And attains same purpose as obsolete "habeas corpus" writ. The writ of ''habeas corpus coram nobis'' being obsolete, its purpose now is attained by the filing of a motion to set aside judgment. Grandbouche v. People, 104 Colo. 175, 89 P.2d 577 (1939); Hackett v. People, 158 Colo. 304, 406 P.2d 331 (1965).

This rule affords all remedies which are available through writ of "habeas corpus". People ex rel. Wyse v. District Court, 180 Colo. 88, 503 P.2d 154 (1972); People v. Santisteven, 868 P.2d 415 (Colo. App. 1993).

Section (c) affords a convicted person all the remedies which are available through a writ of habeas corpus. People v. Bucci, 184 Colo. 367, 520 P.2d 580 (1974).

An improperly filed pro se habeas corpus petition should be treated as a section (c) motion in order to provide review on the merits of the claims raised by a petitioner. Chatfield v. Colo. Court of Appeals, 775 P.2d 1168 (Colo. 1989).

Pro se habeus corpus petition was improperly filed in case where an invalid judgment of conviction and sentence were rendered since relief was available under this rule and Crim. P. 36 and the district court should have treated petition as motion under section (c)(2) of this rule. Kailey v. Colo. Dept. of Corr., 807 P.2d 563 (Colo. 1991).

Rather than dismissing an improper habeas corpus petition, the court should convert such petition into a motion under section (c) of this rule where the petitioner is acting pro se, the petitioner raises issues in the habeas corpus petition which should have been raised in a motion under section (c) of this rule, and the petitioner's claims are not barred by the statute of limitations. Graham v. Gunter, 855 P.2d 1384 (Colo. 1993).

"Habeas corpus" is not proper remedy to gain review of purported constitutional violations. Breckenridge v. Patterson, 374 F.2d. 857 (10th Cir. 1967), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19, L. Ed. 2d 56 (1967).

Rather, the proper procedure is motion under this rule, followed by an appeal. Breckenridge v. Patterson, 374, F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967).

And "habeas corpus" petition raising constitutional questions treated as motion under this rule. Where the issues before a trial court in a ''habeas corpus'' proceeding raise substantive constitutional questions, the issues are within the purview of postconviction remedy, and the petition for ''habeas corpus'' will be treated as a motion under section (c). Dodge v. People, 178 Colo. 71, 495 P.2d 213 (1972).

Under section (c)(3), the court must hold an evidentiary hearing unless the motion, the files, and the record of the case clearly establish that the allegations presented in the motion are without merit and do not warrant postconviction relief. White v. Denver District Court, 766 P.2d 632 (Colo. 1988).

A habeas corpus petition that seeks relief available under this rule should be treated as a motion under this rule based upon the substantive constitutional issues raised therein, rather than upon the label placed on the pleading. White v. Denver Dist. Ct., 766 P.2d 632 (Colo. 1988); DePineda v. Price, 915 P.2d 1278 (Colo. 1996).

Defendant's challenges to procedures by which he was sentenced rather than the legality of his confinement may be raised by means of a motion under section (c) but not by means of a habeas corpus petition. Jones v. Zavaras, 926 P.2d 579 (Colo. 1996).

Prisoner required to pursue remedies under rule before petitioning for "habeas corpus". The requirement that a prisoner must pursue his remedies under this rule before petitioning for ''habeas corpus'' does not constitute a suspension of the writ of ''habeas corpus''. People ex rel. Wyse v. District Court, 180 Colo. 88, 503 P.2d 154 (1972).

So trial court judge abuses discretion when prematurely proceeds with "habeas corpus" hearing. When a motion for postconviction relief is heard and denied by one trial court judge and an appeal is pending, if the defense attorney files a ''habeas corpus'' petition on the same grounds, it is an abuse of discretion for a second trial court judge to proceed with a hearing on the ''habeas corpus'' petition. People ex rel. Wyse v. District Court, 180 Colo. 88, 503 P.2d 154 (1972).

A motion under section (c) must be filed in the sentencing court because that court maintains the records relating to the conviction and sentence. Jones v. Zavaras, 926 P.2d 579 (Colo. 1996).

Defendant may proceed pro se during postconviction proceedings pursuant to this rule. People v. Jones, 665 P.2d 127 (Colo. App. 1982).

Contention that defendant has been

wrongfully deprived of confinement credit is properly put forward in a motion under this rule at the time when defendant claims a right to be released. People v. Lepine, 744 P.2d 81 (Colo. 1987).

An order of a trial court granting or denying a motion filed under section (c) is a final order reviewable on appeal. Such order becomes final after the period in which to perfect an appeal expires. People v. Janke, 852 P.2d 1271 (Colo. App. 1992).

This rule governing postconviction remedies did not provide basis for granting habeas corpus relief where petition was not filed under postconviction rule, even though petition was assigned case number of petitioner's original criminal action. People v. Calyer, 736 P.2d 1204 (Colo. 1987).

Defendant's motion does not seek relief from the judgment and sentence of the trial court but rather against the department of corrections. Therefore, it is not a claim cognizable under section (c). People v. Carrillo, 70 P.3d 529 (Colo. App. 2002).

This rule does not address postconviction claim that defendant is being unconstitutionally denied the opportunity to be considered for parole. Naranjo v. Johnson, 770 P.2d 784 (Colo. 1989).

Former clients are not required to obtain postconviction relief before bringing a malpractice action against their criminal defense attorneys. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

The doctrine of issue preclusion can be used under appropriate circumstances to prevent a criminal defendant from relitigating issues that have been decided against him or her in a motion under section (c) in a subsequent malpractice suit. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

Failure to seek or obtain postconviction relief is not a bar to bringing a malpractice suit. Smith v. Truman, 115 P.3d 1279 (Colo. 2005).

When a postconviction claim is properly presented for evaluation on the merits, but is premised on trial error that was not preserved, the court must review the claim for plain error, employing the prejudice test articulated in Wilson v. People, 743 P.2d 415 (Colo. 1987). People v. Versteeg, 165 P.3d 760 (Colo. App. 2006).

B. When Review Available.

Previously, this rule was entitled Post Conviction Remedy for Prisoner in Custody. Hudspeth v. People, 151 Colo. 5, 375 P.2d 518 (1962), cert. denied, 375 U.S. 838, 84 S. Ct. 82, 11 L. Ed. 2d 66 (1963).

And previously limited to prisoner in custody. This rule was once expressly limited to where a prisoner was attacking a sentence under which he was ''then'' in custody. Hackett v. People, 158 Colo. 304, 406 P.2d 331 (1965).

Such as person to whom probation granted. A person to whom probation has been granted is considered to be in ''custody under sentence'' and may raise a question as to whether his plea was voluntary. People v. Burger, 180 Colo. 415, 505 P.2d 1308 (1973).

Presently, court cannot deny motion for sole reason petitioner not in custody. At the present time, on a sufficient section (c) motion, a trial court would not be justified in summarily denying the motion for the sole reason that a petitioner is not in custody under sentence pursuant to a conviction which he seeks to vacate. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

And this rule now applies to one who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

A defendant who enters a guilty plea is entitled to file a section (c) motion based on newly discovered evidence, and the rule does not limit postconviction review to those who have been convicted after trial or after entering an Alford plea. People v. Mason, 997 P.2d 1245 (Colo. App. 1999), aff'd on other grounds, 25 P.3d 764 (Colo. 2001).

Postconviction relief is presently available where constitutional rights have been violated during trial. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Where defendant contended that the trial court imposed its sentence in an illegal manner, and not that it was an illegal sentence, defendant was required to file his motion within 120 days of the imposition of sentence. People v. Swainson, 674 P.2d 984 (Colo. App. 1983).

Motion to dismiss may be treated as one filed pursuant to this rule. Where a motion to dismiss is filed after the defendant has pleaded guilty to and is sentenced for the charge involved, the trial court may elect to treat the motion as one filed pursuant to this rule. Wixson v. People, 175 Colo. 348, 487 P.2d 809 (1971).

And review provided subsequent to appeal. The very purpose of a section (c) motion is to provide a postconviction remedy subsequent to an appeal to review constitutional errors made at trial. Lucero v. People, 173 Colo. 94, 476 P.2d 257 (1970).

Or where time for appeal has passed. This rule provides for postconviction remedies to attack an unconstitutionally conducted trial although the time for appeal has passed. Baca v. Gobin, 165 Colo. 593, 441 P.2d 6 (1968).

And in spite of fact appeal was dismissed for failure to file the requisite motion for new trial, and that the alleged error could have been

raised had such an appeal been properly brought, nevertheless, where the error asserted would be a violation of a constitutionally protected right, it may be raised in a section (c) motion. Sackett v. People, 176 Colo. 18, 488 P.2d 885 (1971).

Motion based upon change in law may be filed before conviction becomes "final". Motions pursuant to section (c) and § 18-1-410 (1)(f) may be filed at any time before the conviction becomes ''final'', which does not take place until the date when a petition for rehearing, timely filed, has been denied. Litsey v. District Court, 193 Colo. 341, 565 P.2d 1343 (1977) (decided prior to 1979 amendment).

Where an appellant files a motion for a postconviction review of his sentence based on a significant change in the law before his conviction becomes ''final'', the court has jurisdiction to entertain his motion for relief. People v. Thomas, 185 Colo. 395, 525 P.2d 1136 (1974).

Relief from a validly imposed sentence because of amendatory legislation is only available if requested before a conviction becomes final. People v. Johnson, 638 P.2d 61 (Colo. 1981).

Authority to modify sentence after conviction final. After a conviction has become final, relief from a validly imposed sentence cannot be obtained through the judiciary but must instead be sought through the executive department by way of commutation. People v. Akins, 662 P.2d 486 (Colo. 1983); People v. Piotrowski, 855 P.2d 1 (Colo. App. 1993).

The limitations of § 16-5-402 are applicable to a proportionality review of a sentence imposed pursuant to the habitual criminal statutes. People v. Talley, 934 P.2d 859 (Colo. App. 1996).

Because § 16-5-402 (1.5) is discretionary and because defendant's motion was premised on recent authority of constitutional magnitude, appellate court addressed the motion despite its untimeliness. People v. Gardner, 55 P.3d 231 (Colo. App. 2002).

Defendant need not affirmatively assert that relief sought has not been previously denied, although an appeal duplicating an appeal previously denied may be dismissed. People v. Robinson, 833 P.2d 832 (Colo. App. 1992).

Issue raised on appeal may be reviewed when section (b) motion was inadvertently excluded from remainder of record transmitted to court and exclusion was not appellant's fault. People v. Olivas, 911 P.2d 675 (Colo. App. 1995).

Review is appropriate when issues concern the sentencing proceeding and not the propriety of sentence itself. People v. Olivas, 911 P.2d 675 (Colo. App. 1995).

Claims related to the department of corrections' sex offender classification are not reviewable under section (c)(2). The proper claim is suit against the department of corrections. People v. McMurrey, 39 P.3d 1221 (Colo. App. 2001).

Ripeness of claim for review. Sections (c)(2) and (3) require an allegation that the applicant has a present right to be released because the sentence was imposed in violation of the constitution or laws of the United States or of Colorado and the sentence imposed was not in accordance with the sentence authorized by law. People v. Shackelford, 729 P.2d 1016 (Colo. App. 1986).

Convict, who alleged that the department of corrections was incorrectly computing good-time credits for purposes of parole eligibility but who did not assert any defect in the sentence imposed upon him, and who presented his claim prior to the time when, even by his own calculations, he would be eligible for parole, did not present a dispute that was ripe for adjudication and did not state a cognizable claim. People v. Shackelford, 729 P.2d 1016 (Colo. App. 1986).

State waived time bar to section (c) motion by not raising it in trial court. People v. St. John, 934 P.2d 865 (Colo. App. 1996).

When defendant entitled to review even though sentence served. When a defendant has completed service of a sentence and belatedly seeks postconviction relief, he may be charged with the burden of showing a present need for such relief. A sufficient showing is made when the defendant establishes that he is facing prosecution or has been convicted and the challenged conviction or sentence may be, or has been, a factor in sentencing for the current offense. People v. Montoya, 667 P.2d 1377 (Colo. 1983).

A claim under this rule is not barred by a failure to challenge the conviction earlier as long as a postconviction motion states a claim cognizable under this rule, such as where the motion asserts facts which, if true, would invalidate a previously entered guilty plea, and the claim has not been fully and finally resolved in a prior judicial proceeding, the defendant is entitled to judicial review of the asserted error. People v. Montoya, 667 P.2d 1377 (Colo. 1983).

A person seeking postconviction relief must allege with particularity in his motion that present need exists for relief sought and the present need must continue to exist until the time of the hearing on motion and, if a new present need arises prior to a hearing on motion for postconviction relief, defendant may amend his original pleading to reflect the change. Moland v. People, 757 P.2d 137 (Colo. 1988).

Appellate court cannot review allegations not raised in a motion or hearing under section (c). People v. Goldman, 923 P.2d 374 (Colo. App. 1996).

Constitutional error alleged need no longer be of sort not subject to appellate review. There is no longer any adherence to the rule that the constitutional error alleged must be of a sort not effectively subject to review on appeal from a conviction. People v. Bradley, 169 Colo. 262, 455 P.2d 199 (1969); Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

The fact that defendant did not raise a constitutional claim on direct appeal does not preclude the defendant from raising the claim in a motion under section (c) or from seeking appellate review of the trial court's denial of such a motion. The defendant is entitled to review of a motion under this rule so long as the motion states a claim cognizable under this rule and the claim has not been fully and finally resolved in a prior judicial proceeding. People v. Corichi, 18 P.3d 807 (Colo. App. 2000).

Defendant who has voluntarily and knowingly waived right to contest validity of prior convictions cannot apply for postconviction relief under section (c). People v. Gurule, 748 P.2d 1329 (Colo. App. 1987).

But this rule is not a substitute for appeal or writ of error. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

A motion under this rule is not a substitute for a writ of error. People v. Crawford, 183 Colo. 166, 515 P.2d 631 (1973).

And constitutional error previously disposed of on appeal cannot be raised again. An error consisting of a violation of constitutional rights of a defendant may be raised in a section (c) proceeding so long as it was not previously raised and disposed of on appeal. People v. Bradley, 169 Colo. 262, 455 P.2d 199 (1969); Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

Where various matters raised in a motion under this rule have been considered on appeal and no constitutional issues are raised, the motion should be denied without hearing, as provided in this rule. McKenna v. People, 160 Colo. 369, 417 P.2d 505 (1966).

Where a question is reviewed in depth in connection with the defendant's appeal, the matter is not subject to further review under section (c). Moore v. People, 174 Colo. 570, 485 P.2d 114 (1971).

Once an issue has been reviewed on appeal it cannot be raised again by a petition to vacate judgment and sentence. Gallegos v. People, 175 Colo. 553, 488 P.2d 887 (1971).

Unless otherwise required in the interests of justice, any grounds for postconviction relief which have been fully and finally litigated on a writ of error should not be relitigated. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

This rule is a vehicle for correcting errors of constitutional magnitude which were not previously raised and ruled upon. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

An issue can be raised by a section (c) motion only when the alleged error involves a constitutional right and was not previously the subject of review on a writ of error. People v. Hill, 182 Colo. 253, 512 P.2d 257 (1973).

Equitable principles permit a motion for postconviction relief to be denied without a hearing when the ground for postconviction relief relied upon has been fully and finally litigated in the proceedings leading to judgment of conviction, including an earlier appeal, and the interests of justice do not otherwise require another hearing. People v. Trujillo, 190 Colo. 497, 549 P.2d 1312 (1976).

Once a claim has been raised and disposed of by the supreme court in an earlier appeal, it cannot be raised again in a later section (c) motion. People v. Johnson, 638 P.2d 61 (Colo. 1981); People v. Davis, 759 P.2d 742 (Colo. App. 1988).

As there must be some finality in reviewing process. Although section (c) is primarily intended to provide procedure which will permit judicial review of alleged constitutional infirmities in criminal proceedings, it is couched in language which recognizes that there must be some finality in the reviewing process. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Rule not intended to establish perpetual review. This rule was not intended to establish a procedure which would allow continuing review of issues previously decided against the defendant. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Generally, this rule is not intended to provide a repetitive review of alleged errors. Buckles v. People, 162 Colo. 51, 424 P.2d 774 (1967).

Postconviction proceedings are provided as a method of preventing injustices from occurring after a defendant has been convicted and sentenced, but not for the purpose of providing a perpetual right of review to every defendant in every case. People v. Hampton, 187 Colo. 131, 528 P.2d 1311 (1974).

Second appellate review of the propriety of a sentence is prohibited. People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980); People v. Jenkins, 687 P.2d 455 (Colo. 1984).

A defendant is prohibited from using a proceeding under this rule to relitigate issues fully and finally resolved in an earlier appeal. People v. Johnson, 638 P.2d 61 (Colo. 1981); DePineda v. Price, 915 P.2d 1278 (Colo. 1996).

A defendant is precluded from raising an issue under this rule if its review would be nothing more than a second appeal. DePineda v. Price, 915 P.2d 1278 (Colo. 1996).

But if a significant change in the interpretation of the law, of constitutional magnitude, is determined after the defendant's direct ap-

peal is affirmed, and if the change is binding precedent, then it is proper for the court of appeals to exercise its discretion to review the defendant's claims raised under this rule in a subsequent appeal. People v. Close, 22 P.3d 933 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 528 (Colo. 2002).

Rights of accused balanced against right to have final court determination. It is necessary to balance the rights of the accused to review a trial with postconviction proceedings against the right of society to have finality in court determinations. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

Thus, American Bar Association Standards for Criminal Justice are to be followed. In balancing the rights of the accused in postconviction proceedings against the recurring problems which face the courts and society, the supreme court of Colorado has elected to follow the American Bar Association Standards for Criminal Justice relating to delayed applications for relief. People v. Hampton, 187 Colo. 131, 528 P.2d 1311 (1974).

When appeal time expires, petitioner must show entitlement to relief. When the time for appeal has expired, there must be a showing by the petitioner that he would be entitled to relief under section (c). Valdez v. District Court, 171 Colo. 436, 467 P.2d 825 (1970).

As must defendant who has completed challenged sentence. Where the defendant seeking postconviction relief has completed the sentences which were imposed on his challenged convictions, he has the burden of establishing a present need for relief under this rule. People v. Hampton, 187 Colo. 131, 528 P.2d 1311 (1974).

Where the defendant has long since served his sentence, time has dimmed memories, and court records are misplaced or unavailable, the defendant has the burden of demonstrating a present need for section (c) relief. People v. Bucci, 184 Colo. 367, 520 P.2d 580 (1974).

A defendant who has fully discharged the sentence imposed against him and any parole obligation associated with the sentence, but who has made no further showing of the present need for relief, is not entitled to relief under section (c) of this rule. People v. Graham, 793 P.2d 600 (Colo. App. 1989).

Motions under section (c) are subject to § 16-5-402 (1), which prohibits a person convicted under a criminal statute from collaterally attacking the validity of the conviction unless the attack is commenced within three years of the conviction. People v. Green, 36 P.3d 125 (Colo. App. 2001); People v. Salinas, 55 P.3d 268 (Colo. App. 2002); People v. Collier, 151 P.3d 668 (Colo. App. 2006).

However, an exception to the time limit in § 16-5-402 (1), exists if a defendant demonstrates that the failure to seek timely relief was the result of justifiable excuse or excusable neglect. People v. Green, 36 P.3d 125 (Colo. App. 2001); People v. Salinas, 55 P.3d 268 (Colo. App. 2002).

But the allegation that there was "justifiable excuse or excusable neglect" without specificity is insufficient and time barred. People v. Salinas, 55 P.3d 268 (Colo. App. 2002).

Because there is no requirement that appellate counsel advise a defendant of time limitations for seeking postconviction relief, the absence of such advice is not a justifiable excuse for defendant's neglect. People v. Alexander, 129 P.3d 1051 (Colo. App. 2005).

Counsel's affirmative and erroneous advice about the immigration consequences of a defendant's plea may constitute justifiable excuse or excusable neglect for failure to pursue timely collateral relief, and therefore merits a hearing. If a trial court finds that justifiable excuse or excusable neglect exists for a late filing, then the trial court should determine the merits of the defendant's section (c) motion. People v. Martinez-Huerta, 2015 COA 69, 363 P.3d 754.

Postconviction motions that challenge the manner in which a plea is taken, such as whether the person was properly advised about the plea, are not challenges to the legality of the sentence and are properly brought pursuant to section (c), not section (a). People v. Green, 36 P.3d 125 (Colo. App. 2001); People v. Salinas, 55 P.3d 268 (Colo. App. 2002).

When a deferred judgment and sentence agreement remains unrevoked, review under this rule is not available as it establishes postconviction remedies, and no conviction has entered. People ex rel. K.W.S., 192 P.3d 579 (Colo. App. 2008).

Defendant who pleads guilty may not bring an as-applied equal protection postconviction challenge. People v. Ford, 232 P.3d 260 (Colo. App. 2009).

A defendant can challenge a sexually violent predator designation pursuant to section (c). The sexually violent predator designation is part of the criminal judgment that may be challenged under section (c). People v. Baker, 2017 COA 102, __ P.3d __.

C. Grounds Justifying Relief.

1. In General.

Previously, this rule specifically limited the trial court's power to grant relief to situations where: (1) The sentence was imposed in violation of the constitution or laws of Colorado or of the United States; or (2) the court imposing the sentence was without jurisdiction to do so; or (3) the sentence was in excess of the

maximum sentence authorized by law; or (4) the statute for the violation of which the sentence was imposed was unconstitutional or was repealed before the prisoner contravened its provisions. Saiz v. People, 156 Colo. 43, 396 P.2d 963 (1964); Hammons v. People, 156 Colo. 484, 400 P.2d 199 (1965).

2. Change of Law.

Section (c)(1) appropriate where change intervenes before imposition of sentence. A defendant is given the right to make application for postconviction review when there has been a significant change in the law, applied to defendant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard. Hence, section (c)(1) is especially appropriate where a change in the law intervenes before conviction is had and sentence is imposed. People v. Thomas, 185 Colo. 395, 525 P.2d 1136 (1974).

Where amendatory legislation mitigating the penalty for the offense became effective prior to imposition of the sentence, the defendant is entitled as a matter of law to be sentenced thereunder, although probation is imposed before the legislation and revocation with sentencing afterwards. People v. Jenkins, 40 Colo. App. 140, 575 P.2d 13 (1977).

Standing to challenge conviction based upon change of law. Section (c) is proper motion for obtaining postconviction relief in circumstance in which one of the statutes under which the defendant was charged was later held unconstitutional, and therefore defendant had standing to bring such a motion. People v. Crespin, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

But where court overrules prior fourth amendment holding, suppression issues become moot upon entry of a guilty verdict and relief properly denied. People v. Waits, 695 P.2d 1176 (Colo. App. 1984), aff'd in part and rev'd in part on other grounds, 724 P.2d 1329 (Colo. 1986).

Retroactive application of amendments to § 17-2-103 (12), providing that a parole officer shall request that parole revocation proceedings be deferred pending a disposition of a criminal charge, denied under this rule because section (c)(1) provides a remedy to an offender whose conviction or sentence is affected by a change in the law during the pendency of a direct appeal of such conviction or sentence, but not to an offender claiming the benefit of changes in the law that occur during the pendency of other postconviction proceedings. People v. White, 804 P.2d 247 (Colo. App. 1990).

A defendant whose conviction is affirmed on direct appeal may collaterally attack that conviction in a postconviction motion on the ground that state lost the authority to prosecute his conviction during the pendency of the direct appeal because the legislature changed the penalty for the crime of conviction. People v. Cali, 2018 COA 61, __ P.3d __.

3. Constitutionally Infirm Judgment.

Section (c) provides procedural mechanism to attack a conviction which is constitutionally infirm. People v. Ivery, 44 Colo. App. 511, 615 P.2d 80 (1980).

Sufficiency of the evidence is a constitutional issue, cognizable under section (c)(2). People v. Nunez, 673 P.2d 53 (Colo. App. 1983).

Postconviction questions pertaining to constitutionality of judgment of conviction are solely within rule. Shearer v. Patterson, 159 Colo. 319, 411 P.2d 247 (1966).

Defendant's mandatory sentence to life imprisonment without the possibility of parole is unconstitutional pursuant to Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Defendant's sentence of life without parole violates the eighth amendment because it was imposed without any opportunity for the sentencing court to consider whether the punishment was just and appropriate in light of defendant's age, maturity, and the other factors discussed in Miller. People v. Gutierrez-Ruiz, 2014 COA 109, 383 P.3d 44.

A claim that the trial court aggravated a sentence in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), is cognizable under section (c) and not section (a). People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Contention that sentence violates double jeopardy prohibition of the fifth amendment of the U.S. constitution is cognizable under section (c). People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Contention that sentencing scheme set forth in Colorado Sex Offender Lifetime Supervision Act violates equal protection is cognizable under section (c) of this rule. People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Contention that Colorado Sex Offender Lifetime Supervision Act violates due process because it does not provide for a continuing opportunity to be heard and does not give offenders a meaningful chance to demonstrate their rehabilitation is cognizable under section (c) of this rule. People v. Collier, 151 P.3d 668 (Colo. App. 2006).

Contention that trial court used an unreliable test in sentencing defendant in violation of due process is cognizable under section (c) of this rule. People v. Collier, 151 P.3d 668 (Colo. App. 2006).

If motion specifies violation of constitutional rights, hearing required. If a defendant's motion to vacate, or any attachments thereto, specify matters which are deemed to have violated his constitutional rights, then it would be incumbent upon the trial court to treat this motion in the nature of a section (c) motion and conduct a hearing to determine if there was a violation of any of the constitutional rights of the defendant. DeBaca v. People, 170 Colo. 415, 462 P.2d 496 (1969).

Submission of the constitutionally infirm crime of extreme indifference murder under a general verdict to jury was not harmless error beyond a reasonable doubt. Crespin v. People, 721 P.2d 688 (Colo. 1986).

4. Unlawful Revocation of Sentence.

Rule provides remedy for revocation of deferred sentence. A defendant may either appeal an order revoking a deferred sentence, pursuant to C.A.R. 1, or file a motion for postconviction review, pursuant to section (c) of this rule. People v. Boykin, 631 P.2d 1149 (Colo. App. 1981).

As an order revoking deferred sentence is equivalent of revocation of conditional release for purposes of section (c)(2)(VII). People v. Boykin, 631 P.2d 1149 (Colo. App. 1981).

Offender is not entitled to relief under section (c) of this rule when record demonstrates that offender was given statutorily required administrative review prior to termination from a community corrections program by the trial court in its role as the referring agency. People v. Rogers, 9 P.3d 371 (Colo. 2000).

5. Invalid Guilty Plea.

State courts empowered to determine validity of pleas. Section (c) confers jurisdiction upon the state courts to hear and determine allegations which go to the validity of a petitioner's plea of guilty. Patterson v. Hampton, 355 F.2d 470 (10th Cir. 1966).

As such allegations raise no question justiciable in "habeas corpus". Allegations of a petition which go to the validity of petitioner's plea of guilty are properly brought under this rule and raises no question properly justiciable in habeas corpus. Stewart v. Tinsley, 157 Colo. 441, 403 P.2d 220 (1965); Martinez v. Tinsley, 158 Colo. 236, 405 P.2d 943 (1965).

Defendant entitled to opportunity to prove allegations of coercion. No matter how improbable allegations of coercion may be, so long as they are not completely incredible, a defendant is entitled to the opportunity of trying to prove them at a hearing. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

And entitled to withdraw plea made under influence of drugs. If the defendant can show that he was under the influence of tranquilizing drugs at the time he changed his plea to guilty, to the extent that the guilty plea was not a free and voluntary act, he would be entitled to withdraw that plea and go to trial on a plea of not guilty, particularly where he alleges that he has a valid defense to the charges against him. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

Failure of court to advise or make inquiry precludes treating plea as voluntary. Failure of the trial court to advise or to make a proper inquiry precludes treating the defendant's plea of guilty as a voluntary and intelligent waiver of his constitutional rights, so defendant may withdraw his plea of guilty and be permitted to plea anew. People v. Harrington, 179 Colo. 312, 500 P.2d 360 (1972).

And elements of crime charged must be explained in understandable terms. A guilty plea cannot stand as voluntarily and knowingly entered unless the defendant understands the nature of the crime charged, and this requirement is not met unless the critical elements of the crime charged are explained in terms which are understandable to the defendant. People v. Gorniak, 197 Colo. 289, 593 P.2d 349 (1979).

But a defendant may plead guilty to a crime which does not exist and for which he could not be convicted at trial, and because the defendant receives a substantial benefit by pleading guilty to the lesser charges, postconviction relief will be denied. People v. Waits, 695 P.2d 1176 (Colo. App. 1984), aff'd in part and rev'd in part on other grounds, 724 P.2d 1329 (Colo. 1986).

Defendant need not be advised on right to remain silent in competency evaluation for a postconviction motion under section (c) if the evaluation is not being used to establish guilt. No self-incrimination issue exists, and procedural safeguards of § 16-8-117 do not apply because defendant already confessed, pleaded guilty, and was sentenced. People v. Karpierz, 165 P.3d 753 (Colo. App. 2006).

The defendant must receive advisement of mandatory parole requirement when entering into a plea agreement so that the defendant has the requisite knowledge of the consequences of the plea agreement. Without sufficient advisement, the plea agreement can be withdrawn. People v. Seaney, 36 P.3d 81 (Colo. App. 2000).

Hearing granted where no showing defendant aware of difference between felony and misdemeanor. Where the record fails to show defendant was aware of difference between felony and misdemeanor offenses when pleading guilty, he should be granted a hearing on his petition for postconviction relief. People v. Rivera, 185 Colo. 337, 524 P.2d 1082 (1974).

Existence of prejudice resulting from ineffective assistance of counsel is not determined by underlying ''truth'' of a guilty plea, but rather by whether there is a reasonable probability that defendant would not have pleaded guilty but for counsel's failure to make him aware of the consequences of such plea. People v. Garcia, 799 P.2d 413 (Colo. App. 1990).

Defendant who pleaded guilty to first degree sexual assault was resentenced to reflect terms of plea bargain as interpreted by court. Defendant's plea was based on court's interpretation of plea bargain that, if qualified under ''good time law'', he would serve no more than one-half of sentence agreed upon, but after defendant entered his plea, parole board determined that parole was discretionary, not mandatory, for sex offenders and that defendant may be required to serve the full sentence on his conviction. People v. Wilbur, 873 P.2d 1 (Colo. App. 1993).

Trial court did not cause defendant's plea to be involuntarily made, where neither the People nor the trial court represented that defendant would be released on parole at any particular time, the court specifically stated to defendant that it would not be bound by any representations made to defendant concerning the penalty to be imposed or the granting or denial of probation, and neither the trial court nor the prosecutor referred to the parole board's early release policy. People v. Lustgarden, 914 P.2d 488 (Colo. App. 1995).

Trial court's failure to advise defendant of the possibility of being sentenced pursuant to the Sex Offenders Act, former §§16-13-201 to 16-13-216, was not grounds to set aside defendant's guilty plea entered a decade earlier; the failure to so advise was harmless since the defendant was not originally sentenced under the Act. People v. Lustgarden, 914 P.2d 488 (Colo. App. 1995).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it related to the quality of his counsel was properly denied as successive under section (c)(3)(VII) of this rule, where lengthy evidentiary hearing was held on defendant's Crim. P. 32(d) motion claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. People v. Vondra, 240 P.3d 493 (Colo. App. 2010).

In the context of a guilty plea, the prejudice prong of Strickland v. Washington requires a defendant to show that there is a reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial. ''Reasonable probability'' means a probability sufficient to undermine confidence in the outcome and is a standard somewhat lower than a preponderance of the evidence. The standard presents an objective inquiry that asks not whether the defendant likely would have been acquitted at trial but whether counsel's conduct affected the outcome of the plea process. Some objective evidence must corroborate the defendant's testimony that he or she would have made a different decision about the plea if he or she had been properly advised. In the end, the defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. People v. Sifuentes, 2017 COA 48M, 410 P.3d 730.

Because defendant established a reasonable probability that his plea counsel's deficient performance affected the outcome of the plea process, he must be allowed to withdraw his guilty plea. People v. Sifuentes, 2017 COA 48M, 410 P.3d 730.

Defendant showed prejudice from his counsel's erroneous advice about the immigration consequences of his guilty plea. Rejecting the guilty plea offer and going to trial would have been a rational decision for defendant. People v. Sifuentes, 2017 COA 48M, 410 P.3d 730.

Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), requires that a defense attorney give ''correct advice'', that is, advice that informs his or her client about the risk of deportation arising from a guilty plea. This advice need not be unequivocal, and it does not require counsel to tell a defendant that his plea will subject him to mandatory removal, presumptively mandatory deportation, or automatic or mandatory deportation. Because deportation is not automatic after conviction for a deportable offense, Padilla does not require an attorney to advise a client that he or she will, with 100 percent certainty, be deported. Taking into account the language counsel actually uses and the circumstances of the noncitizen client (such as the ability to read and understand English), a criminal defense attorney may provide effective assistance even when using equivocal terms such as ''likely'', ''strong chance'', or ''probably''. People v. Juarez, 2017 COA 127, __ P.3d __.

Plea counsel's failure to advise defendant on mandatory deportation, while error, did not prejudice defendant. Because federal law was clear and straightforward, plea counsel's failure to advise client that removal was mandated for the plea on a controlled substance charge resulted in ineffective assistance of counsel. Defendant could not show prejudice, however, because testimony at hearing established that defendant's overriding goal was to avoid prison, and it would not have been rational under the circumstances for defendant to change his plea. People v. Campos-Corona, 2013 COA 23, 343 P.3d 983.

Plea counsel was not ineffective when he advised defendant that his plea on a controlled substance charge would ''probably result in deportation''. Although a noncitizen

defendant is deportable under federal law for a controlled substance conviction, deportation is not guaranteed. Counsel is required to inform his or her client of the risk of deportation arising from a guilty plea, but counsel is not required to say that the plea will result in mandatory deportation. People v. Juarez, 2017 COA 127, __ P.3d __.

6. Deprivation of Appellate Rights.

Constitutional violation where deprivation of appellate rights by fraud or deception. A deprivation of constitutional rights has been held to exist where factors such as fraud or deception imposed upon a convicted person by his attorney deprive him of his appellate rights. Haines v. People, 169 Colo. 136, 454 P.2d 595 (1969).

Otherwise, meritorious grounds for appellate review must be shown. Where a motion for postconviction relief is based on an alleged deprivation of the right to appeal, meritorious grounds for appellate review must be shown. Haines v. People, 169 Colo. 136, 454 P.2d 595 (1969).

Indigent defendant is entitled to obtain a free transcript when necessary to exercise the right of appeal. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

So long as furnishing of free transcript not "vain and useless" gesture. To warrant the furnishing of a free transcript, the petitioner must make some showing that the furnishing of such would not be just a ''vain and useless'' gesture, but that he is entitled to relief under this rule. Valdez v. District Court, 171 Colo. 436, 467 P.2d 825 (1970); Romero v. District Court, 178 Colo. 200, 496 P.2d 1049 (1972).

Inasmuch as such would be the infliction of a needless expense. As to the right to have a free transcript on appeal, where petitioner does not come within the requirements of section (c) and no showing has been made why a very expensive transcript will be of any use to him, then the infliction of the needless expense to prepare such upon a small local unit of government under these circumstances would be an injustice. Peirce v. People, 158 Colo. 81, 404 P.2d 843 (1965).

Allegations of ineffective assistance of counsel in appellate proceedings may be considered by the trial court in connection with motion for postconviction relief. People v. Williams, 736 P.2d 1229 (Colo. App. 1986).

Attorney's performance found to be patently deficient in proceeding under this rule alleging ineffective assistance of counsel where such attorney failed to file a petition for writ of certiorari in a timely fashion after receiving three extensions of time from supreme court. People v. Valdez, 789 P.2d 406 (Colo. 1990).

Motion for postconviction relief under this rule denied where defendant failed to establish that he had suffered prejudice due to patently deficient performance of attorney in handling criminal appeal. People v. Valdez, 789 P.2d 406 (Colo. 1990).

A motion or petition for habeas corpus is a collateral attack that may be dismissed upon the defendant's death, since doing so does not deprive the defendant of the right to appeal the conviction. People v. Valdez, 911 P.2d 703 (Colo. App. 1996).

The doctrine of abatement ab initio in this state does not extend to cases pending on certiorari review. Rather, where a defendant dies after he already has been afforded the protections of a direct appeal as of right, the interests of justice would not be served by abating the conviction. People v. Griffin, 2014 CO 48, 328 P.3d 91.

7. Other Grounds.

Issue involving jurisdiction of court to impose certain sentence is subject to review under section (c). Johnson v. People, 174 Colo. 75, 482 P.2d 105 (1971).

A defendant may not plead guilty to a crime after the general assembly has expressly repealed the statute defining that crime. Defendant's plea to first degree assault pursuant to § 18-3-202 (1)(d), after such section was repealed, was illegal and, because it was material to his plea agreement, his plea agreement was vacated. People v. Wetter, 985 P.2d 79 (Colo. App. 1999).

Due process failure where jury would not have convicted with later discovered evidence. If with later discovered evidence the jury would not have convicted the defendant, it can be said that the conviction can be laid at the door of inadequate preparation on the part of both sides, and this has the magnitude of a failure to due process, calling for a new trial. People v. Armstead, 179 Colo. 387, 501 P.2d 472 (1972).

Where prior conviction is decreed a nullity by final judgment of court of appeals. The defendant cannot ''reaffirm'' the validity of a prior conviction at an habitual offender hearing when the court of appeals has decreed by final judgment that the prior conviction is a nullity. People v. Dugger, 673 P.2d 351 (Colo. 1983).

Invited error doctrine not applicable as basis for denying postconviction relief. Defendant should not be estopped from challenging conviction on grounds that he invited the error by successfully objecting to submission of a special verdict form where court found that although the use of a general verdict form prevented a means of determining whether error raised in postconviction motion was harmless, the use of a general verdict form did not induce

error by the trial court. People v. Crespin, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

Ineffective assistance of counsel. Defendant has burden to show inadequate representation, and a conviction will not be set aside unless, based on record as a whole, there was a denial of fundamental fairness. People v. Gies, 738 P.2d 398 (Colo. 1987); People v. Karpierz, 165 P.3d 753 (Colo. App. 2006).

There is no need to inquire into trial errors or prejudice if trial counsel is found to be incompetent as a matter of law. In such case as trial counsel is found to be incompetent as a matter of law, defendant is entitled to new trial for this reason alone. People v. Kenny, 30 P.3d 734 (Colo. App. 2000).

Trial counsel conflict of interest. If the trial court determines that a conflict of interest existed, such conflict adversely affected counsel's conduct, and that defendant did not voluntarily, knowingly, and intelligently waive the right to conflict-free representation, judgment of conviction must be vacated and a new trial should be conducted. People v. Kenny, 30 P.3d 734 (Colo. App. 2000).

Strickland ineffective assistance standard requires that the court evaluate the evidence from the perspective of defense counsel as of the time of the representation in question and to indulge a strong presumption that defense counsel's efforts constituted effective assistance. People v. Naranjo, 840 P.2d 319 (Colo. 1992).

If the court determines defense counsel's performance was not constitutionally deficient, it need not consider the prejudice prong of the ineffective assistance test. People v. Sparks, 914 P.2d 544 (Colo. App. 1996).

Strickland test, while based on the constitutional right to counsel, is applicable to the determination of whether a defendant has received effective assistance of counsel in a postconviction proceeding. People v. Hickey, 914 P.2d 377 (Colo. App. 1995).

In order to obtain relief based on a claim of ineffective assistance of counsel, a defendant must affirmatively prove both that his counsel's performance fell below the standard of professional reasonableness and that such performance prejudiced him, i.e., that there is reasonable probability that, but for such deficient performance, the outcome at trial would have been different. People v. Palmer, 888 P.2d 348 (Colo. App. 1994); People v. Washington, 2014 COA 41, 345 P.3d 950.

Ineffective assistance of counsel may arise when an attorney's representation is intrinsically improper because of an actual conflict of interest. However, to make a showing of actual conflict of interest, the defendant must demonstrate a basis for the underlying ineffective assistance of counsel challenges. No basis was found where claim of ineffective assistance of counsel was based on bare allegations of failure to file an appeal with no showing of the existence of grounds for an appeal. People v. Rhorer, 946 P.2d 503 (Colo. App. 1997), rev'd on other grounds, 967 P.2d 147 (Colo. 1998).

To succeed on a motion for new trial based on newly discovered evidence, the defendant must show that the evidence was discovered after the trial; that defendant and his counsel exercised diligence to discover all possible evidence favorable to the defendant prior to and during the trial; that the newly discovered evidence is material to the issues involved and not merely cumulative or impeaching; and lastly, that the newly discovered evidence is of such character as probably to bring about an acquittal verdict if presented at another trial. People v. Muniz, 928 P.2d 1352 (Colo. App. 1996); People v. Tomey, 969 P.2d 785 (Colo. App. 1998); People v. Mason, 997 P.2d 1245 (Colo. App. 1999), aff'd on other grounds, 25 P.3d 764 (Colo. 2001).

Question in evaluating probability that new evidence would bring about an acquittal is not whether the court, in its experience, would consider a particular witness credible, but rather whether a reasonable jury would probably conclude that there existed a reasonable doubt of guilt based on all evidence, including the new evidence, as developed in the course of trial. People v. Estep, 799 P.2d 405 (Colo. 1990).

Defendant entitled to a new trial upon the withdrawal of his guilty plea based upon newly discovered evidence. The defendant must present evidence from which the trial court may reasonably conclude that: (1) The newly discovered evidence was discovered after the entry of the plea, and in the exercise of reasonable diligence by the defendant and his or her counsel, could not have been discovered earlier; (2) the charges that the People filed against the defendant, or the charges to which the defendant pleaded guilty were actually false or unfounded; and (3) the newly discovered evidence would probably bring about a verdict of acquittal in a trial. People v. Schneider, 25 P.3d 755 (Colo. 2001); Mason v. People, 25 P.3d 764 (Colo. 2001).

An Alford plea and a guilty plea are the same for purposes of analysis under Schneider. People v. Schneider, 25 P.3d 755 (Colo. 2001).

A trial court may consider corroborating evidence in assessing a recanting witness's credibility. People v. Schneider, 25 P.3d 755 (Colo. 2001).

Trial court record demonstrated defendant was aware that a crime of violence charge would increase his potential sentence and supported trial court's denial of motion to vacate upon finding that defendant's plea was knowingly and voluntarily entered. People v. Palmer, 888 P.2d 348 (Colo. App. 1994).

It is extremely unlikely that a reasonable jury would acquit the defendant of drug charges in a new trial at which a witness now states, six years after the original trial, that she placed the drugs in the defendant's wallet. The trial court found it ''rather incredible'' that the witness would not mention that she had put the drugs in his wallet during the first trial and that the witness did not know that the defendant was in prison until six years later. The witness' testimony was further weakened by the fact that she was no longer subject to prosecution for her conduct and the fact that her testimony conflicted with her affidavit with respect to where she obtained the drugs. People v. Muniz, 928 P.2d 1352 (Colo. App. 1996).

A defendant who enters a guilty plea is entitled to file a motion for post-conviction relief based on newly discovered evidence. People v. Tomey, 969 P.2d 785 (Colo. App. 1998).

District court exceeded its statutory jurisdiction by ordering that defendant not have custody of her children as a condition of probation, since juvenile courts have exclusive jurisdiction to determine the legal custody of any child who is dependent and neglected under § 19-1-104. People v. Forsythe, 43 P.3d 652 (Colo. App. 2001).

D. Grounds Not Justifying Relief.

1. In General.

Mere error, unless of constitutional dimension, is no grounds for postconviction relief. People v. Crawford, 183 Colo. 166, 515 P.2d 631 (1973).

Such as failure to follow rule's formal requirements. For collateral relief such as habeas corpus to be available, more than a failure to follow the formal requirements of a rule of criminal procedure must be shown. Martinez v. Ricketts, 498 F. Supp. 893 (D. Colo. 1980).

Trial court's failure to readvise defendant of elements of crime at providency hearing is not fatal to the conviction where record shows that defendant's plea was knowingly and understandingly made. People v. Reyes, 713 P.2d 1331 (Colo. App. 1985).

Trial court's alleged error in refusing to permit defendant's wife to testify as to his nonviolent character and prior sexual conduct and allegation that prosecutor's remarks during cross-examination and closing argument were so prejudicial as to constitute reversible error were not proper grounds for postconviction relief. People v. Williams, 736 P.2d 1229 (Colo. App. 1986).

Alleged defects in grand jury proceedings do not constitute grounds for relief from conviction, because once a defendant has been found guilty beyond a reasonable doubt, the issue of probable cause found at a grand jury proceeding becomes moot. People v. Tyler, 802 P.2d 1153 (Colo. App. 1990).

Trial court's failure to advise defendant of the mandatory parole term did not constitute reversible error. Because the length of the defendant's sentence was less than the maximum that he was advised he could receive, the trial court properly determined that defendant had entered a valid guilty plea. Consequently, it committed no error in denying defendant's motion under this rule. People v. Tyus, 776 P.2d 1143 (Colo. App. 1989).

Trial court's failure to advise defendant of mandatory parole term at the time he pleaded guilty to probation violation was not error because court had previously advised defendant when he pleaded guilty to the charge. People v. Wright, 53 P.3d 730 (Colo. App. 2002).

Where mittimus does not reference a mandatory period of parole, remand is required for correction of the mittimus rather than granting defendant's section (c) motion. People v. Barth, 981 P.2d 1102 (Colo. App. 1999).

Allowing witness for defendant to appear in jail clothing is not reversible error where defendant cannot show he was prejudiced thereby. People v. Walters, 796 P.2d 13 (Colo. App. 1990); People v. Martinez, 32 P.3d 520 (Colo. App. 2001).

Trial court's instruction that the jury could consider defendant's voluntary absence from the trial as evidence of guilt was not error. The court had made reasonable inquiry as to the defendant's whereabouts before continuing the trial. People v. Tafoya, 833 P.2d 841 (Colo. App. 1992).

Where the only issue raised in a motion under this rule concerns the construction of statutes, failure of the trial court to make findings of fact and conclusions of law is harmless and does not require reversal. People v. Young, 908 P.2d 1147 (Colo. App. 1995).

Defense counsel's failure to inform defendant of mandatory consecutive sentences did not result in ineffective assistance of counsel. The record supported the trial court's conclusion that defendant would not have accepted a plea bargain sentence in excess of 20 years, therefore defense counsel's failure to inform defendant of the mandatory consecutive sentence provision did not result in prejudice. People v. Williams, 908 P.2d 1157 (Colo. App. 1995).

Defendant cannot claim ineffective assistance of counsel for failing to perfect appeal while defendant was a fugitive. Counsel's performance could not have prejudiced defendant by forcing forfeiture of an appeal because, by fleeing from justice while his appeal was pending, defendant himself forfeited his right to ap-

pellate review. People v. Brown, 250 P.3d 679 (Colo. App. 2010).

Application of mandatory parole period did not violate equal protection where person is sentenced differently than others in same felony ''class''. Defendant is only ''similarly situated'' with defendants who commit the same or similar acts. People v. Friesen, 45 P.3d 784 (Colo. App. 2001); People v. Walker, 75 P.3d 722 (Colo. App. 2002).

2. Procedural Errors.

Review on grounds of duplicity in charge is proper only by appeal to the conviction and not by means of this rule. Specht v. People, 156 Colo. 12, 396 P.2d 838 (1964).

And mere surplusage in charge does not require court to hold a full-blown hearing into a motion to vacate, where it could be clearly seen from the motion itself that the particular matter was without merit, such being a matter of form not affecting the ''real merits'' of the offense charged. Carter v. People, 161 Colo. 10, 419 P.2d 654 (1966).

Defendant cannot collaterally attack untrue record of arraignment and plea. Where the record as to arraignment and plea is not true, the defendant must reasonably call the defect to the court's attention by a motion for correction of error, but he cannot collaterally attack it. Madrid v. People, 148 Colo. 149, 365 P.2d 39 (1961).

Hearing not required by delay where not oppressive or arbitrary. Where the record does not disclose any objection to a delay made by the defendant at the time of trial and the defendant's motion under this rule does not set forth any facts showing that the delay was in any manner oppressive or arbitrary, that he was in any way deprived of any defense, or that any witness was unavailable, then under such circumstances, the court is not required to hold an evidentiary hearing. Valdez v. People, 174 Colo. 268, 483 P.2d 1333 (1971).

Attack on credibility of witnesses for the state is a matter not reviewable by motion under this rule, since it does not raise a constitutional question. Taylor v. People, 155 Colo. 15, 392 P.2d 294 (1964).

Nor is admissibility of exhibit based on alleged lack of foundation. The issue as to the admissibility of an exhibit based on an alleged lack of foundation not based on any constitutional ground is not one which can form the basis for relief under section (c). Walters v. People, 166 Colo. 90, 441 P.2d 647 (1968).

Tactical error regarding trial strategy insufficient basis for relief. Where counsel makes an informed decision regarding trial strategy and offers several theories of defense, only one of which is challenged as having been ineffectively presented at trial, this tactical error does not provide the necessary basis for postconviction relief. People v. Stroup, 624 P.2d 913 (Colo. App. 1980).

As are, generally, errors in jury instructions. As a general rule, errors in jury instructions do not constitute fundamental error that would provide a basis for collateral attack. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

And failure to appoint counsel on appeal. The failure to appoint counsel to carry an appeal does not authorize, or even permit, the setting aside of a judgment and sentence under this rule. Rather, the proper remedy is another request that he be appointed counsel to examine the trial record. Cruz v. People, 157 Colo. 479, 405 P.2d 213 (1965), cert. denied, 383 U.S. 915, 86 S. Ct. 905, 15 L. Ed. 2d 669 (1966).

3. Plea Bargaining and Disparate Sentences.

Allegation of plea bargaining, standing alone, is not sufficient upon which to base a charge of coercion of a guilty plea. Smith v. People, 162 Colo. 558, 428 P.2d 69 (1967).

Due process not denied where judge considers truthfulness of defendant's presentence statements. It is not a denial of due process for a judge, in connection with sentencing procedure, to consider the truthfulness of voluntary statements made by the defendant at a presentence hearing. People v. Quarles, 182 Colo. 321, 512 P.2d 1240 (1973).

And relief cannot be given for disparity in sentences. A defendant is not entitled to relief under section (c) based on a lack of equal protection of the law due to the disparity of the sentences between himself and a codefendant. People v. Jenkins, 180 Colo. 35, 501 P.2d 742 (1972).

Nor where defendant alleges that prison conditions constitute cruel and unusual punishment. The defendant's allegations that conditions at a prison constitute cruel and unusual punishment, making his sentence more onerous than that contemplated by the sentencing judge, do not present a claim for relief under this rule. People v. Sundstrom, 638 P.2d 831 (Colo. App. 1981).

Defendant need not be advised on right to remain silent in competency evaluation for a postconviction motion under section (c) if the evaluation is not being used to establish guilt. No self-incrimination issue exists, and procedural safeguards of § 16-8-117 do not apply because defendant already confessed, pleaded guilty, and was sentenced. People v. Karpierz, 165 P.3d 753 (Colo. App. 2006).

Retrospective competency determination for a postconviction motion under section (c) was sufficient because the postconviction court had access to three contemporaneous compe-

tency evaluations of the defendant and transcripts of the plea and sentencing hearings, which contained defendant's statements to the court. The fact that the postconviction court did so five years later does not invalidate its findings. People v. Pendleton, 2015 COA 154, 374 P.3d 509.

4. Failure to Take Appeal.

Mere failure to take appeal cannot support collateral attack. The mere failure, or even neglect, to take an appeal, ''standing alone'', whether excusable or not, raises no constitutional question, and, hence, does not support a collateral attack. Haines v. People, 169 Colo. 136, 454 P.2d 595 (1969); People v. Rhorer, 946 P.2d 503 (Colo. App. 1997), rev'd on other grounds, 967 P.2d 147 (Colo. 1998).

Unless party precluded from appealing. Where a party has not availed himself of the normal appeal procedure, unless he has been effectively precluded from doing so, he cannot thereafter seize upon this remedy in order to seek relief from alleged grievances which are properly the subject of an appeal. Taylor v. People, 155 Colo. 15, 392 P.2d 294 (1964).

Or where true prejudice to petitioner. Where a petitioner's time to sue out an appeal has long since passed and he has effectively and knowingly waived his right to file a motion for a new trial, he cannot, in the absence of any showing of true prejudice which could bring him under this rule, be heard to complain that his waiver had a legal effect he did not then contemplate. Peirce v. People, 158 Colo. 81, 404 P.2d 843 (1965).

E. Motion and Hearing.

1. When Hearing Granted.

If allegations set forth proper grounds for relief, court must grant prompt hearing. Patterson v. Hampton, 355 F.2d 470 (10th Cir. 1966).

If a motion under section (c) sets forth facts constituting grounds for relief from a sentence, a prompt hearing by the trial court must be granted, unless the motions, files, and records satisfactorily show that the prisoner is not entitled to relief. Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965); Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965); Coleman v. People, 174 Colo. 94, 482 P.2d 378 (1971).

When defense counsel's ineffective assistance deprives defendant of a hearing on the merits of his or her postconviction claim, the remedy is to provide such a hearing. Thus, vindication of this statutory right trumps society's interest in the finality of convictions. People v. Valdez, 178 P.3d 1269 (Colo. App. 2007).

Even when the record clearly demonstrates that postconviction counsel was ineffective in representing defendant through counsel's delay, proof of acquiescence could show defendant abandoned an ineffective assistance of counsel claim or waived the right to effective assistance of counsel. People v. Valdez, 178 P.3d 1269 (Colo. App. 2007).

Whether a waiver of effective assistance of counsel was voluntary is a question of fact for the trial court. People v. Valdez, 178 P.3d 1269 (Colo. App. 2007).

The allegation that defense counsel failed to inform defendant of his or her right to appeal plus the fact that the court did not advise the defendant of his or her right to appeal is sufficient to warrant an evidentiary hearing. People v. Boespflug, 107 P.3d 1118 (Colo. App. 2004).

Evidentiary hearing not required where only legal issues to be decided by judge. An evidentiary hearing is not required under this rule where the motion, files, and record present only issues of law, or where the motion itself fails to specify the facts supporting the constitutional claim. People v. Trujillo, 190 Colo. 497, 549 P.2d 1312 (1976); People v. Johnson, 195 Colo. 350, 578 P.2d 226 (1978).

Hearing unnecessary, and motion dismissed, where record shows no entitlement to relief. A motion under this rule may be dismissed without a hearing in the case where the motion, the files, and the record show to the satisfaction of the court that the prisoner is not entitled to relief. Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

This rule permits a trial judge to deny the motion without granting a hearing, but only in those cases where the motion, the files, and the record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief. People v. Hutton, 183 Colo. 388, 517 P.2d 392 (1973); People v. Breaman, 924 P.2d 1139 (Colo. App. 1996).

Where the motion and the record of the case show, to the satisfaction of the court, that the prisoner is not entitled to relief, a hearing is not necessary. People v. Velarde, 200 Colo. 374, 616 P.2d 104 (1980).

A motion under section (c) may be dismissed without a hearing if the motion, the files, and the record clearly establish that the defendant is not entitled to relief. People v. Hartkemeyer, 843 P.2d 92 (Colo. App. 1992); People v. Ruiz, 935 P.2d 68 (Colo. App. 1996); People v. Mayes, 981 P.2d 1106 (Colo. App. 1999); People v. Moriarity, 8 P.3d 566 (Colo. App. 2000); People v. Martinez, 36 P.3d 201 (Colo. App. 2001); People v. Salinas, 55 P.3d 268 (Colo. App. 2002); People v. Vieyra, 169 P.3d 205 (Colo. App. 2007).

Trial court did not err in failing to grant defendant a hearing where the court referred only to information in the motion, record, and files in denying defendant's motion. People v. Fernandez, 53 P.3d 773 (Colo. App. 2002).

An investigator's report attached to the prosecution's response to a motion under this rule is not a pleading as contemplated by section (c)(3)(V). Therefore, the court cannot consider it in denying the motion without a hearing. People v. Smith, 2017 COA 12, 413 P.3d 195.

Although the court may, after considering the motion and supporting documents, deny a motion pursuant to Crim. P. 35 without a hearing, the court may not grant the motion without a hearing. People v. Davis, 849 P.2d 857 (Colo. App. 1992), aff'd, 871 P.2d 769 (Colo. 1994).

The court is required to allow the public defender's office to respond to a defendant's request for counsel during a postconviction hearing. People v. Higgins, 2017 COA 57, 413 P.3d 298.

The district court erred by departing from the postconviction relief procedure outlined in sections (c)(3)(IV) and (c)(3)(V) by sending a copy of defendant's postconviction motion to the prosecution and, after receiving the prosecution's response, denying the motion without a hearing and without response from the public defender's office. People v. Higgins, 2017 COA 57, 413 P.3d 298.

Under section (c)(3)(V), a defendant need not both request appointment of an attorney and object to the court's failure to allow the public defender to respond to preserve a claim that the district court erred by not sending the motion to the public defender's office. A defendant need only request appointed counsel in a section (c) motion to preserve such a claim. People v. Higgins, 2017 COA 57, 413 P.3d 298.

Court of appeals erred in vacating respondent's guilty plea based upon allegations contained in his or her section (c) motion. However, since the allegations, if true, may entitle respondent to relief, the district court must conduct an evidentiary hearing to ascertain the veracity of respondent's claims. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Before accepting a defendant's guilty plea, a trial court must adequately advise the defendant regarding a mandatory parole period. Appropriate remedy is to remand for a hearing to determine if defendant was aware of a mandatory parole term and, if not, whether he nevertheless would have pled guilty. People v. Calderon, 992 P.2d 1201 (Colo. App. 1999).

2. Sufficiency of Allegations.

Bald allegation of constitutional error is sufficient for review when specific facts are not pleaded to support the claim. People v. Bruebaker, 189 Colo. 219, 539 P.2d 1277 (1975).

Bare allegations of incompetence or coercion are not sufficient to entitle a defendant to an evidentiary hearing in section (c) proceeding. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967); Bradley v. People, 175 Colo. 146, 485 P.2d 875 (1971).

Bare allegations of incompetency of counsel are not sufficient to entitle a defendant to an evidentiary hearing in a proceeding under section (c). Moore v. People, 174 Colo. 570, 485 P.2d 114 (1971); People v. Osorio, 170 P.3d 796 (Colo. App. 2007).

Bare assertions of mental exhaustion on the part of the defendant because of a series of continuances resulting in less than a month's delay is not equivalent to mental incompetence. Bradley v. People, 175 Colo. 146, 485 P.2d 875 (1971).

And evidentiary hearings will not be granted on vague conclusional charges. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

As where motion alleges sentence is "illegal" in violation of fourth and fifth amendments. It is impossible to glean from a motion any clear indication of how petitioner's constitutional rights may have been violated in connection with his conviction and sentence in the trial court where the motion does no more than allege that the sentence of the trial court was ''illegal'' and should be vacated because it was imposed in ''violation of the fourth and fifth amendments'', as such a motion contains no exposition of any facts from which a trial court could detect any basis for unconstitutional action or inaction. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

Specific facts to support the claim must appear in petition for postconviction relief. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

A defendant need only assert facts that, if true, would provide a basis for relief to warrant a hearing. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Petitioner must allege ultimate facts with particularity. The petitioner has the burden to allege with particularity ultimate facts which support a conclusion that a judicial proceeding is illegal or irregular. Melton v. People, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966).

Motion for section (c) review is insufficient where it does not specify facts which constitute the basis for the unconstitutional charge. DeBaca v. People, 170 Colo. 415, 462 P.2d 496 (1969).

Motion that fails to contain sufficient allegations to support the claim asserted as the

basis for relief may be dismissed for failure to state a claim upon which relief may be granted. People v. Bossert, 772 P.2d 618 (Colo. 1989).

And, failing specific facts, no hearing. Failing specific facts to support a claim, no issue is raised which demands an evidentiary hearing. DeBaca v. District Court, 163 Colo. 516, 431 P.2d 763 (1967).

If the motion contains no allegations of facts upon which relief can be granted, there is no requirement that an evidentiary hearing be had or that an attorney be appointed to represent the defendant. Kostal v. People, 167 Colo. 317, 447 P.2d 536 (1968); People v. Lyons, 196 Colo. 384, 585 P.2d 916 (1978).

And motion, and relief, denied. In a proceeding to compel the trial court to grant the defendant a free transcript of all proceedings had in connection with his criminal conviction, such may be refused where the defendant fails to allege sufficient facts which would warrant the granting of the transcript or which would warrant the granting of relief under section (c). Valdez v. District Court, 171 Colo. 436, 467 P.2d 825 (1970).

A motion for review in the trial court as contemplated by the provisions of this rule is insufficient and may be summarily denied where it does not specify the facts which constitute the basis for the unconstitutional charge. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970); People v. Rodriguez, 914 P.2d 230 (Colo. 1996).

However, that prisoner's factual allegations seem unbelievable or improbable is not the test set forth in this rule for determining whether a hearing should or should not be afforded the prisoner; unless the motion itself, the files, or the record of the case show that the prisoner is not entitled to relief, he must be given an opportunity to support his allegations with evidence presented at a hearing. Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965).

Court of appeals erred in vacating respondent's guilty plea based upon allegations contained in his or her section (c) motion. However, since the allegations, if true, may entitle respondent to relief, the district court must conduct an evidentiary hearing to ascertain the veracity of respondent's claims. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Court may dismiss a motion without a hearing if the motion, the files, and the record clearly establish the right to relief. People v. Simons, 826 P.2d 382 (Colo. App. 1991).

Defendant must allege with particularity in the motion that a present need exists for the relief sought such as the applicant may be disadvantaged in obtaining parole under a later sentence. People v. Santisteven, 868 P.2d 415 (Colo. App. 1993).

Denial of free transcript not an abuse of discretion. Court did not abuse its discretion when it denied a request for free use of a transcript when an indigent defendant failed to demonstrate that he may be entitled to relief under section (c) and that the transcript might contain facts that substantiate his claim. Jurgevich v. District Ct., 907 P.2d 565 (Colo. 1995).

3. Contemporaneous Objection and Waiver.

Like habeas corpus, proceeding under this rule governed by equitable principles. This rule affords a convicted person the remedies which are available through a writ of habeas corpus, and like the federal habeas corpus proceeding, a proceeding under this rule is governed by equitable principles. People v. Trujillo, 190 Colo. 497, 549 P.2d 1312 (1976); People v. Bravo, 692 P.2d 325 (Colo. App. 1984).

Relief denied where right to counsel waived at trial. A trial court properly denies postconviction relief when the defendant knowingly waived his right to be represented by counsel at trial. Martinez v. People, 166 Colo. 132, 442 P.2d 422, cert. denied, 393 U.S. 990, 89 S. Ct. 474, 21 L. Ed. 2d 453 (1968).

Rule is not designed to eliminate the requirement for contemporaneous objection and certain rights not raised at trial will be considered waived. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Failure to raise search and seizure issue at trial tantamount to waiver. The contemporaneous objection rule applies to search and seizure issues, and the failure to raise the objection of an illegal search and seizure by proper objection at the trial level is tantamount to a waiver, in which case a trial court properly denies a motion for relief under section (c) based thereon. Brown v. People, 162 Colo. 406, 426 P.2d 764 (1967).

As is failure to raise identification issue. Where there never was an issue raised in the trial as to the identification of defendant, this is a contrived issue, and a trial court is correct in refusing an evidentiary hearing based on petitioner's objection to lineup procedures. Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

And failure to allege lack of speedy trial in motion to dismiss. Where the defendant claims that he pleaded guilty because he was promised that after he had entered his plea the trial court would consider a motion to dismiss for lack of a speedy trial, but makes no such allegation in his motion to dismiss, and there is nothing in the record which could even lead to the inference that such a promise might have been made, the court will not consider the argument. Wixson v. People, 175 Colo. 348, 487 P.2d 809 (1971).

One who pleads guilty cannot claim search and seizure illegal. One who pleads guilty is not in a position to successfully move for vacation of judgment on claims of an alleged illegal search and seizure. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

No issue exists as to legality of plea bargain where sentence given vacated. Where the defendant first admitted his guilt upon being promised a minimum sentence prior to his first sentencing, but, upon being given more than that amount of time, his first sentence is vacated, the issue of the legality of his first plea bargain no longer exists in a subsequent motion. James v. People, 162 Colo. 577, 427 P.2d 878 (1967).

4. Burden of Proof.

Legality of prior judgment and proceedings presumed. When attacking a conviction and sentence by a motion under this rule, the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. Melton v. People, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966); Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971).

When a defendant attacks a conviction and sentence by a motion under section (c), the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. People v. Brewer, 648 P.2d 167 (Colo. App. 1982).

Burden of proof of allegations in a section (c) motion rests with petitioner. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971); Bresnahan v. Patterson, 352 F. Supp. 1180 (D. Colo. 1973); People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973); Kailey v. Colo. Dept. of Corr., 807 P.2d 563 (Colo. 1991); People v. Fleming, 867 P.2d 119 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 19 (Colo. 1995); People v. Sickich, 935 P.2d 70 (Colo. App. 1996).

Pleas of guilty induced by threats or promises are not valid, but upon postconviction procedures to set aside such a plea, it becomes the burden of the petitioner to establish that the plea was entered because of coercion. Normand v. People, 165 Colo. 509, 440 P.2d 282 (1968).

The burden is on the defendant section (c) hearing to show that his plea was entered because of coercion. People v. Brewer, 648 P.2d 167 (Colo. App. 1982).

And measure of proof on motion is ordinarily proof by preponderance of evidence. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971); People v. Malouff, 721 P.2d 159 (Colo. App. 1986).

The burden is upon the defendant to establish by at least the preponderance of the evidence the allegations of his section (c) motion. Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971); People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973).

In a Crim. P. 35(c) proceeding, the legality of the judgment and the regularity of the proceedings leading up to the judgment are presumed. The burden is upon the movant to establish by a preponderance of the evidence the allegations of the motion for post-conviction relief. If the evidence supports the district court's findings and order, the decision will not be disturbed on review. People v. Hendricks, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

District court properly required that petitioner who improperly filed habeus corpus petition establish entitlement to relief under this rule by a preponderance of evidence since the motion should have been treated by the court as a motion under section (c)(2) of this rule. Kailey v. Colo. Dept. of Corr., 807 P.2d 563 (Colo. 1991).

State is under no duty to present any evidence if it believes that petitioner has failed to meet that burden. Bresnahan v. Patterson, 352 F. Supp. 1180 (D. Colo. 1973).

Court need not grant defendant's motion because it denies state's motion for dismissal at the conclusion of the defendant's evidence. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

As denial afforded no effect on whether defendant meets burden. A state motion to dismiss and its denial can be afforded no effect as to whether the defendant meets his burden under this rule. Bresnahan v. People, 175 Colo, 286, 487 P.2d 551 (1971).

5. Evidence Examined.

Section (c) hearing criminal, not civil. A section (c) hearing is but one phase of a criminal proceeding, and it is not a civil proceeding. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

Trial judge may utilize the complete trial record insofar as possible and pertinent when he rules on a section (c) motion. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

And judge should identify all documents before him at time of trial. The trial judge should identify for the purposes of the record in the section (c) hearing all documents, letters, and reports which were before him as of the time he permitted the defendant to plead at trial, such identification should be made without regard to the ultimate admissibility of the particular document at the section (c) hearing, and the documents thus identified should then be furnished to counsel for petitioners for the purpose of inspection, copying, and use by counsel in the section (c) hearing as applicable rules per-

mit. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

However, rule's purpose cannot be disposed of by reference to trial record alone. The purpose of a section (c) hearing is to take evidence pertinent to the allegations, which cannot be disposed of by reference to the trial record alone. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

And absence of transcript of prior hearing not necessarily equivalent to silent record. The absence of a transcript of a prior providency hearing is not necessarily equivalent to a silent record at the postconviction review hearing, and whether a knowing and voluntary guilty plea was entered by the defendant may be determined by any evidence adduced at his section (c) hearing. People v. Brewer, 648 P.2d 167 (Colo. App. 1982).

Taking of depositions governed by criminal rules and statutory provision. The taking of any deposition to be used in a section (c) hearing is governed by the rules on criminal procedure and the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, contained in § 16-9-201 et seq. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

And so subpoenas may be served on out-of-state residents to compel attendance. That the Rules of Civil Procedure do not govern the taking of depositions in connection with a section (c) hearing is without prejudice to the right of a petitioner to serve subpoenas in accordance with the Rules of Criminal Procedure and § 16-9-201 et seq. on out-of-state residents and thereby compel their attendance at a section (c) hearing. Bresnahan v. District Court, 164 Colo. 263, 434 P.2d 419 (1967).

Defendant's attorney for prior hearing and sentencing may testify in postconviction relief hearing. Regarding the voluntariness of a guilty plea, the defendant's knowledge of the elements of the crime may be developed in a postconviction relief hearing, and the defendant's attorney for the prior hearing and sentencing may testify in the postconviction relief hearing that the defendant knew and understood all the elements of the crime charged. People v. Keenan, 185 Colo. 317, 524 P.2d 604 (1974).

6. Role of Petitioner and Judge.

Petitioner's presence generally necessary. If an evidentiary hearing under section (c) is required, then the petitioner's presence would be necessary under most circumstances. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

And assistance of counsel essential, unless claim wholly unfounded. An accused has a right to counsel at every stage of the proceeding, and, in the absence of a knowing and intelligent waiver, the assistance of counsel is essential in postconviction proceedings, unless the asserted claim for relief is wholly unfounded. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Where no hearing is necessary, no error is committed where petitioner is absent. Hooker v. People, 173 Colo. 226, 477 P.2d 376 (1970).

Or where case is submitted on agreed statements of facts. Applications for postconviction relief can appropriately be decided on the merits without a plenary evidentiary hearing and without the expense, risk, and inconvenience of transporting the applicants, if in custody, from the prison to the courthouse; such a summary disposition is proper in all cases where there is no factual issue and where the case is submitted on an agreed statement of facts. Dabbs v. People, 175 Colo. 273, 486 P.2d 1053 (1971).

Rule contemplates hearing wherever possible before trial judge who presided over the case. A disqualification because he is familiar with what occurred at the trial renders the rule anomalous; familiarity with the circumstances surrounding the trial does not render the judge a material witness. Bresnahan v. Luby, 160 Colo. 455, 418 P.2d 171 (1966).

Trial court erred in not holding a hearing on defendant's motions and instead directing defense counsel to conduct an investigation of pertinent allegations and accepting counsel's conclusion that they lacked merit. Such procedure was inappropriate first because defense counsel should not be placed in a position of warranting the validity of his client's assertions, and second because a court in passing upon the validity of a party's assertions must reach its own independent evaluation of such assertions. People v. Breaman, 924 P.2d 1139 (Colo. App. 1996).

Weight and credibility given evidence within court's province. The weight and credibility to be given to the testimony of witnesses in a section (c) hearing is within the province of the trial court. Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971).

Where the trial court found polygraph evidence to be of little weight, it was fully entitled to make such finding as the trier of facts on a motion for postconviction relief. People v. Armstead, 179 Colo. 387, 501 P.2d 472 (1972).

Under this rule, the trial court determines all issues of fact and law. Swift v. People, 174 Colo. 259, 488 P.2d 80 (1971).

And makes findings and conclusions. In a section (c) hearing the trial court is bound to determine the issues and make findings of fact and conclusions of law. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

Question of whether defendant's burden of proof is met is answered by findings made by the trial judge. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

Page-long comments, analysis, and conclusions by the trial judge are sufficient to establish that the requirement of this rule, that findings and conclusions must be made, was met. People v. Crater, 182 Colo. 248, 512 P.2d 623 (1973).

Judge's findings are based upon trial record and evidence taken as postconviction hearing. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

Findings and conclusions required under rule must sufficiently set forth basis of ruling. People v. Crater, 182 Colo. 248, 512 P.2d 623 (1973); People v. Breaman, 924 P.2d 1139 (Colo. App. 1996).

Unconstitutional to place undue emphasis on findings not supported by record. A denial of due process under this rule will exist when the trial court places undue emphasis on findings not supported by the record, and the denial is compounded when the trial court arbitrarily refuses to permit defense counsel to point out to the court the fact that matters not in evidence are being considered. Noland v. People, 175 Colo. 6, 485 P.2d 112 (1971).

Trial court lacked jurisdiction to entertain motion to reconsider order denying motion under section (b) filed more than 120 days after the date of sentencing. People v. Gresl, 89 P.3d 499 (Colo. App. 2003).

F. Determination.

1. Relief Granted.

Resentencing where long-time intervals and defendant's status changes from juvenile to adult. Long-time intervals between the arrest and the making of the charge, between the arrest and the arraignment, and between the arrest and time of the appointment of an attorney to represent a defendant require a reversal and a remand of a case to the trial court for the purpose of vacating its prior sentence and resentencing a defendant when defendant's sentence was adversely affected by a change in status from juvenile to adult. England v. People, 175 Colo. 236, 486 P.2d 1055 (1971).

New trial required where defendant's trial attorneys fail to present any favorable evidence. Where the defendant fails to receive a fair trial because of the failure of his trial attorneys to present any of the evidence favorable to the defendant which was clearly available and discoverable by even rudimentary investigation, and as a result the damaging prosecution's version of the incident is allowed to remain uncontradicted and unimpeached, even though there was evidence to challenge it, the defendant was denied his constitutional right to a fair trial, which requires that the defendant's conviction be vacated and that he be afforded a new trial. People v. Moya, 180 Colo. 228, 504 P.2d 352 (1972).

Inquiry into question of effectiveness of counsel. Where guilty plea subjected defendant to deportation proceedings, inquiry must begin with initial determination that defense counsel in criminal case was aware that his client was an alien, and therefore was reasonably required to research relevant immigration law. People v. Pozo, 746 P.2d 523 (Colo. 1987).

Guilty plea vacated where no explanation of elements of charge given defendant. Where the record of the hearing held under section (c) is devoid of any evidence that the defendant understood the nature of the charge, and the only explanation of the charge to the defendant was in the wording of the information, which the court did not even read to him, and the court admits on the record that no explanation was given defendant of the elements of the charge, and there is no other indication that he received the requisite knowledge from other sources, his plea of guilty was improperly accepted and had to be vacated. People v. Brown, 187 Colo. 244, 529 P.2d 1338 (1974).

And where plea results in sentence far in excess to that promised. Where a guilty plea results in a sentence far in excess of that which was promised by the district attorney, the prisoner is entitled to have the sentence vacated and to go to trial on a plea of not guilty when he alleges that he has a valid defense to the charge. Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965).

And violation not remedied by resentencing defendant to same term for lesser offense. Resentencing a defendant years later to substantially the same term for a lesser offense does not remedy the violation of the defendant's right to withdraw his guilty plea or have a determination at the time of the trial whether or not he was guilty ''as charged'' for a greater offense. Burman v. People, 172 Colo. 247, 472 P.2d 121 (1970).

Amended sentence invalid where defendant and attorney not notified and not present. An amended sentence handed down by the trial court is invalid where neither the defendant nor his attorney are notified of resentencing, neither is present, and the substantial rights of defendant are violated by these omissions. People v. Emig, 177 Colo. 174, 493 P.2d 368 (1972).

Where jury not qualified to fix death penalty, entry of life-imprisonment sentence authorized. In a first-degree case, where the United States supreme court affirms the guilty verdict and invalidates the punishment portion of the verdict only because the jury was not constitutionally qualified to fix the death penalty, leaving the sole statutory alternative as to punishment available to the jury that of life imprisonment, the entry by the court of such a judgment is a mere ministerial act within the power and authority of the trial judge under the

terms and within the contemplation of section (c). Segura v. District Court, 179 Colo. 20, 498 P.2d 926 (1972).

Defendant cannot serve a county jail sentence while incarcerated in the penitentiary, and, conversely, he cannot serve a penitentiary sentence in the county jail. People v. Emig, 177 Colo. 174, 493 P.2d 368 (1972).

Defendant cannot serve a misdemeanor sentence consecutively to a felony sentence while being held by corrections department. People v. Green, 734 P.2d 616 (Colo. 1987); People v. Battle, 742 P.2d 952 (Colo. App. 1987).

2. Relief Denied.

Where confession's admission harmless error, defendant not prejudiced. Even assuming that a confession was involuntarily made, where its admission is harmless error, there is no prejudice to any substantive right of the petitioner. Melton v. People, 157 Colo. 169, 401 P.2d 605 (1965), cert. denied, 382 U.S. 1014, 86 S. Ct. 624, 15 L. Ed. 2d 528 (1966).

Assistance of counsel effective where no evidence full consideration not given case. The effective assistance of counsel is not denied the defendant where there is no evidence to support the assertion that counsel did not keep defendant informed or that anything but full consideration was given to his case. People v. Crater, 182 Colo. 248, 512 P.2d 623 (1973).

And constitutional for attorney not retained to give postconviction testimony. Postconviction testimony of an attorney contacted, but not retained, on behalf of the defendant discloses no violation of defendant's constitutional right to counsel. LaBlanc v. People, 177 Colo. 250, 493 P.2d 1089 (1972).

Petitioner found not entitled to relief for denial of effective assistance of counsel. People v. Stephenson, 187 Colo. 120, 528 P.2d 1313 (1974).

District court made detailed and extensive findings in determining that, while defense counsel's performance fell below the range of competency expected from him in certain areas, such deficiencies did not result in prejudice to defendant. Therefore, trial court did not err in denying defendant's section (c) motion. People v. Hendricks, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

Even if counsel had presented certain witness's testimony and other evidence of the events surrounding the giving of defendant's statements in a successful effort to suppress them, in light of overwhelming independent evidence that defendant committed this offense, there was no reasonable probability that the outcome of the trial would have been different. Similarly, trial court did not err in determining that trial counsel's performance was not deficient in deciding not to raise the issue of defendant's competency. People v. Hendricks, 972 P.2d 1041 (Colo. App. 1998), rev'd on other grounds, 10 P.3d 1231 (Colo. 2000).

Voluntary guilty plea not set aside. A plea of guilty should not be set aside if a factual basis exists for the plea and if the defendant has knowledge of the elements of the crime and enters the plea voluntarily. People v. Hutton, 183 Colo. 388, 517 P.2d 392 (1973).

And plea voluntary where considered, deliberate, advised choice. Where the record indicates a considered, deliberate, advised choice on the part of the defendant to change his plea from not guilty to guilty, the trial court's finding that the guilty plea is voluntary and not coerced is amply supported by the record of the proceedings at the time of the entry of the plea, it not being shown to be otherwise by any evidence presented at the hearing on a section (c) motion. Workman v. People, 174 Colo. 194, 483 P.2d 213 (1971).

And where defendant represented by able counsel and understands elements of charge. Where at all relevant times the defendant was represented by able counsel and neither in his motion to vacate the guilty plea, nor in the hearing thereon conducted under this rule, was there any indication that he did not understand the elements of the charge, the substance of the circumstances surrounding the plea indicates that it was voluntarily made with an understanding of the elements of the charge. People v. Edwards, 186 Colo. 129, 526 P.2d 144 (1974).

Guilty plea upheld where trial judge makes careful and thorough inquiry of defendant. Where the trial court fully complied with the requirements of Crim. P. 11, before granting a defendant's request to withdraw his previous plea and to enter a guilty plea, but the defendant alleges in his Crim. P. 35(c) motion that his plea of guilty was entered because of fear and duress, the plea will be upheld when the record reflects that the trial judge did with care and thoroughness make inquiry of the defendant in order to assure himself that the defendant's act of pleading guilty was his free and voluntary act. Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971).

Where the record on its face shows that the trial court in a providency hearing advised the petitioner of the possible sentence term, the sentence imposed was within that range, and the trial court did not treat the offense as a second offense, an evidentiary hearing on the petitioner's contention that the sentencing court failed to properly inform him of the possible penalties for crimes to which he entered a guilty plea is not required and the motion for relief will be denied. Hyde v. Hinton, 180 Colo. 324, 505 P.2d 376 (1973).

The failure to advise a defendant of the provisions of mandatory parole after the defendant has entered into a plea agreement and the stipulated sentence and mandatory parole period is less than the maximum sentence the court could have imposed upon the defendant is harmless error, thus the court affirmed the trial court's order summarily denying the defendant's motion under this rule. People v. Munoz, 9 P.3d 1201 (Colo. App. 2000).

Failure to convey a plea offer is deficient performance by defense counsel and a violation of the standard practice that a defense attorney should follow, but the failure did not constitute prejudice against defendant requiring reversal because the record did not show reasonable probability that the defendant would have accepted the offer if it had been timely communicated. People v. Perry, 68 P.3d 472 (Colo. App. 2002).

No credit for presentence jail time where time taken into consideration in sentencing. Where the defendant is sentenced by the judge after the judge is advised of the time that the defendant has spent in jail before the sentence is imposed, where the defendant is advised by the judge at the time sentence is imposed that the time he spent in custody was taken into consideration in determining his sentence, and where the sentence imposed, plus the time spent in custody, is far less than the maximum penalty prescribed by law, the defendant is not entitled to credit for presentence jail time through a postconviction proceeding. People v. Puls, 176 Colo. 71, 489 P.2d 323 (1971).

Failure to provide transcript on appeal found not to prejudice defendant. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

The equitable doctrine of laches may be invoked to bar postconviction relief. People v. Bravo, 692 P.2d 325 (Colo. App. 1984).

Defendant pleading guilty was sufficiently informed of mens rea element of the offense of rape by information read to him that contained the term "feloniously" and, therefore, postconviction relief was properly denied. Wilson v. People, 708 P.2d 792 (Colo. 1985).

Present need standard for postconviction relief not established under collateral attack statute for 30-year-old conviction for violations of municipal ordinances. City and County of Denver v. Rhinehart, 742 P.2d 948 (Colo. App. 1987).

The trial court was correct in denying defendant's motion under this rule since defendant, who was extradited to Colorado for trial on two charges, was not entitled to credit in second sentence for time spent in confinement prior to imposition of first sentence, if the first sentence had allowed presentence confinement credit for that period of time. People v. Garcia, 757 P.2d 1110 (Colo. App. 1988).

Court correctly denied section (c) motion and held that no conflict of interest existed to defeat defendant's right to counsel. Public defender represented both the defendant and another person against whom the authorities had no evidence, but whom the defendant had admitted to be a co-participant in the burglary. The court stated that the defendant could not seek to profit from the collapse of a self-created situation. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Defendant may not seek review of felony conviction under section (c) because, under the plea agreement, judgment and sentencing did not enter but were deferred. People v. Kazadi, 284 P.3d 70 (Colo. App. 2011), aff'd, 2012 CO 73, 291 P.3d 16; People v. Espino-Paez, 2014 COA 126M, 410 P.3d 548, aff'd, 2017 CO 61, 395 P.3d 786.

When a criminal defendant, who pled guilty to charge, dies while his appeal for relief from his sentence is pending, an abatement of the underlying conviction is not warranted. People v. Rickstrew, 961 P.2d 1139 (Colo. App. 1998).

A witness's exercise of the privilege against self-incrimination does not give rise to a violation of the defendant's right to a fair trial or to present a defense. People v. Coit, 50 P.3d 936 (Colo. App. 2002).

Because the United States supreme court's decision in Crawford v. Washington, 541 U.S. 36 (2004), established a procedural, not a substantive, rule and it was not a "watershed" rule, Crawford does not apply retroactively to cases on collateral review where the defendant's conviction became final prior to Crawford. Under prior case law, out-of-court statements properly admitted. People v. Edwards, 101 P.3d 1118 (Colo. App. 2004), aff'd, 129 P.3d 977 (Colo. 2006).

G. Successive Motions.

Repetitive postconviction proceedings with some legal and factual claims not afforded by constitution. Although postconviction relief is grounded upon constitutional principles, it does not afford any person the right to clog the judicial machinery with repetitive postconviction proceedings seeking relief on the same principles of law and the same factual claims. People ex rel. Wyse v. District Court, 180 Colo. 88, 503 P.2d 154 (1972).

Defendant is unauthorized to file successive motions based upon same or similar allegations in the hope that a sympathetic judicial ear may eventually be found. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Especially where defendant fails to seek review of denial of first similar claim. Where the defendant fails to avail himself of the right to have review of the propriety of the trial

court's denial of his motion and thereafter files a second motion to vacate in which he reurges the same grounds raised in the first motion, the trial court under section (c), need not entertain such second and successive motion. Henson v. People, 163 Colo. 302, 430 P.2d 475 (1967).

The court is not required to entertain successive motions for similar postconviction relief on behalf of the same prisoner. Graham v. Zavaras, 877 P.2d 363 (Colo. 1994); People v. Harmon, 3 P.3d 480 (Colo. App. 2000).

Standards on successive motions for review. In the case of a successive motion for postconviction review, the appropriate consideration is whether the defendant's constitutional claim has been fully and finally litigated in the prior postconviction proceeding. People v. Billips, 652 P.2d 1060 (Colo. 1982).

The doctrine of res judicata is not an appropriate standard for the resolution of postconviction claims. People v. Billips, 652 P.2d 1060 (Colo. 1982).

Collateral estoppel inapplicable. Although the doctrine of estoppel is as applicable to criminal proceedings as it is to civil proceedings, it is inapplicable in a section (c) proceeding. People v. Wright, 662 P.2d 489 (Colo. App. 1982).

All allegations relating to constitutional violations should be included in single motion. In light of the right to counsel in postconviction proceedings, all allegations relating to the violation of a defendant's constitutional rights should be included in a single section (c) motion. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

All allegations relating to the violation of defendant's constitutional rights should be included in a single section (c) motion. People v. Bucci, 184 Colo. 367, 520 P.2d 580 (1974).

And failure to do so results in summary denial of second similar application. The failure of an application to contain all factual and legal contentions will, unless special circumstances exist, ordinarily result in a second application containing such grounds being summarily denied. People v. Scheer, 184 Colo. 15, 518 P.2d 833 (1974).

And prisoner deliberately withholding ground for postconviction relief waives right to second hearing. If a prisoner deliberately withholds one of two grounds for postconviction relief at the time of filing his first application, he may be deemed to have waived his right to a hearing on the second ground in subsequent application. This interpretation is not intended to eliminate any judicial determination on the merits of a prisoner's claims, but rather is to ensure that all claims are considered in one proceeding. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Section (c)(3)(VIII) supersedes prior case law holding that a defendant can raise new postconviction claims in a second section (c) motion if the first section (c) motion was filed pro se. Filing a section (c) motion pro se does not allow a defendant to file a second section (c) motion raising new postconviction claims. People v. Taylor, 2018 COA 175, __ P.3d __.

Second motion dismissed unless failure to include newly-asserted grounds in first motion excusable. If a second or successive motion is filed, it may be summarily dismissed without a hearing unless the trial judge finds that the failure to include newly asserted grounds for relief in the first motion is excusable. People v. Hubbard, 184 Colo. 243, 519 P.2d 945 (1974).

Such as where defendant urges incompetency of counsel representing him in first hearing. Ordinarily, a defendant would be expected to raise the matter of competency of counsel in a section (c) proceeding, but where his trial counsel is still representing him, and this same counsel prepares the motion of a new trial which does not mention the subject and a new counsel then comes into the case, then under these particular circumstances, if the defendant wishes to urge the point of incompetency of his initial counsel, he may attempt to raise the point in a further section (c) proceeding in the trial court. Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971).

Such as where the factual and legal allegations raised in the second motion have not previously been fully and finally decided. People v. Wimer, 681 P.2d 967 (Colo. App. 1983).

In the absence of special circumstances, courts need not consider successive requests for the same relief based on the same or similar allegations on behalf of the same prisoner. People v. Holmes, 819 P.2d 541 (Colo. App. 1991).

Because defendant did not know of the changed double jeopardy standard when the defendant filed his first motion under section (c), the provisions of section (c)(1) mandate that the defendant's application for relief is not barred under the provisions of section (c)(3). People v. Allen, 843 P.2d 97 (Colo. App. 1992).

Defendant's actions in specifically withdrawing those claims from the trial court's consideration at an earlier proceeding which he argues should have been addressed in the second proceeding, constitute an abandonment of those claims. People v. Abeyta, 923 P.2d 318 (Colo. App. 1996).

Defendant's section (c) motion raising cognizable constitutional claims is not successive merely because he had unsuccessfully attempted to raise those claims in his prior appeal. People v. Diaz, 985 P.2d 83 (Colo. App. 1999).

Defendant's postconviction motion based on the voluntariness of his guilty plea as it

related to the quality of his counsel was properly denied as successive under section (c)(3)(VII) of this rule, where lengthy evidentiary hearing was held on defendant's Crim. P. 32(d) motion claiming that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. People v. Vondra, 240 P.3d 493 (Colo. App. 2010).

Missouri v. Seibert, 542 U.S. 600 (2004), not a "watershed rule of criminal procedure". Therefore it is not applied retroactively to defendant's conviction that was final prior to its announcement. Court properly denied hearing on defendant's section (c) motion because it did not meet the exception in section (c)(3)(VI)(b). People v. McDowell, 219 P.3d 332 (Colo. App. 2009).

Subsection (c) does not bar as successive judicial review of parole revocation procedures following appeal to the parole board because the parole statute, § 17-2-201 (4)(b), explicitly provides for judicial review of parole revocation. People v. Melnick, 2019 COA 28, 440 P.3d 1228.

H. Review on Appeal.

Appellate review of decisions made under this rule may be made. Henry v. Tinsley, 344 F.2d 109 (10th Cir. 1965); Ruark v. Tinsley, 350 F.2d 315 (10th Cir. 1965).

Including review of order denying relief. Previously, it was not clear whether an order denying relief sought under this rule was appealable. Nevertheless, denial of such relief can now be appealed. Smith v. Tinsley, 223 F. Supp. 68 (D. Colo. 1963).

An order of a trial court denying a motion to vacate is a final order reviewable on appeal. Henson v. People, 163 Colo. 302, 430 P.2d 475 (1967).

Question raised for first time in postconviction motion properly before appellate court. A question presented on appeal which was raised for the first time in a postconviction motion and has not been previously considered or disposed of on appeal is properly before an appellate court. Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

Including matters not raised in new trial motion. While it is true that on appeal an appellate court will not consider a matter not raised in a new trial motion, this constraint does not apply to a section (c) motion. Lucero v. People, 173 Colo. 94, 476 P.2d 257 (1970).

But matters not contained in motion cannot be considered on appeal. The ground that certain exhibits were erroneously received upon trial because of an alleged lack of foundation, not having been contained in the section (c) motion filed in the trial court, cannot be raised for the first time on appeal. Walters v. People, 166 Colo. 90, 441 P.2d 647 (1968).

Issue not raised in motion or hearing not reviewable. An issue not raised in either section (c) motion or at the trial court hearing is not properly before the appellate court for review. People v. McClellan, 183 Colo. 176, 515 P.2d 1127 (1973); People v. Simms, 185 Colo. 214, 523 P.2d 463 (1974).

Relief pursuant to section (b) of this rule is discretionary and the exercise of the sentencing court's discretion is generally not subject to appeal. However, defendant's appeal was not barred where the sentencing court declined to entertain the defendant's motion and exercise its discretion for the reason that it erroneously considered itself bound to impose a sentence to the department of corrections by statute. Shipley v. People, 45 P.3d 1277 (Colo. 2002).

Defendant's claim of statutory violation in imposition of consecutive sentences is barred in postconviction proceeding because it was available to defendant to be raised on his direct appeal and was not raised at that time. People v. Banks, 924 P.2d 1161 (Colo. App. 1996).

To merely charge that a trial proceeding was "unconstitutional" is wholly insufficient as a basis for relief or review in an appellate court. Peirce v. People, 158 Colo, 81, 404 P.2d 843 (1965).

Where motion specifies grounds for relief, trial court conducts hearing before appeal determined. Before the merits of an appeal can be determined, it might be necessary first that the trial court conduct a hearing into the merits of the allegations made in the petition for section (c) relief where the motion sets forth facts constituting proper grounds for relief. Roberts v. People, 158 Colo. 76, 404 P.2d 848 (1965); Black v. People, 166 Colo. 358, 443 P.2d 732 (1968).

And hearing should be granted where facts supporting claim appear outside record. Where the very basis of defendant's claim of error is that the trial court should have granted an evidentiary hearing because the facts he alleges in his motion do not appear in the record, then, however regular the proceedings might appear from the trial transcript, it still might be the case that the petitioner did not make an intelligent and understanding waiver of his constitutional rights at trial if the facts on which petitioner's claim is predicated are outside the record, and the court should have granted evidentiary hearing. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

Otherwise, state to furnish transcript on appeal to justify trial court's determination. Where the defendant asserts that his plea was involuntary for reasons not appearing on the record, it is incumbent on the state to provide the appellate court with a transcript which shows that the trial court at the time of a guilty plea made such inquiry as to justify its determination without a hearing on a section (c) peti-

tion that defendant's plea was voluntarily made. Von Pickrell v. People, 163 Colo. 591, 431 P.2d 1003 (1967).

Trial court's judgment not disturbed where evidence amply supports findings. Where the evidence before the trial court amply supports the findings and holding of the trial court, the judgment of the trial court on a section (c) motion will not be disturbed on review. Lamb v. People, 174 Colo. 441, 484 P.2d 798 (1971).

Vacation of guilty plea not upset absent extreme circumstances. When a trial judge holds a hearing on a section (c) motion and determines after hearing the testimony that the interests of justice require the vacation of a guilty plea and that a trial be held on the question of guilt or innocence, this determination will not be upset by an appellate court, except in extreme circumstances. People v. Gantner, 173 Colo. 92, 476 P.2d 998 (1970).

Denial of motion upheld where sufficient evidence to convict the defendant is found. People v. Grass, 180 Colo. 346, 505 P.2d 1301 (1973).

Including testimony of defendant at postconviction hearing concerning truth of probation report. Where a motion under this rule asserts that the defendant was denied the opportunity to confront the witnesses furnishing the information contained in a probation report which he contends was incorrect and prejudicial to him, but at the hearing on this motion defendant was permitted to testify concerning the truth of the matters contained in the probation report and to give his explanation of them, the record supports the trial court's denial of the motion. Wolford v. People, 178 Colo. 203, 496 P.2d 1011 (1972).

Trial court errs in not setting aside conviction where massive, prejudicial publicity. A trial court errs in determining that it cannot compare present day standards of newspaper conduct to past happenings in denying a motion under section (c) to set aside the conviction of a defendant, since the line of cases culminating in Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), hold that the publicity can be so ''massive, pervasive, and prejudicial'' that the denial of a fair trial may be presumed, and the court therefore also erred in holding that a showing must be made that the jurors were actually and directly affected by the publicity. Walker v. People, 169 Colo. 467, 458 P.2d 238 (1969).

And order denying motion reversed where rule on judicial plea-bargain inquiry not followed. The failure of a trial court to follow the requirements of Crim. P. 11, as to the inquiry to be conducted before the acceptance of a plea necessitates a reversal of the order of the trial court denying defendant's section (c) motion. Westendorf v. People, 171 Colo. 123, 464 P.2d 866 (1970).

Denial of motion reversed with directions to conduct new hearing. People v. Burger, 180 Colo. 415, 505 P.2d 1308 (1973).

Trial court erred in denying defendant's motion where defendant was not advised that, in addition to any term of incarceration, a separate and additional term of parole was a required consequence of his plea. People v. Espinoza, 985 P.2d 68 (Colo. App. 1999).

Setting definite execution date in order granting stay of execution not unconstitutional. The fact that an appellate court sets definite execution date in order granting a stay of execution pending the determination of postconviction relief is not ''suggestion of predetermination'' in violation of due process and does not constitute an implied direction to deny petitioner relief. Bell v. Patterson, 279 F. Supp. 760 (D. Colo. 1968), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Court of appeals has jurisdiction to decide if trial court erred in granting a new trial under postconviction relief motion when issues in motion were brought pursuant to the ''other remedies'' portion of this rule. People v. Naranjo, 821 P.2d 836 (Colo. App. 1991).

An order of a trial court granting or denying a motion filed under section (c) is a final order reviewable on appeal. Such order becomes final after the period in which to perfect an appeal expires. People v. Janke, 852 P.2d 1271 (Colo. App. 1992); People v. Ovalle, 51 P.3d 1073 (Colo. App. 2002).

Since an appellate court is not in as good a position as the trial court to make factual findings, the court of appeals erred in vacating respondent's conviction where the trial court denied the section (c) motion without a hearing. People v. Simpson, 69 P.3d 79 (Colo. 2003).

Trial court did not abuse its discretion in denying defendant's section (c) motion without an evidentiary hearing on ineffective assistance of counsel claim. The defendant received sufficient notice from the Crim. P. 11 advisement form and had an affirmative obligation to request clarification at the providency hearing. People v. DiGuglielmo, 33 P.3d 1248 (Colo. App. 2001).

Once a final order under this rule is entered, the only means by which a trial court may alter, amend, or vacate such order is by an appropriate motion under C.R.C.P. 59 or 60. Accordingly, people's argument that the doctrine of law of the case authorizes trial court to reconsider final order is rejected. People v. Janke, 852 P.2d 1271 (Colo. App. 1992).

I. Federal Habeas Corpus.

In Colorado, habeas corpus is not a substitute for review by an appeal. Martinez v. Patterson, 382 F.2d 1002 (10th Cir. 1967).

Federal relief denied where state remedies under this rule not exhausted. A federal court will deny habeas corpus where one fails to exhaust state remedies by failing to seek state review of a trial court's denial of a motion under this rule. Breckenridge v. Patterson, 374 F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967); Kanan v. Denver Dist. Court, 438 F.2d 521 (10th Cir. 1971).

Where the petitioner fails to raise any of his allegations of error in state courts either by direct appeal or by means of this rule, he has not exhausted his state remedies on these issues and cannot obtain habeas corpus relief from the federal courts. Thompson v. Ricketts, 500 F. Supp. 688 (D. Colo. 1980).

But mere availability of possible remedy under this rule cannot preclude federal writ of habeas corpus. Smith v. Tinsley, 223 F. Supp. 68 (D. Colo. 1963). But see Breckenridge v. Patterson, 374 F.2d 857 (10th Cir.), cert. dismissed, 389 U.S. 801, 88 S. Ct. 9, 19 L. Ed. 2d 56 (1967); Kanan v. Denver Dist. Court, 438 F.2d 521 (10th Cir. 1971).

Section (c)(3)(VI)'s bar on claims raised and resolved in a prior appeal or postconviction proceeding has no effect on the availability of federal habeas corpus review where new trial motion was based on the same facts as a later-raised claim under Brady v. Maryland, 373 U.S. 83 (1963), but the Brady claim was not raised in the new trial motion. Lebere v. Abbott, 732 F.3d 1224 (10th Cir. 2013).

Postconviction hearing unnecessary where state supreme court decision already controls question. Where the Colorado supreme court reaches a conclusion on the substantive issue stating it in such a way that under ordinary circumstances a trial court would feel bound by the decision, even though it is only dictum, and would therefore deny a motion made pursuant to section (c), on the grounds that the Colorado supreme court has already decided the question, then, for all practical purposes, the petitioner has exhausted his state remedies, and a petition for federal habeas corpus is proper. Peters v. Dillon, 227 F. Supp. 487 (D. Colo. 1964), aff'd, 341 F.2d 337 (10th Cir. 1965).

State remedies exhausted by prior prosecution of state habeas action. Where the federal habeas corpus act requires that a defendant exhaust one of his available alternative state remedies, the maintenance of a motion under this rule is not necessary where there has been prior prosecution of a habeas corpus action. Martinez v. Tinsley, 241 F. Supp. 730 (D. Colo. 1965).

A state post-conviction application for relief remains "pending" when it could have been but wasn't dismissed on grounds of abandonment. Thus, the limitations period for a federal habeas petition was tolled while the post-conviction application worked its way through the state courts. Fisher v. Raemisch, 762 F.3d 1030 (10th Cir. 2014).

There is no constitutionally mandated requirement that appellate counsel advise a defendant about the time limitation for filing a petition under 28 U.S.C. section 2254, even if defendant were to testify that he told appellate counsel he was interested in pursuing section 2254 relief. People v. Gutierrez-Ruiz, 2014 COA 109, 383 P.3d 44.

Rule 36. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

ANNOTATION

Correction of error discretionary. The language of this rule indicates that the decision to correct an error is discretionary rather than mandatory. Quintana v. People, 200 Colo. 258, 613 P.2d 1308 (1980).

Judge may correct grammar and strike meaningless repetitions. A judge may correct or amend a record, to make certain perfunctory changes to correct grammar, and to strike meaningless repetitions. People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972).

And may correct mittimus to reflect sentence actually imposed. Where a mittimus recites what purports to be the sentence imposed, but a clerical error in the mittimus quite obviously does not reflect the actual sentence intended to be imposed by the sentencing judge, the order of the trial judge correcting the mittimus to reflect the sentences actually imposed by the sentencing judge is the proper procedure. People v. Mason, 188 Colo. 410, 535 P.2d 506 (1975).

But cannot correct mistakes after commutation of sentence. Since the courts lack jurisdiction to alter or amend a commuted sentence imposed by the executive, a motion under this rule to correct clerical oversights in sentencing may not be granted after commutation. People

v. Quintana, 42 Colo. App. 477, 601 P.2d 637 (1979), aff'd, 200 Colo. 258, 613 P.2d 1308 (1980).

Clerical error in judgment of conviction, sentence, and mittimus concerning the sentences imposed for sexual assault and kidnapping is proper grounds for remand to correct the error. People v. Turner, 730 P.2d 333 (Colo. App. 1986).

Prosecutor's request to amend restitution order did not merely correct a scrivener's error, but affected defendant's substantive rights by making his sentence more onerous. The prosecution erred in the amount of restitution requested in its motion for restitution, despite having knowledge of the correct amount in the presentence investigation report. Once the final sentence was entered, the order could not be amended under § 18-1.3-603 (3)(a), and this rule cannot be used to obtain that result. People v. McLain, 2016 COA 74, 411 P.3d 1037.

Rule 37. Appeals from County Court

(a) Filing Notice of Appeal and Docketing Appeal. The district attorney may appeal a question of law, and the defendant may appeal a judgment of the county court in a criminal action under simplified procedure to the district court of the county. To appeal the appellant shall, within 35 days after the date of entry of the judgment or the denial of posttrial motions, whichever is later, file notice of appeal in the county court, post such advance costs as may be required for the preparation of the record and serve a copy of the notice of appeal upon the appellee. He shall also, within such 35 days, docket the appeal in the district court and pay the docket fee. No motion for new trial or in arrest of judgment shall be required as a prerequisite to an appeal, but such motions if filed shall be pursuant to Rule 33(b) of these Rules.

(b) Contents of Notice of Appeal and Designation of Record. The notice of appeal shall state with particularity the alleged errors of the county court or other grounds relied upon for the appeal, and shall include a stipulation or designation of the evidence and other proceedings which the appellant desires to have included in the record certified to the district court. If the appellant intends to urge upon appeal that the judgment or a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. The appellee shall have 14 days after service upon him of the notice of appeal to file with the clerk of the county court and serve upon the appellant a designation of any additional parts of the transcript or record which he deems necessary. The advance cost of preparing the additional record shall be posted by the appellant with the clerk of the county court within 7 days after service upon him of the appellee's designation, or the appeal will be dismissed. If the district court finds that any part of the additional record designated by the appellee was unessential to a complete understanding of the questions raised by the appeal, it shall order the appellee to reimburse the appellant for the cost advanced for the preparation of such part without regard to the outcome of the appeal.

(c) Contents of Record on Appeal. Upon the filing of a notice of appeal and upon the posting of any advance costs by the appellant, as are required for the preparation of a record, unless the appellant is granted leave to proceed as an indigent, the clerk of the county court shall prepare and issue as soon as possible a record of the proceedings in the county court, including the summons and complaint or warrant, the separate complaint if any has been issued, and the judgment. The record shall also include a transcription or a joint stipulation of such part of the actual evidence and other proceedings as the parties designate. If the proceedings have been recorded electronically, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the court, either by him or her or under his or her supervision, within 42 days after the filing of the notice of appeal or within such additional time as may be granted by the county court. The clerk shall notify in writing the opposing parties of the completion of the record, and such parties shall have 14 days within which to file objections. If none are received, the record shall be certified forthwith by the clerk. If objections are made, the parties shall be called for hearing and the objections settled by the county judge and the record then certified.

(d) Filing of Record. When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county

court, and the opposing parties shall be notified by the clerk of the county court of such filing.

(e) Briefs. A written brief setting out matters relied upon as constituting error and outlining any arguments to be made shall be filed in the district court by the appellant within 21 days after certification of the record. A copy of the appellant's brief shall be served upon the appellee. The appellee may file an answering brief within 21 days after such service. A reply brief may be filed within 14 days after service of the answering brief. In the discretion of the district court, the time for filing briefs and answers may be extended.

(f) Stay of Execution. Pending the docketing of the appeal, a stay of execution shall be granted by the county court upon request. If a sentence of imprisonment has been imposed, the defendant may be required to post bail, and if a fine and costs have been imposed, a deposit of the amount thereof may be required by the county court. Upon a request for stay of execution made any time after the docketing of the appeal, such action may be taken by the district court. Stays of execution granted by the county court or district court and, with the written consent of the sureties if any, bonds posted with such courts shall remain in effect until after final disposition of the appeal, unless modified by the district court.

(g) Trials de Novo; Penalty Not Increased. If for any reason an adequate record cannot be certified to the district court the case shall be tried de novo in that court. No action on appeal shall result in an increase in penalty.

(h) Judgment; How Enforced. Unless there is further review by the Supreme Court upon writ of certiorari pursuant to the rules of such court, after final disposition of the appeal the judgment on appeal entered by the district court shall be certified to the county court for action as directed by the district court, except in cases tried de novo by the district court or in cases in which the district court modifies the county court judgment, and in such cases, the judgment on appeal shall be that of the district court and so enforceable.

(i) Appeals to Superior Court. In counties in which a superior court has been established, appeals from the county court shall be taken to the superior court rather than the district court. All of the provisions of this section governing appeals from the county court to the district court are applicable when the appeal is taken to the superior court, and the term ''district court'' as used in this section shall be understood to include the superior court.

Source: (a), (b), (c), and (e) amended and adopted December 14, 2011, effective July 1, 2012; (c) amended and effective January 9, 2014.

ANNOTATION

Law reviews. For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses a case relating to the right of appeal, see 15 Colo. Law. 1613 (1986). For article, ''Criminal Appeals From County Court'', see 41 Colo. Law. 43 (Sept. 2012). For article, ''Appeals of County Court, Municipal Court, and Magistrate Rulings'', see 47 Colo. Law. 32 (Oct. 2018).

Appeals between county and superior courts. The district court has no jurisdiction to interfere with the appeal process between the county and superior courts. Petry v. County Court, 666 P.2d 1125 (Colo. App. 1983).

This rule does not give authority to the court of appeals to hear an appeal of a district court judgment modifying a county court decision. The modified county judgment becomes a district court judgment only for purposes of enforcement. People v. Smith, 874 P.2d 452 (Colo. App. 1993).

Because appellant's conviction originated in a municipal court of record, appellant had 30 days following the judgment of conviction to file the notice of appeal pursuant to § 13-10-116, this rule, and C.M.C.R. 237. Normandin v. Town of Parachute, 91 P.3d 383 (Colo. 2004).

Finality attaches upon expiration of 30 days from judgment. Where judgment and sentence had been entered in the county court, at the expiration of 30 days — no notice of appeal having been filed — it became final. Mills v. People, 181 Colo. 168, 509 P.2d 594 (1973).

And time to file appeal not automatically extended by new trial motion. The filing of a motion for a new trial does not have the effect

of automatically extending the time to file a notice of appeal as prescribed by this rule. Mills v. People, 181 Colo. 168, 509 P.2d 594 (1973).

Appeals filing period begins to run when the judgment becomes final — that is when sentence has been passed — even though sentencing has been delayed for over a year due to defendant's voluntary unavailability. Hellman v. Rhodes, 741 P.2d 1258 (Colo. 1987).

Section 16-2-114 (6) and section (f) of this rule require a county court, upon request, to grant a stay of execution of a defendant's sentence pending appeal of a misdemeanor conviction to the district court. People v. Steen, 2014 CO 9, 318 P.3d 487.

For purposes of appeal, a final judgment must include the sentence. Therefore, after the sentence was vacated on appeal, an order withdrawing plea of guilty was not a final judgment. Ellsworth v. People, 987 P.2d 264 (Colo. 1999).

A trial de novo conducted by the district court is not a review of the county court judgment; it is an entirely new proceeding. Bovard v. People, 99 P.3d 585 (Colo. 2004).

Only in cases tried de novo by the district court will the district court judgment be subject to direct appeal. Justifiably, then, the defendant may seek direct appeal when the district court enters its judgment from a de novo trial. Bovard v. People, 99 P.3d 585 (Colo. 2004).

Certiorari review does not suffice as an appellate review from a final judgment of the district court. Bovard v. People, 99 P.3d 585 (Colo. 2004).

Transcript of all evidence presented to lower court relevant to challenged ruling required. Where an appellant challenges a ruling that was based, either in whole or in part, on evidence presented to the lower court, a transcript of all evidence pertaining to the decision must be included in the record; however, the appellant is not required by Crim. P. 37(b), to include in the record a transcript of evidence that is not relevant to the issues raised on appeal. Holcomb v. City & County of Denver, 199 Colo. 251, 606 P.2d 858 (1980); People v. Campbell, 174 P.3d 860 (Colo. App. 2007).

Filing a notice of appeal in the county court is not a jurisdictional requirement of section (a), but timely docketing an appeal in the district court is sufficient to invoke the appellate jurisdiction of that court. Peterson v. People, 113 P.3d 706 (Colo. 2005).

Timely filing of a brief is not jurisdictional under this rule, and a trial court's discretion to extend the time to file a brief under section (e) is not restricted to extensions requested within the normal filing time. People v. Chapman, 192 Colo. 322, 557 P.2d 1211 (1977).

Excusable or inexcusable neglect considered in deciding whether to reinstate after late brief. Although no ''excusable neglect'' prerequisite appears in section (e), the court may consider excusable or inexcusable neglect among other factors in deciding whether to grant a motion to reinstate after late filing of a brief. People v. Chapman, 192 Colo. 322, 557 P.2d 1211 (1977).

Unavailability or inadequacy of record mandates trial de novo. If the record is unavailable, a defendant should not suffer for the lack thereof, but should be afforded an entirely new trial; if a record is inadequate, the district court must grant a trial de novo under section (g). It has no discretion in the matter. Hawkins v. Superior Court, 196 Colo. 86, 580 P.2d 811 (1978).

When a felony case starts in county court pursuant to § 16-5-101 (1)(c) and is resolved by a plea to only misdemeanor charges, it is a county court matter and an appeal must be made to the district court. People v. Vargas-Reyes, 2018 COA 181, 434 P.3d 1198.

Applied in People v. Lessar, 629 P.2d 577 (Colo. 1981); People v. Luna, 648 P.2d 624 (Colo. App. 1982); Waltemeyer v. People ex rel. City of Arvada, 658 P.2d 264 (Colo. 1983); Dike v. People, 30 P.3d 197 (Colo. 2001).

Rule 37.1. Interlocutory Appeal from County Court

(a) Grounds. The prosecuting attorney may file an interlocutory appeal in the district court from a ruling of a county court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the prosecuting attorney certifies to the judge who granted such motion and to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) Filing Notice of Appeal. The prosecuting attorney shall file the notice of appeal with the clerk of the district court and shall serve the defendant and the clerk of the trial court with a copy thereof. Such notice of appeal shall be filed within 14 days of the entry of the order being appealed and any docket fee shall be paid at the time of the filing.

(c) Contents of Record on Appeal. The record for an interlocutory appeal shall consist of the information or charging document, the motions filed by the defendant or defendants and the grounds stated in section (a) above, a transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or

photographs thereof as the parties may designate (subject to the provisions in C.A.R. 11(b) pertaining to exhibits of bulk), the order of court ruling on said motions and the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. The record shall be filed within 14 days of the date of filing the notice of appeal, and may be supplemented by order of the district court.

(d) Briefs. Within 14 days after the record has been filed in the district court, the prosecuting attorney shall file an opening brief. Within 14 days after service of said opening brief, the defendant shall file an answer brief, and the prosecuting attorney shall have 7 days after service of said answer brief to file a reply brief.

(e) Disposition of Cause. Unless oral argument is ordered by the court and it rules on the record and in the presence of the parties, the decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to all parties. No petition for rehearing shall be permitted. A certified copy of the judgment and directions to the county court, and a copy of the written opinion, if any, shall constitute the mandate of the district court, concluding the appeal and restoring jurisdiction to the county court. Such mandate shall issue and be transmitted by the clerk of the court by mail to the trial judge and all parties on the 44th day after the district court's oral or written order, unless the district court is given notice by one of the parties that it has sought further review by the supreme court upon a writ of certiorari pursuant to the rules of that court, in which case the mandate shall issue upon notification that certiorari has been denied or upon receiving the remittitur of the supreme court.

(f) Time. The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

(g) If no procedure is specifically prescribed by this rule, the court shall look to the Rules of Appellate Procedure for guidance.

(h) Nothing in this Rule 37.1 shall be construed to deprive the county court of jurisdiction to consider bail issues during the pendency of the interlocutory appeal.

Source: Added July 16, 1992, effective November 1, 1992; (b) to (e) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For article, ''Appeals of County Court, Municipal Court, and Magistrate Rulings'', see 47 Colo. Law. 32 (Oct. 2018).

The 10-day time frame under subsection (b) for filing an interlocutory appeal is to be calculated according to C.A.R. 26(a), with intervening Saturdays, Sundays, and legal holidays excluded in the computation. People v. Zhuk, 239 P.3d 437 (Colo. 2010).

Rule 38. Appeals from the District Court

Appeals from the district court shall be conducted pursuant to the Colorado Appellate Rules.

Source: Entire rule amended and adopted June 27, 2002, effective July 1, 2002.

Rule 39. Stays

The filing of an interlocutory appeal or an appeal from an order that dismisses one or more counts of a charging document prior to trial automatically stays all proceedings until final determination of the appeal, unless the appellate court lifts such stay in whole or in part.

Source: Entire rule added and adopted June 27, 2002, effective July 1, 2002.

Rule 40. (Reserved)

VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 41. Search, Seizure, and Confession

(a) Authority to Issue Warrant. A search warrant authorized by this Rule may be issued by any judge of a court of record.

(b) Grounds for Issuance. A search warrant may be issued under this Rule to search for and seize any property:

(1) Which is stolen or embezzled; or

(2) Which is designed or intended for use as a means of committing a criminal offense; or

(3) Which is or has been used as a means of committing a criminal offense; or

(4) The possession of which is illegal; or

(5) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(6) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(7) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to public health.

(c) Application for Search Warrant. (1) A search warrant shall issue only on affidavit sworn or affirmed to before the judge, except as provided in (c)(3). Such affidavit shall relate facts sufficient to:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) Establish the grounds for issuance of the warrant, or probable cause to believe that such grounds exist; and

(IV) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(2.5) A no-knock search warrant, which means, for purposes of this section, a search warrant authorized by the court to be executed by law enforcement officers through a forcible entry without first announcing their identity, purpose, and authority, shall be issued only if the affidavit for such warrant:

(I) Complies with the provisions of subsections (1) and (2) of this section (c) and section 16-3-303(4), C.R.S.;

(II) Specifically requests the issuance of a no-knock search warrant;

(III) Relates sufficient circumstances to support the issuance of a no-knock search warrant;

(IV) Has been reviewed and approved for legal sufficiency and signed by a district attorney with the date and his or her attorney registration number on the affidavit, pursuant to section 20-1-106.1(2), C.R.S.; and

(V) If the grounds for the issuance of a no-knock warrant are established by a confidential informant, the affidavit for such warrant shall contain a statement by the affiant concerning when such grounds became known or were verified by the affiant, but such statement shall not identify the confidential informant.

(3) Application and Issuance of a Warrant by fascimile or Electronic Transmission. A warrant, signed affidavit, and accompanying documents may be transmitted by electronic fascimile transmission (fax) or by electronic transfer with electronic signatures

to the judge, who may act upon the transmitted documents as if they were originals. A warrant affidavit may be sworn to or affirmed by administration of the oath over the telephone by the judge. The affidavit with electronic signature received by the judge or magistrate and the warrant approved by the judge or magistrate, signed with electronic signature, shall be deemed originals. The judge or magistrate shall facilitate the filing of the original affidavit and original warrant with the clerk of the court and shall take reasonable steps to prevent the tampering with the affidavit and warrant. The issuing judge or magistrate shall also forward a copy of the warrant and affidavit, with electronic signatures, to the affiant. This subsection (c)(3) does not authorize the court to issue warrants without having in its possession either a faxed copy of the signed affidavit and warrant or an electronic copy of the affidavit and warrant with electronic signatures.

COMMITTEE COMMENT

For purposes of this rule, the term ''electronic signature'' has the same meaning as used in C.R.S. § 16-1-106(4)(c).

(d) Issuance, Contents, Execution, and Return of Warrant. (1) If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that such grounds exist, he shall issue a search warrant, which shall:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) State the grounds or probable cause for its issuance; and

(IV) State the names of the persons whose affidavits of testimony have been taken in support thereof.

(2) The search warrant may also contain such other and further orders as the judge may deem necessary to comply with the provisions of a statute, charter, or ordinance, or to provide for the custody or delivery to the proper officer of any property seized under the warrant, or otherwise to accomplish the purposes of the warrant.

(3) Unless the court otherwise directs, every search warrant authorizes the officer executing the same:

(I) To execute and serve the warrant at any time; and

(II) To use and employ such force as may reasonably be necessary in the performance of the duties commanded by the warrant.

(4) **Joinder.** The search of one or more persons, premises, places, or things, may be commanded in a single warrant or in separate warrants, if compliance is made with Rule 41(c)(1)(IV) of these Rules.

(5) **Execution and Return.** (I) Except as otherwise provided in this Rule, a search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located.

(II) Any judge issuing a search warrant, for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported may make an order authorizing a peace officer to be named in such warrant to execute the same, and the person named in such order may execute such warrant anywhere in the state. All sheriffs, coroners, police officers, and officers of the Colorado State Patrol, when required, in their respective counties, shall aid and assist in the execution of such warrant. The order authorized by this subsection (5) may also authorize execution of the warrant by any officer authorized by law to execute it in the county wherein the property is located.

(III) When any officer, having a warrant for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported, shall be in pursuit thereof and such person, motor vehicle, aircraft, or other object shall cross or enter into another county, such officer is authorized to execute the warrant in such other county.

(IV) It shall be the duty of all peace officers into whose hands any search warrant shall come, to execute the same, in their respective counties or municipalities, and make due return thereof.

(V) The officers executing a search warrant shall first announce their identity, purpose, and authority, and if they are not admitted, may make a forcible entry into the place to be searched; however, the officers may make forcible entry without such prior announcement if the warrant expressly authorizes them to do so or if the particular facts and circumstances known to them at the time the warrant is to be executed adequately justify dispensing with this requirement.

(VI) A search warrant shall be executed within 14 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(VII) A warrant under Rule 41(b) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(d)(5)(VI) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant; or

(2) The warrant is insufficient on its face; or

(3) The property seized is not that described in the warrant; or

(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued; or

(5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

(f) Return of Papers to Clerk. The judge who has issued a warrant shall attach to the warrant a copy of the return, inventory, and all other documents in connection therewith, including any affidavit in application for the warrant, and shall file them with the clerk of the district court for the county of origin. If a case has been filed in the district court after issuance of the warrant, the clerk of the district court shall notify the clerk of the county court which issued it that the warrant has been filed in the district court. When the warrant has been issued by the county judge and there is no subsequent filing in the district court, after the issuance of the warrant, the documents shall remain in the county court. Any documents transmitted by fax or electronic transmission to the judge to obtain the warrant

and the documents transmitted by the judge to the applicant shall be filed with the clerk of the court.

(g) Suppression of Confession or Admission. A defendant aggrieved by an alleged involuntary confession or admission made by him, may make a motion under this Rule to suppress said confession or admission. The motion shall be made and heard before trial unless opportunity therefor did not exist or defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial. The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

(h) Scope and Definition. This Rule does not modify any statute, inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

COMMITTEE COMMENT

This rule is intended to facilitate the issuance of warrants by eliminating the need to physically carry the supporting affidavit to the judge.

Source: The introductory portion to (c), (c)(3), and (f) amended July 16, 1993, effective November 1, 1992; entire rule amended and effective October 4, 2001; entire rule corrected and effective October 22, 2001; entire rule corrected and effective October 25, 2001; (d)(5)(VI) amended May 7, 2009, effective July 1, 2009; (c)(3) and (f) amended and effective February 10, 2011; (c)(3) amended and effective June 16, 2011; (d)(5)(VI) amended and adopted December 14, 2011, effective July 1, 2012; (d)(5)(VI) amended and (d)(5)(VII) added, effective January 11, 2018.

Editor's note: The 2001 amendments to this section added a new (d)(5)(V) and renumbered the existing (d)(5)(V) as (d)(5)(VI).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For note, ''Search and Seizure Since Mapp'', see 36 U. Colo. L. Rev. 391 (1964). For comment on Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963), appearing below, see 36 U. Colo. L. Rev. 435 (1964). For article, ''Attacking the Seizure — Overcoming Good Faith'', see 11 Colo. Law. 2395 (1982). For comment, ''Colorado's Approach to Searches and Seizures in Law Offices'', see 54 U. Colo. L. Rev. 571 (1983). For article, ''Criminal Procedure'', which discusses a Tenth Circuit decision dealing with post-arrest silence and searches, see 61 Den. L.J. 281 (1984). For article, ''The Demise of the Aquilar-Spinelli Rule: A Case of Faulty Reception'', see 61 Den. L.J. 431 (1984). For comment, ''The Good Faith Exception: The Seventh Circuit Limits the

Exclusionary Rule in the Administrative Context'', see 61 Den. L.J. 597 (1984). For article, ''Veracity Challenges in Colorado: A Primer'', see 14 Colo. Law. 227 (1985). For article, ''Consent Searches: A Brief Review'', see 14 Colo. Law. 795 (1985). For article, ''Criminal Procedure'', which discusses Tenth Circuit decisions dealing with searches, see 62 Den. U. L. Rev. 159 (1985). For article, ''Civil Action for Return of Property: 'Anomalous' Federal Jurisdiction in Search of Justification'', see 62 Den. U. L. Rev. 741 (1985). For article, ''People v. Mitchell: The Good Faith Exception in Colorado'', see 62 Den. U. L. Rev. 841 (1985). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses cases relating to protection from searches and warrant requirements, see 15 Colo. Law. 1564 and 1566 (1986). For article, ''Criminal Procedure'', which discusses Tenth Circuit decisions dealing with unreasonable searches and seizures, see 65 Den. U. L. Rev. 535 (1988). For article ''Electronic Search Warrants in Colorado'', see 44 Colo. Law. 45 (June 2015).

Applied in Seccombe v. District Court, 180 Colo. 420, 506 P.2d 153 (1973); People v. Hoinville, 191 Colo. 357, 553 P.2d 777 (1976); People v. Fletcher, 193 Colo. 314, 566 P.2d 345 (1977); People v. Valdez, 621 P.2d 332 (Colo. 1981); People v. Conwell, 649 P.2d 1099 (Colo. 1982); People v. Lindsey, 660 P.2d 502 (Colo. 1983); People v. Roybal, 672 P.2d 1003 (Colo. 1983).

II. CONSTITUTIONAL PROTECTIONS.

State courts to resolve search and seizure problems in light of constitutional guarantees. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), does not by its terms nationalize the law of search and seizure, but it does compel state courts to examine and resolve the problems arising from the search for and the seizure of evidence in the light of state and federal constitutional guarantees against unlawful searches and seizures. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

And state rules proper, provided they do not violate federal constitution. Rules establishing workable state procedures governing searches and seizures, even though they may not be strictly in accord with federal procedures, are proper provided that such rules do not violate the fourth amendment proscription against unreasonable searches and seizures. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

Thus, this rule issued to implement constitutional guarantees. As a result of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and to implement the constitutional guarantees against unlawful searches and seizures, the supreme court of Colorado on November 1, 1961, initially issued this rule providing for the manner in which search warrants should be issued and making property obtained by an unlawful search and seizure inadmissible in evidence in the courts of this state, provided timely motions to suppress are made. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

Though use of search warrant has long been encouraged in Colorado. It has long been the policy of the supreme court of Colorado and other courts to encourage the use of the search warrant as a most desirable method of protecting and preserving the constitutional rights of the accused. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

But previous statute on issuance of search warrants held unconstitutional. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970); People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971) (decided under § 48-5-11(3), C.R.S. 1963).

Federal constitution guarantees security of persons against unreasonable searches. The fourth amendment to the United States Constitution does not guarantee the security of persons against all searches but only those which are unreasonable. Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970).

And practical accuracy determines whether warrant complies with constitutional requirements. The standard for determining whether search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety. People v. Ragulsky, 184 Colo. 86, 518 P.2d 286 (1974).

No constitutional violation when prison cells "shaken down". Considering normal and necessary prison practices and the charge placed upon prison officials to supervise the operation of state prisons, to preserve order and discipline therein, and to maintain prison security, there is no violation of the fourth amendment prohibition against unreasonable search and seizure when prison cells are searched or ''shaken down'' in carrying out this charge. Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970).

So long as searches not cruel, or conducted for harassing or humiliating purposes. Searches conducted by prison officials entrusted with the orderly operation of the prisons are not unreasonable so long as they are not conducted for the purpose of harassing or humiliating the inmate or in a cruel or unusual manner. Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970).

And seizure of business records not unconstitutional where records instrumentalities of crime. Seizure of records does not violate defendant's privilege against self-incrimination where defendant is not ''compelled'' to produce the papers, the papers are not communicative in

nature, they are business records of which others must have knowledge rather than personal and private writings, and they are instrumentalities of the crime with which defendant is charged. People v. Tucci, 179 Colo. 373, 500 P.2d 815 (1972).

Voluntary surrender of nontestimonial evidence waives any constitutional protections. People v. Mattas, 645 P.2d 254 (Colo. 1982).

III. APPLICABILITY OF RULE.

Validity of a search warrant is to be judged under this rule. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970); People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

Consequently, it is necessary for search warrant to comply with provisions of this rule. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

But only unlawfully seized or obtained evidence or confession suppressed. This rule provides only for motions to suppress physical evidence unlawfully seized, as well as confessions and statements unlawfully obtained, from accused defendants. People v. McNulty, 173 Colo. 491, 480 P.2d 560 (1971).

Mandatory pretrial suppression of evidence hearing only for matters listed in rule. There is nothing in the Colorado Rules of Criminal Procedure which contemplates a mandatory pretrial suppression of evidence hearing other than for the matters listed in sections (e) and (g) of this rule, viz., evidence obtained because of an illegal search and seizure or an extrajudicial confession or admission. People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970).

Therefore, this rule does not encompass motions for suppression of testimonial evidence. People v. McNulty, 173 Colo. 491, 480 P.2d 560 (1971).

Nor motions for suppression of identification testimony. Where the defendant contends that he was not afforded counsel during a lineup and that the lineup was overly suggestive, so that identification testimony should not be allowed into evidence, such a matter is to be resolved at trial rather than pursuant to this rule. People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970).

Likewise, whether an arrest is without probable cause is a subject which may not properly be considered under a motion to suppress. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Interlocutory appeals by state made only from adverse suppression rulings governed by rules. C.A.R. 4.1, which provides for interlocutory appeals by the state, is designed to review rulings of the trial court made upon suppression hearings under sections (e) and (g) of this rule; where objections to proposed evidence do not come within these sections, rulings on the same are not subject to review under C.A.R. 4.1. People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970); People v. McNulty, 173 Colo. 491, 480 P.2d 560 (1971); People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971); People v. Patterson, 175 Colo. 19, 485 P.2d 494 (1971); People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971) (all cases decided prior to 1979 amendment of C.A.R. 4.1).

Under C.A.R. 4.1, interlocutory appeals may only be made by the state from adverse rulings by a district court to motions made pursuant to sections (e) and (g) of this rule and Crim. P. 41.1(i). People v. Morgan, 619 P.2d 64 (Colo. 1980).

A person who has property unlawfully seized by law enforcement officers and who has not been charged with a crime has standing to bring a claim for return of the property under section (e). Boudette v. State, 2018 COA 109, 425 P.3d 1228.

Although there was no criminal complaint or information filed against the property owner, this rule still governs his claim, and section (e) does not require a person to be a criminal defendant to file a motion under this rule. Boudette v. State, 2018 COA 109, 425 P.3d 1228.

IV. AUTHORITY TO ISSUE WARRANT.

Only judicial officer may issue search warrant. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); Mayorga v. People, 178 Colo. 106, 496 P.2d 304 (1972).

And only such authority may modify warrant. It is axiomatic that the right to alter, modify, or correct a warrant is necessarily vested only in a judicial authority. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); Mayorga v. People, 178 Colo. 106, 496 P.2d 304 (1972).

So, alteration of search warrant by police officer is usurpation of judicial function and is therefore improper. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

But warrant modified before issued by judge not subject to challenge. Where changes and modifications on a search warrant take place before it is signed and issued by a judge, the validity of the search warrant is not subject to challenge. People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

V. APPLICATION FOR WARRANT.

A. General Procedural Requirements.

Rule requires affidavit to support search warrant, which establishes the grounds for the issuance of the warrant, and demands that the affidavit be sworn to before a judge. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Which must comply with United States supreme court standards. If a search warrant is to be sustained, the affidavit must comply with the standards set forth in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, 10 A.L.R.3d 359 (1966), and in Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

But technical requirements and elaborate specificity are not required in the drafting of affidavits for search warrants. People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

Probable cause must be supported by oath or affirmation reduced to writing. The fourth amendment to the United States constitution requires probable cause supported by oath or affirmation as a condition precedent to the valid issuance of a search warrant; § 7 of art. II, Colo. Const., is even more restrictive and provides that probable cause must be supported by oath or affirmation reduced to writing. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Under the Colorado Constitution, the warrant can only be issued upon probable cause supported by oath or affirmation which is ''reduced to writing''. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

And verbal communication insufficient. Verbal communication of facts, as contrasted with written communication, will not suffice to establish probable cause. People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

Previously, this rule did not require affidavit to be attached to search warrant. People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971); People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

Admission of evidence seized from a defendant's residence pursuant to a defective warrant did not constitute reversible error, even though warrant was issued based on an affidavit inadvertently failing to allege facts linking defendant to the residence to be searched. People v. Deitchman, 695 P.2d 1146 (Colo. 1985).

Failure for good cause to comply with section (c)(1), which requires affidavits for search warrants to be sworn to or affirmed before the issuing judge, does not constitute a constitutional violation that automatically triggers the exclusionary rule. People v. Fournier, 793 P.2d 1176 (Colo. 1990).

B. Role of Courts and Police.

Probable cause determined by detached magistrate, not police officer. Search warrants must be supported by evidentiary affidavits containing sufficient facts to allow ''probable cause'' to be determined by a detached magistrate instead of the accusing police officer. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F. 2d 733 (10th Cir. 1968).

Existence of probable cause must be determined by a member of the judiciary rather than by a law enforcement officer who is employed to apprehend criminals and to bring before the courts for trial those who would violate the law. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Be it a judge of the supreme, district, county, or superior court. The determination of whether probable cause exists is a judicial function to be performed by the issuing magistrate, which in Colorado may be any judge of the supreme, district, county, or superior court under this rule, and is not a matter to be left to the discretion of a police officer. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

And to dispense with this requirement would render search warrant itself meaningless, since it would allow a police officer to subjectively determine probable cause. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968).

Police officer's role limited to providing judge with facts to make proper determination. The role of the police officer in search warrant practice is limited solely to providing the judge with facts and trustworthy information upon which he, as a neutral and detached judicial officer, may make a proper determination. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavits for warrants interpreted by magistrates in common-sense fashion. Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

And judge, in determining sufficiency, looks to four corners of affidavit. In determining whether the affidavit is sufficient, the judge must look within the four corners of the affidavit to determine whether there are grounds for the issuance of a search warrant. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); People v. Woods, 175 Colo. 34, 485 P.2d 491 (1971); People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

Issuing magistrate need only state result that probable cause exists. This rule was not intended to require the issuing magistrate to reiterate his mental process for reaching the result that probable cause exists, but rather to require only that he state that the result has been reached. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971); People v. Noble, 635 P.2d 203 (Colo. 1981).

Reasons given for search judicially reviewed by standards appropriate for reason-

able police officer. Where an officer believes he has probable cause to search and states his reasons, an appellate court will not examine such reasons grudgingly, but will measure them by standards appropriate for a reasonable, cautious, and prudent police officer trained in the type of investigation which he is making. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

For negative attitude by reviewing courts discourages police from submitting evidence before acting. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

C. Underlying Facts and Circumstances.

Issuing magistrate to be apprised of underlying facts and circumstances showing probable cause. Before the issuing magistrate can properly perform his official function he must be apprised of the underlying facts and circumstances which show that there is probable cause to believe that proper grounds for the issuance of the warrant exist. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973); People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

The police must show to the issuing magistrate the underlying facts and circumstances upon which the magistrate can determine that probable cause exists for the issuance of a warrant. People v. Massey, 178 Colo. 141, 495 P.2d 1141 (1972).

And it is elementary and of no consequence that police have additional information which could provide a basis for the issuance of the warrant. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Mere affirmance of the belief or suspicion on the officer's part is not enough, for to hold otherwise would attach controlling significance to the officer's belief rather than to the magistrate's judicial determination. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Mere conclusory belief or suspicion by an affiant officer is not enough upon which to base the issuance of a search warrant. People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

Nor will affiant's conclusory declaration that he has probable cause add strength to the showing made. People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

For without facts, affidavits fatally defective. Affidavits containing only the conclusion of the police officer that he believes that certain property is on the premises or person and that such property is designed, or intended, or is, or has been, used as a means of committing a criminal offense, or the possession of which is illegal, without setting forth facts and circumstances from which the judicial officer can determine whether probable cause exists are fatally defective. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

And warrant issued on basis of mere conclusion deemed nullity. Where the mere conclusions by an officer provide nothing from which the judge can make an independent determination of probable cause, a warrant issued on the basis of such an affidavit is a nullity. People v. Baird, 172 Colo. 112, 470 P.2d 20 (1970).

But a search warrant may be based on hearsay, as long as a substantial basis for crediting the hearsay exists. People v. Woods, 175 Colo. 34, 485 P.2d 491 (1971).

Police officer's statements in affidavit that are erroneous and false must be stricken and may not be considered in determining whether the affidavit will support the issuance of a search warrant. People v. Malone, 175 Colo. 31, 485 P.2d 499 (1971).

Where the information supplied by an affiant which supports the issuance of a search warrant is false, the trial court has no alternative but to strike the admittedly erroneous information which the affiant supplied. People v. Hampton, 196 Colo. 466, 587 P.2d 275 (1978).

But other information supplied by affidavit not ignored. Fact that some portions of affidavit are erroneous does not require the issuing magistrate to ignore the other information supplied by the affidavit. People v. Hampton, 196 Colo. 466, 587 P.2d 275 (1978).

And where affidavit still sufficient, court will not strike down warrant. Where the affidavit still contains material facts sufficient as a matter of law to support the issuance of a warrant after the deletion of erroneous statements, the court will not strike down the warrant because the affidavit is not completely accurate. People v. Malone, 175 Colo. 31, 485 P.2d 499 (1971).

Verbal communications cannot correct deficient affidavit. Verbal communications, to the magistrate, of additional supporting information cannot correct an affidavit which is basically deficient in its statement of the underlying facts and the circumstances relied upon. People v. Padilla, 182 Colo. 101, 511 P.2d 480 (1973).

But sworn testimony to supplement warrant, or amendment of affidavit, may be required. Should the judge to whom application has been made for the issuance of a search warrant determine that the affidavit is insufficient, he can require that sworn testimony be offered to supplement the warrant or can de-

mand that the affidavit be amended to disclose additional facts, if a search warrant is to be issued. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavit containing stale information. Although crimes were perpetrated eight months prior to application for search warrant, because officers proceeded with all due diligence upon discovery of information upon which to base request for a search warrant, the affidavit was sufficient to establish probable cause. People v. Cullen, 695 P.2d 750 (Colo. App. 1984).

Anticipatory warrants are barred by language of rule and identical language in § 16-3-303 requiring that property to be searched for, seized, or inspected ''is located at, in, or upon'' premise, person, place, or thing to be searched. People v. Poirez, 904 P.2d 880 (Colo. 1995).

D. Finding of Probable Cause.

Police entry into individual's private domain made only upon showing of probable cause. It is only upon a showing of probable cause that the legal doors are opened to allow the police to gain official entry into an individual's domain of privacy for the purpose of conducting a search or to make an official seizure under the constitution. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Not necessary to specifically allege that possession of articles illegal. To establish the grounds in an affidavit it is not necessary that the person seeking the search warrant specifically allege therein the conclusion that the possession of the articles is illegal. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970); People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

Or that the use thereof is illegal. Where an affidavit identifies the articles in question and alleges where they are located, but does not state that the possession or use thereof is illegal, the fact that the illegality is not set forth in the affidavit does not prevent the issuance of a search warrant. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

But warrant issues upon judge finding grounds established, or probable cause therefor. This rule provides that if the judge is satisfied from the facts alleged in the affidavit that the existence of one or more of the grounds for the issuance of a warrant has been established or that there is probable cause to believe that one or more grounds for issuing the warrant exist, then it should issue. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970); People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

Warrant authorized upon connection being provided between evidence and criminal activity. One test for authorizing a search warrant for the seizure of certain articles is: Does the evidence in itself or with facts known to the officer prior to the search, excluding any facts subsequently developed, provide a connection between the evidence and criminal activity? People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Probable cause exists where facts warrant reasonable belief offense committed. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been, or is being, committed. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); Finley v. People, 176 Colo. 1, 488 P.2d 883 (1971).

Moreover, in dealing with probable cause, one deals with probabilities; these are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971); Finley v. People, 176 Colo. 11, 488 P.2d 883 (1971).

Hence, the odor of a decomposing body is certainly probable cause for obtaining a search warrant. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

Affidavit must support probable cause finding as to each place searched. The fact that places to be searched were apartments rather than single-family residences does not alter the rule that an affidavit must support a finding of probable cause as to each separate place to be searched. People v. Arnold, 181 Colo. 432, 509 P.2d 1248 (1973).

Affidavit detailing various items at named address presents sufficient facts showing probable cause. Where the affidavit of a police officer in support of a search warrant sets forth at length the various items of information regarding the presence of certain articles at a named address, elaborating in detail on the items of police surveillance and discovery of such, such an affidavit presents ample and sufficient facts showing probable cause for the issuance of the search warrant. People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

Officers rightly in defendant's residence entitled to seize stolen items in plain view. If the supporting affidavit was sufficient to provide probable cause for issuance of a warrant, are the searching officers are rightfully in the defendant's residence, then the officers are entitled to seize items in plain view which they recognize as stolen. People v. Espinoza, 195 Colo. 127, 575 P.2d 851 (1978).

Even if not false, statements of officer-affiants may be so misleading that a finding of probable cause may be deemed erroneous. People v. Winden, 689 P.2d 578 (Colo. 1984).

Probable cause to issue a search warrant for a residence was sufficiently established by affidavit that was based primarily on information provided by confidential police informant and only thinly corroborated by independent police investigation. The ''totality of circumstances'' test for determining whether probable cause existed for issuing warrant was met. People v. Paquin, 811 P.2d 394 (Colo. 1991).

Where only non-criminal activity is corroborated by independent police investigation, the question of whether probable cause exists focuses on the degree of suspicion that attaches to the types of corroborated non-criminal acts and whether the informant provides details that are not easily obtained. People v. Pacheco, 175 P.3d 91 (Colo. 2006).

E. Informers.

Affidavit for search warrant based on an informant's information must meet a two-pronged test requiring that the officer establish: (1) The underlying circumstances from which the informant concluded what he claims, and (2) some of the underlying circumstances from which the officer concludes that the informant is credible or his information reliable. People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971); Stork v. People, 175 Colo. 324, 488 P.2d 76 (1971).

The standards of probable cause for issuance of search warrant based on information given to affiant police officer by unidentified informant are that the affidavit must: (1) Allege facts from which the issuing magistrate can independently determine whether there are reasonable grounds to believe that an illegal activity is being carried on in the place to be searched; and (2) set forth sufficient facts to allow the magistrate to determine independently if the informer is credible or his information reliable. People v. Peschong, 181 Colo. 29, 506 P.2d 1232 (1973); People v. Harris, 182 Colo. 75, 510 P.2d 1374 (1973); People v. Baird, 182 Colo. 284, 512 P.2d 629 (1973); People v. Masson, 185 Colo. 65, 521 P.2d 1246 (1974).

The two-pronged test which emphasizes the basis upon which an informer's tip will provide a foundation for the issuance of a search warrant requires that the affidavit set forth: (1) The underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion; and (2) support of the affiant's claim that the informant was credible or his information reliable. People v. McGill, 187 Colo. 65, 528 P.2d 386 (1974); People v. Dailey, 639 P.2d 1068 (Colo. 1982).

And informant's personal knowledge satisfies first prong of test. Personal observation by informant of the objects of the search within the place to be searched satisfied the first prong of establishing probable cause. People v. Ward, 181 Colo. 246, 508 P.2d 1257 (1973); People v. Harris, 182 Colo. 75, 510 P.2d 1374 (1973).

The requirement that the affidavit for a search warrant set forth underlying circumstances so as to enable a magistrate to independently judge the validity of the informant's conclusion that criminal activity exists can be satisfied by the assertion of personal knowledge of the informant. People v. Montoya, 189 Colo. 106, 538 P.2d 1332 (1975).

Where the affiant states that the informant personally observed illegal property in the premises to be searched, this statement is sufficient to permit the issuing magistrate to determine independently that there were reasonable grounds to believe that illegal activity was being carried on in the place to be searched. People v. Harris, 182 Colo. 75, 510 P.2d 1374 (1973).

Where it appears that the informant personally saw an illegal narcotic on the premises, that he was given an illegal narcotic by someone on the premises and that he observed other illegal narcotics at the time he left the premises, these facts are sufficient to allow a magistrate to determine whether there was probable cause to determine presence of illegal activity. People v. Baird, 182 Colo. 284, 512 P.2d 629 (1973).

But informant's information insufficient where place searched not connected with illegal substance. An affidavit, while stating that an informant was present when defendants sold contraband, but does not state that he was ever in the defendants' place, that he had seen such contraband in the defendants' place, or that he had witnessed the sale of such in the defendants' place is not sufficient information upon which to base a search warrant of defendants' place. People v. Massey, 178 Colo. 141, 495 P.2d 1141 (1972).

Also, affidavit insufficient if no explanation of how information received. An affidavit is insufficient to support a finding of probable cause where the officer does not more than state that he received information from an investigator who received the information from a reliable source and there is nothing in the affidavit concerning personal knowledge of the facts on the part of either officer, the facts upon which the informant based his information, or the circumstances from which the officers could conclude that the informant is credible or his information reliable. People v. Baird, 172 Colo. 112, 470 P.2d 20 (1970).

An affidavit does not meet the test if there is no explanation as to how the police obtained the information, nor does the affidavit set forth who made the observation or whether the information was obtained from an eyewitness or from a person who received the information indirectly. People v. Myers, 175 Colo. 109, 485 P.2d 877 (1971).

Magistrate must be shown facts to form basis for believing informant's information reliable. Some facts must also be shown to a magistrate upon which he can form a basis for believing information supplied by an informer is credible or the informer reliable. People v. Massey, 178 Colo. 141, 495 P.2d 1141 (1972).

There must be a comprehensive statement of underlying facts upon which the magistrate can make an independent determination that the informant is credible or his information reliable. People v. Aragon, 187 Colo. 206, 529 P.2d 644 (1974).

And merely stating informant known to be reliable does not establish his credibility. An affidavit does not establish the credibility of an informant by merely stating that the informant is known to be reliable, nor does an affidavit establish the credibility of an informant by merely stating that the informant is known to be reliable based on ''past information'' supplied by the informer which has proved to be accurate. Although the words ''past information'' might conjure up in the mind of the officer some knowledge of the underlying circumstances from which the officer might conclude that the informant is reliable, the judge has not been apprised of such facts, and consequently, he cannot make a disinterested determination based upon such facts. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

As a basis for issuing a search warrant, the mere assertion of reliability is not sufficient to establish an informant's credibility. People v. Aragon, 187 Colo. 206, 529 P.2d 644 (1974).

An affidavit for a search warrant seeking to show an informant's credibility is not satisfactory by merely stating that the informant is reliable, or that he has supplied information in the past which proved to be accurate. Nor are irrelevant, albeit correct, details sufficient. People v. Montoya, 189 Colo. 106, 538 P.2d 1332 (1975).

Where the only recital in the affidavit for a search warrant bearing upon the informant's credibility or the reliability of the information supplied was as follows: ''That the confidential informant has related information to the affiant regarding several previous narcotics and dangerous drugs sellers and users which has been confirmed and proven reliable by the affiant'', this was totally conclusory and devoid of details sufficient to support an independent finding of credibility or reliability. People v. Bowen, 189 Colo. 126, 538 P.2d 1336 (1975).

Neither does allegation of suspect's criminal reputation. An allegation of suspect's criminal reputation standing alone does not set forth sufficient facts to allow a magistrate to determine independently reliability of information supplied by an informant. People v. Peschong, 181 Colo. 29, 506 P.2d 1232 (1973).

But three ways to allow magistrate to determine reliability of informant's information. There are at least three ways in which an affidavit might allow a magistrate to determine the reliability of an informant's information so as to issue a search warrant: (1) By stating that the informant had previously given reliable information; (2) by presenting the information in detail which clearly manifests its reliability; and (3) by presenting facts which corroborate the informant's information. People v. Masson, 185 Colo. 65, 521 P.2d 1246 (1974).

Reliability of informant. Where an affidavit is based upon an informer's tip, the totality of the circumstances inquiry looks to all indicia of reliability, including the informer's veracity, the basis of his knowledge, the amount of detail provided by the informer, and whether the information provided was current. People v. Leftwich, 869 P.2d 1260 (Colo. 1994); People v. Randolph, 4 P.3d 477 (Colo. 2000); People v. Pacheco, 175 P.3d 91 (Colo. 2006).

Assertion that informant previously furnished solid information of criminal activity shows his credibility. The requirement that the affiant-police officer support his request for a search warrant with information showing that the informant was credible, or his information was reliable, may be satisfied by an assertion that the informant has previously furnished solid material information of specified criminal activity. People v. Montoya, 189 Colo. 106, 538 P.2d 1332 (1975).

Previously furnished information leading to arrests sufficient to find informant reliable. Where the affidavit related that the informant had, within the past 14 months, supplied information which led to the arrest and conviction of an individual for possession of a narcotic drug, and that the informant had, within the past 24 hours, supplied information which resulted in arrests and the seizure of a quantity of marijuana, this information was sufficient to permit the issuing magistrate to find that the informant was reliable. People v. Harris, 182 Colo. 75, 510 P.2d 1374 (1973).

Where the affidavit states that the informant has ''given information in the past that has resulted in seizures and arrests'' and that the informant ''reported that he has just left this location and observed the described articles'', then a fair reading of these statements compels one to conclude that the informant is personally aware of the location and the identity of the articles and additional details, such as the name of the person who led the informant to the location of the articles; these constitute examples of that type of essential information that allows the judge who issues the warrant to determine the underlying circumstances from which the officer who signs the affidavit concluded that these articles are on the premises.

People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970).

Where informant had furnished information which ''has been the cause of approximately 20 narcotic and dangerous drug arrests in the past year'', the magistrate could independently conclude that the police would not repeatedly accept information from one who has not proven by experience to be reliable, and hence, the magistrate could determine that the informant was credible. People v. Baird, 182 Colo. 284, 512 P.2d 629 (1973).

Additionally, reliability of informant can be corroborated by descriptions in police reports. Where defendant contends that an affidavit does not contain sufficient corroborative information as to reliability of informant, such is without merit when the similarity of descriptions given by the informant, as well as by police employee, of articles matches descriptions contained in police (e.g., theft) reports; this is sufficient independent proof of reliability of informant, and employee, and constitutes sufficient probable cause for issuance of a warrant. People v. Greathouse, 173 Colo. 103, 476 P.2d 259 (1970).

Citizen-informer not considered on same basis as ordinary informant. Colorado follows the citizen-informer rule and will recognize that a citizen who is identified by name and address and was a witness to criminal activity cannot be considered on the same basis as the ordinary informant. People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971).

And not necessary that affidavit contains facts showing reliability of citizen-informer. Where the citizen-informant rule applies to information contained in an affidavit for issuance of a search warrant, it is not necessary that the affidavit contain a statement of facts showing the reliability of the citizen-informant, as is the case when the informant is confidential and unidentified. People v. Schamber, 182 Colo. 355, 513 P.2d 205 (1973).

Totality of circumstances test adopted. People v. Pannebaker, 714 P.2d 904 (Colo. 1986).

VI. ISSUANCE, CONTENTS, EXECUTION, AND RETURN.

A. Issuance and Contents.

Affidavit must support finding of probable cause as to each warrant issued. While more than one search warrant may be issued on the basis of a single affidavit, the affidavit must support a finding of probable cause as to each separate warrant or each separate place to be searched. People v. Arnold, 181 Colo. 432, 509 P.2d 1248 (1973).

Search warrant should not be broader than the justifying basis of facts. People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

Description sufficient where person presented with warrant knows place authorized to be searched. The description in a warrant is sufficient where any person, upon being presented with the warrant, would know immediately in which place the search is authorized. People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970).

And number of place searched not required where location specifically indicated. It is unrealistic to require the technicality of indicating the number of the place to be searched when the location is otherwise indicated with reasonable specificity. People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970).

Warrant describing house as within Denver when in fact the house lay one-half block outside Denver was not for that reason invalid. People v. Martinez, 898 P.2d 28 (Colo. 1995).

Illicit property may be described generally. If the purpose of search is to seize not a specific property but any property of a specified character which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary, and it may be described generally as to its nature or character. People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971).

Such as "a quantity of narcotic drugs". Where the affidavit contains information which justifies the magistrate in believing that upon a search of the particular premises not only marijuana but other narcotics might be found, a warrant describing ''a quantity of narcotic drugs'' is in order. People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971).

Historically, problem has arisen in execution of warrant at night. Historically, there has not been a question about executing a search warrant during the daytime; the problem has arisen in the execution of a warrant at night when the warrant did not specifically so authorize such execution. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Thus, under rule, warrant without specified time may be executed in daytime. Under this rule, when a search warrant does not specify the time at which it is to be served, or that it may be served at any time, its validity is not affected, and it may be executed in the daytime. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Or at any time. Unless and until a warrant specifically indicates that it must be served in the daytime, it may be served at any time. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

Language sufficient to identify affiant. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

B. Execution and Return.

The fourth amendment generally requires officers to knock before executing a search warrant except when the warrant specifically authorizes a ''no-knock'' or the particular facts and circumstances known to them at the time the warrant is executed adequately justify dispensing with the requirement to knock. In this case the officers had reasonable suspicion that knocking would result in destruction of the drugs subject to seizure. People v. King, 292 P.3d 959 (Colo. App. 2011).

Execution means searching premises authorized to be searched in warrant. The execution of a search warrant means carrying out the judicial command of the warrant to conduct a search of the premises authorized to be searched. Mayorga v. People, 178 Colo. 106, 496 P.2d 304 (1972).

Warrant directed to ''authorized'' officers sufficient, as name of specific officer not required. The contention that a search warrant which directs ''all sheriffs and peace officers'' is improperly directed and should be specifically directed to officers in a certain county is without merit where it is implicit after considering all the language of the warrant that its direction or command is to officers in a certain county and that in this respect it complies with section (d). People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

A search warrant addressed to ''any person authorized by law to execute warrants within the state of Colorado'' complies with the provisions of this rule and is not deemed insufficient merely because it does not contain the name of the officer who would execute it. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Rule's requirements relating to making of return and inventory are ministerial in nature. People v. Schmidt, 172 Colo. 285, 473 P.2d 698 (1970).

And the failure to make a proper return can always be corrected at a later time in the proceedings. Deficiencies, if any exist in the return, can always be corrected by order of court. People v. Schmidt, 172 Colo. 285, 473 P.2d 698 (1970).

Technical perfection not required. Where warrant specified a street address that was adjacent to defendant's residence and owned by the same owner, and defendant's residence was not itself searched, both the warrant and the search were valid. People v. Schrader, 898 P.2d 33 (Colo. 1995).

Not every violation of section (c)(1) requires suppression of evidence under the exclusionary rule. Where search warrant was executed one-half block outside officers' jurisdiction, but city boundaries were not clear and officers promptly notified the proper authorities when the error was discovered, no violation of defendant's constitutional rights occurred. People v. Martinez, 898 P.2d 28 (Colo. 1995).

VII. MOTION TO SUPPRESS EVIDENCE.

A. In General.

Annotator's note. For further annotations concerning search and seizure, see § 7 of art. II, Colo. Const., part 3 of article 3 of title 16, and Crim. P. 26.

Previously, evidence obtained in unlawful search was admissible in criminal prosecution. Until June 19, 1961, when the supreme court of the United States decided Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the rule in Colorado was that evidence, even though obtained as a result of an unlawful search and seizure, was admissible in a prosecution for a criminal offense. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

But now is inadmissible. The fruits of an unlawful search are, by Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and by this rule, inadmissible in evidence. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

This rule specifically provides for motion to suppress. A motion to suppress is excluded by definition from Crim. P. 12(b), but section (e) of this rule specifically provides for such a motion. Adargo v. People, 173 Colo. 323, 478 P.2d 308 (1970).

Only purpose served by suppressing evidence is preventing use by prosecution. The only purpose that can be served by suppressing the evidence which is seized by the police is to prevent its use by the prosecution at the trial. Lucero v. People, 164 Colo. 247, 434 P.2d 128 (1967).

Habeas corpus is not correct vehicle to raise the issue of illegal evidence having been secured through wiretapping. Ferrell v. Vogt, 161 Colo. 549, 423 P.2d 844 (1967).

Not every violation of section (c)(1) requires suppression of evidence under the exclusionary rule. Where search warrant was executed one-half block outside officers' jurisdiction, but city boundaries were not clear and officers promptly notified the proper authorities when the error was discovered, no violation of defendant's constitutional rights occurred. People v. Martinez, 898 P.2d 28 (Colo. 1995).

Trial court erred in holding that defendant abandoned the motions to suppress when he

failed to appear at the suppression hearings. The court could have heard and decided the motions on the merits though defendant was absent. People v. Dashner, 77 P.3d 787 (Colo. App. 2003).

Defendant's incriminating statements were obtained in violation of his Miranda rights, and trial court's order to suppress the statements was appropriate. A reasonable person in defendant's circumstances would have felt deprived of his or her freedom of action in a manner similar to a formal arrest. Therefore, defendant was in custody and subject to interrogation without being advised of his Miranda rights. People v. Holt, 233 P.3d 1194 (Colo. 2010).

B. Aggrieved Party.

Defendant has the burden of showing that he is an aggrieved person under the provisions of this rule. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

And where burden not established, motion denied. Where the defendant does not meet his burden and does not establish that he has standing to object to the search and seizure, his motion to suppress is properly denied. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

Prosecutor bears no burden at suppression hearing to prove that defendant was the victim of the claimed illegal police conduct because, when a defendant files a motion to suppress claiming his or her fourth amendment rights were violated, this initial allegation suffices to establish that he or she was the victim or aggrieved party of the alleged invasion of privacy. People v. Jorlantin, 196 P.3d 258 (Colo. 2008).

Defendant legitimately on premises when search occurs possesses standing to object. A defendant has standing to object to a search or to a seizure if he is legitimately on the premises when the search occurs. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

When fruits of search to be used against him. Anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. Lanford v. People, 176 Colo. 109, 489 P.2d 210 (1971).

Including a child subject to delinquency adjudication. Since a child subject to a delinquency adjudication is entitled to same constitutional safeguards as adult accused of crime, evidence obtained as result of unlawful search should be suppressed. In re People in Interest of B.M.C., 32 Colo. App. 79, 506 P.2d 409 (1973).

Hence, defendant "aggrieved" where search occurs in sister's home while defendant there. Where the search and seizure which a defendant challenges occurred in the home of his sister and the defendant was there with the permission of his sister, the defendant qualifies under this rule as a person "aggrieved", where the search, if valid, produces evidence which is relevant to the issue of his guilt, for under the circumstances, he has standing to have the question of the validity of the search determined upon its merits. Adargo v. People, 173 Colo. 323, 478 P.2d 308 (1970).

One not legitimately on the premises has no standing to move to suppress the fruits of a search and seizure of those premises. People v. Trusty, 183 Colo. 291, 516 P.2d 423 (1973).

And defendant cannot urge standing on basis of fleeting presence before search. Where a defendant neither claims nor has a possessory interest in premises and has no personal expectation of privacy, he cannot successfully urge standing on the basis of his fleeting presence in the premises before the search. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

State precluded from denying defendant's possessory interest when possession essential element of offense. When possession of the seized evidence is itself an essential element of the offense charged, the state is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

Defendant did not have automatic standing to challenge automobile search. Where the defendant was found unconscious inside an automobile which upon a search was found to contain the deceased's body, and it was not an instance where the basis for defendant's prosecution was possession of the vehicle, the defendant did not have automatic standing to challenge the vehicle's search and seizure. People v. Trusty, 183 Colo. 291, 516 P.2d 423 (1973).

Likewise, where defendant has abandoned a car, he has no standing to suppress the evidence seized in a warrantless search of the car as "a person aggrieved". Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

A person who has abandoned a vehicle is not an "aggrieved" person under section (e) and has no standing to suppress evidence seized in a search of that vehicle. People v. Parker, 189 Colo. 370, 541 P.2d 74 (1975).

Jail not place where defendant can claim constitutional immunity from search. A public jail is not the equivalent of a man's "house" or a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects. A jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order

of the day. Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970).

C. Grounds.

1. In General.

Motion has limited reach. A brief examination of the five grounds that support a motion to suppress discloses the limited reach of the motion. People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971).

A court cannot exclude all of a witness's testimony based on a violation of the constitution. The court has the authority to suppress only the tainted evidence, not the untainted evidence. People v. Cowart, 244 P.3d 1199 (Colo. 2010).

Entrapment does not present a question of admissibility of evidence, but presents rather the proposition that a conviction may not be obtained, no matter what the evidence, where the authorities instigated the acts complained of, and this is generally a question of fact for a jury; therefore, entrapment is not within the scope of section (e) of this rule, which deals solely with the question of admissibility. People v. Patterson, 175 Colo. 19, 485 P.2d 494 (1971).

Absence of "chain of evidence" not within rule's perimeters. When the defendant argues that there is no ''chain of evidence'' to establish that a specimen analyzed is one obtained from the defendant, then, in the absence of any averment of constitutional overtones for this claim, this ground does not fall within the perimeters set forth in section (e) of this rule, and to which interlocutory appeals are limited. People v. Kokesh, 175 Colo. 206, 486 P.2d 429 (1971).

Where no constitutional rights invaded under official authority, motion denied. Where no constitutional rights are invaded by or under color of official authority, a motion to suppress will be denied. People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971).

Rule not expanded to exclude evidence obtained by private persons. Even though the rule as to the exclusion of evidence obtained by an unreasonable search and seizure has been broadened and expanded, it has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officials must be excluded. People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971).

But question whether items seized inadmissible on other grounds determined at trial. The question of whether the items seized are inadmissible in evidence on grounds other than those specified in this rule must be determined at the time of trial. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

Rule applicable to evaluate validity of arrest prior to search. This rule does apply when the validity of an arrest must be evaluated before the court can rule upon a motion to suppress items seized in a search incident to the arrest. People v. Lott, 197 Colo. 78, 589 P.2d 945 (1979).

Evidence need not be suppressed if it is obtained in violation of a statutory provision unless it also amounts to a constitutional violation. People v. Mandez, 997 P.2d 1254 (Colo. App. 1999).

Police search of cloth glove not unconstitutional. Like the plain view doctrine, the plain feel doctrine allows police to seize contraband discovered through the sense of touch during an otherwise lawful search; therefore, trial court erred in suppressing evidence. People v. Brant, 252 P.3d 459 (Colo. 2011).

Where search warrant validly is obtained, motion to suppress evidence is not valid. People v. Buttorff, 179 Colo. 406, 500 P.2d 979 (1972).

Preservation of hazardous substances not required. The destruction of evidence rule cannot be applied mechanically in a way that endangers the lives of public safety officers or forces the police to preserve hazardous substances which cannot be stored safely. People v. Clements, 661 P.2d 267 (Colo. 1983).

Such as high explosives. The prosecution does not have the duty to preserve high explosives, homemade bombs or dangerous materials if that requirement would endanger lives and the public safety. People v. Clements, 661 P.2d 267 (Colo. 1983).

Failure for good cause to comply with section (c)(1), which requires affidavits for search warrants to be sworn to or affirmed before the issuing judge, does not constitute a constitutional violation that automatically triggers the exclusionary rule. People v. Fournier, 793 P.2d 1176 (Colo. 1990).

2. Illegal Seizure Without Warrant.

Not every search that is conducted without search warrant is "unreasonable" or "illegal" as those words are used in the United States Constitution and in this rule. More v. People, 171 Colo. 338, 467 P.2d 50 (1970).

Nor does Mapp decision exclude all evidence incident to arrest without warrant. The decision of the supreme court of the United States in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), went no further than to exclude in state courts the use of evidence obtained by unreasonable search and seizure prohibited by the fourth amendment; it does not exclude all evidence which might be obtained as an incident to a lawful arrest, nor does it preclude admission of all evidence which may have been obtained without the sanction of a search warrant. Peters v. People, 151 Colo. 35, 376 P.2d 170 (1962).

But probable cause requirements are at least as strict in warrantless searches as in those pursuant to a warrant. People v. Thompson, 185 Colo. 208, 523 P.2d 128 (1974).

Where search illegal at inception, nothing intervening can render search legal. Where a search is illegal at its inception, nothing intervening, including the last minute obtaining of a search warrant, can render any part of the search legal. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

But where warrantless entry and arrest legal, evidence seized not inadmissible. Where warrantless entry and arrest are based on probable cause and a search warrant is issued subsequent to the entry and arrest, the evidence seized is not inadmissible because the entry and arrest were without warrant. People v. Vaughns, 175 Colo. 369, 489 P.2d 591 (1971).

Except where supposed legitimate entry utterly vitiated by method of entry. Where any supposed legitimate entry is utterly vitiated by the method of entry, the evidence observed by the officers is tainted, cannot be used as the basis for probable cause to arrest or seized as incident to a lawful arrest, and is therefore properly suppressed. People v. Godinas, 176 Colo. 391, 490 P.2d 945 (1971).

Warrant needed where article believed concealed. A belief, no matter how well-founded, that an article sought is concealed in a dwelling furnishes no justification for the search of the dwelling without a lawful warrant. People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972).

Defendant's allegedly criminal acts were sufficiently attenuated from any illegal conduct of sheriff's deputies so that exclusion of evidence was not appropriate. Evidence of a new crime committed in response to an unlawful trespass is admissible. People v. Doke, 171 P.3d 237 (Colo. 2007).

"Emergency doctrine" tested on particular facts of each case. In applying the ''emergency doctrine'' to warrantless searches each case must be tested on its own particular facts. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

And the test is reasonableness under the circumstances. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

But odor of decomposing body not emergency. The detection of an odor which might be that of a decomposing body does not create, in and of itself, an emergency sufficient to justify a warrantless search. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

Burden of proving probable cause for arrest without warrant is on the prosecution. People v. Chacon, 177 Colo. 368, 494 P.2d 79 (1972).

As is burden to establish probable cause for warrantless search. The burden is upon the state at a suppression hearing to establish that probable cause existed which would justify a warrantless search of the defendant's person. People v. Ware, 174 Colo. 419, 484 P.2d 103 (1971).

Burden of proof for warrantless arrest and search. Where defendant is arrested without a warrant and moves to suppress evidence seized in course of his arrest, burden of proof is upon prosecution to prove constitutional validity of arrest and search. People v. Crow, 789 P.2d 1104 (Colo. 1990).

"Reasonable" search may be made in the place where a lawful arrest occurs in order to find and seize articles connected with the crime as its fruits or as the means by which it was committed. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

And police entitled to made contemporaneous search of person. When a person is lawfully arrested, the police have the right, without a search warrant, to made a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit a crime. People v. Vigil, 175 Colo. 421, 489 P.2d 593 (1971).

And such searches not violative of constitutions. Even if there is a search, where the arrest is legal the search is not violative of the state and federal constitutions regarding unreasonable search and seizure. People v. Clark, 173 Colo. 129, 476 P.2d 564 (1970).

So long as not too much time between search and arrest. The lapse of too much time between the inception of the search and the arrest falls short of the requirement that the two acts (search and arrest) be nearly simultaneous and constitute for all practical purposes one transaction. People v. Drumright, 172 Colo. 577, 475 P.2d 329 (1970).

Search incident to arrest limited to evidence related to offense. The scope of a warrantless evidentiary search incident to arrest is limited to evidence related to offense for which arrest is made. In re People in Interest of B. M. C., 32 Colo. App. 79, 506 P.2d 409 (1973).

And extends to things under accused's immediate control and place of arrest. The right to search and seize without a search warrant incident to a lawful arrest extends to things under the accused's immediate control and to an extent, depending on the circumstances of the case, to the place where he is arrested. People v. Vigil, 175 Colo. 421, 489 P.2d 593 (1971).

Including police station. A police station, immediately following an arrest, cannot be held to be too remote from the place of arrest in a search and seizure case. Glass v. People, 177 Colo. 267, 493 P.2d 1347 (1972).

Search following arrest may also be conducted as inventory procedure. A warrantless search of defendant's purse that followed her

arrest for drug use and the seizure of the contraband found therein may be upheld either as a search incident to an arrest or as an inventory procedure conducted prior to incarceration. Avalos v. People, 179 Colo. 88, 498 P.2d 1141 (1972).

Where probable cause for a warrantless arrest is lacking, subsequent search is invalid. People v. Trujillo, 179 Colo. 428, 500 P.2d 1176 (1972).

And fact contraband found in search does not make arrest valid. Where police officers when they arrest a defendant have no idea of what the charge is for which they are arresting him, the fact that contraband is found in an illegal search does not make such an arrest valid. Gallegos v. People, 157 Colo. 173, 401 P.2d 613 (1965).

Fruits of unlawful arrest inadmissible. The prosecution's failure to present evidence to support a determination that the arrest of the defendant was supported by probable cause leaves the court with no alternative but to hold that the arrest was unlawful and its fruits inadmissible. People v. Chacon, 177 Colo. 368, 494 P.2d 79 (1972).

And the defendant's motion to suppress should be granted where the police conducted a warrantless search and arrest without probable cause. People v. Henderson, 175 Colo. 400, 487 P.2d 1108 (1971).

Test of admissibility of evidence seized in lawful search following unlawful search is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been arrived at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. People v. Hannah, 183 Colo. 9, 514 P.2d 320 (1973).

"Pat down" or "stop and frisk" search justified for potentially armed individual. It is well established that an officer may conduct a limited search for weapons (a so-called ''pat down'' or ''stop and frisk'') for his own safety when he is justified in believing that he is dealing with a potentially armed and dangerous individual. Finley v. People, 176 Colo. 1, 488 P.2d 883 (1971).

Limited searches of person for weapons during investigative detention, where probable cause for arrest is lacking, is permissible, but there must be: (a) Some reason for the officer to confront the citizen in the first place; (b) something in the circumstances, including the citizen's reaction to the confrontation, must give the officer reason to suspect that the citizen may be armed and, thus, dangerous to the officer or others; and (c) the search must be limited to a frisk directed at discovery and appropriation of weapons and not at evidence in general. People v. Martineau, 185 Colo. 194, 523 P.2d 126 (1974).

And evidence of crime uncovered is competent and admissible. Where the search was limited to a frisk directed at the discovery and appropriation of weapons, and not to uncover evidence as such, evidence of a crime having thus been lawfully uncovered, it is competent and admissible in evidence as relevant proof of the charges of which defendant is accused. People v. Martineau, 185 Colo. 194, 523 P.2d 126 (1974).

Objects in plain view of officer subject to seizure. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972).

Where the record fails to support defendant's contention that the officers were engaged in a search when they observed the evidence in plain view, suppression is not required. Blincoe v. People, 178 Colo. 34, 494 P.2d 1285 (1972).

As such does not constitute a search. The discovery of the fruits of a crime or of contraband lying free in the open does not constitute any kind of search. Alire v. People, 157 Colo. 103, 402 P.2d 610 (1965).

Police protective search of passenger compartment of vehicle justified. People v. Brant, 252 P.3d 459 (Colo. 2011).

Applying the "plain feel" doctrine, police properly seized evidence discovered in cloth glove. People v. Brant, 252 P.3d 459 (Colo. 2011).

Validity of automobile searches turn upon their own peculiar circumstances. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Police officer entitled to approach suspicious parked automobile and look inside. Where a police officer approaches a parked automobile, in which the defendant is seated, he has a right to flash his light inside, and any contraband which he sees in the automobile and seizes is admissible against the defendant. People v. Shriver, 186 Colo. 405, 528 P.2d 242 (1974).

Plain view exception applies to contraband in defendant's home observed by officers using a flashlight to view inside defendant's residence. Officers who were lawfully on defendant's porch when defendant left front door open could use flashlights to peer into the home. The fact that the officers used their flashlights to see inside defendant's home did not transform their plain view observations into an illegal search because, had it been daylight, the contraband on the table inside the home would have been plainly visible to the officers. People v. Glick, 250 P.3d 578 (Colo. 2011).

Lawful to stop vehicle for investigatory purposes, and search where probable cause. Where police officer obtained probable cause to search a vehicle and seize evidence in the process of making a lawful stop for threshold in-

vestigatory purposes, the defendant's motion to suppress this evidence was properly denied. People v. Lucero, 182 Colo. 39, 511 P.2d 468 (1973).

Stopping automobile not "unreasonable" where probable cause offense committed. Stopping an automobile and conducting a search and seizure is not ''unreasonable'' where the officer conducting it has a probable and reasonable belief that an offense has been committed. Hopper v. People, 152 Colo. 405, 382 P.2d 540 (1963).

If probable cause to search car, right to search without warrant. If there is probable cause to obtain a warrant to search a car, police officers have the right to stop and search it without a warrant. People v. Chavez, 175 Colo. 25, 485 P.2d 708 (1971).

And items found admissible into evidence. Where police officers have probable cause to search defendants' automobile, the search of defendants' automobile without a warrant is proper, and it is not error to admit the items found into evidence. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Search of vehicle which is made substantially contemporaneously with an arrest is permissible as an incident to the arrest. People v. Olson, 175 Colo. 140, 485 P.2d 891 (1971).

And evidence seized during arrest not suppressed. The denial of a motion to suppress evidence seized during a warrantless arrest of fleeing felons in an automobile should be affirmed. People v. Duncan, 179 Colo. 253, 500 P.2d 137 (1972).

Where defendant stopped for careless driving, exposed contraband seized. The fact that a defendant is stopped by police officers because of his careless driving will not prevent them from seizing contraband found lying exposed on the seat of the automobile. Alire v. People, 157 Colo. 103, 402 P.2d 610 (1965).

As inspection protected by "plain view rule". Where a police officer properly stops a car for careless driving, that officer has every right to look into the car and seize anything that is contraband, for such an inspection is held to be protected by the ''plain view rule''. People v. Teague, 173 Colo. 120, 476 P.2d 751 (1970).

And items in "plain view" admissible in evidence. Where an arrest is made with probable cause, any items in ''plain view'' after the defendant exits from a vehicle can properly be used in evidence against him. People v. Clark, 173 Colo. 129, 476 P.2d 564 (1970).

Probable cause must exist at moment arrest or automobile search made. In order for a warrantless search of an automobile to be excused under exigent circumstances, probable cause must exist at the moment the arrest or the search is made. People v. Thompson, 185 Colo. 208, 523 P.2d 128 (1974).

Factors which lead to the conclusion that a warrantless search of a car was reasonable include the commission of a felony, abandonment of the car by the suspects at the scene of the crime, and their flight from the scene on foot into the night and their remaining at large. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Suspicious demeanor and odor supports probable cause for possession of marijuana in car. The combination of the suspicious demeanor of the occupants of a vehicle and the subsequent odor of marijuana emanating from within the car moments after the occupants had exited was a sufficient basis upon which to predicate probable cause for the belief that the offense of possession of marijuana had been recently committed. People v. Olson, 175 Colo. 140, 485 P.2d 891 (1971).

Moreover, it is unnecessary for officer to have a chemical analysis of a suspected narcotic prior to making a valid seizure; it is only necessary that he have reason to believe that the article seized is a narcotic. Alire v. People, 157 Colo. 103, 402 P.2d 610 (1965).

But mere exploratory search not sustained. Where a police officer has no cause to believe that a car contains any contraband, a search is exploratory only and cannot be sustained. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

Search not incident to arrest where defendant in custody, car outside search area. The defendant was in custody so there was no danger of his destroying any evidence in his car, and the car was without the area authorized to be searched by a warrant, the search was not incident to the arrest. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

Suppression of evidence proper where it was undisputed that defendant had already been arrested, handcuffed, and placed in patrol car at the time of the search of defendant's vehicle and because it would not have been reasonable for officers to believe that defendant's vehicle might contain evidence relevant to the false reporting crime. People v. Chamberlain, 229 P.3d 1054 (Colo. 2010).

Permissive search is not unreasonable search and seizure within the coverage of Mapp v. Ohio (367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)). Peters v. People, 151 Colo. 35, 376 P.2d 170 (1962).

Hence, a search loses its illegal effect when defendant gives permission for such a search of the premises, as this consent removes the applicability of the constitutional guaranty. Williams v. People, 136 Colo. 164, 315 P.2d 189 (1957); Hopper v. People, 152 Colo. 405, 382 P.2d 540 (1963).

But search must be voluntary. A search conducted without a warrant but with the voluntary consent of the person whose place is

searched is reasonable and not in violation of the state or federal constitutions. Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

And voluntary means that the consent is intelligently and freely given. Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

Burden of proof as to consent to warrantless search on people. The burden of proof in the determination of whether a consent to a warrantless search is intelligently and freely given rests firmly on the people. People v. Neyra, 189 Colo. 367, 540 P.2d 1077 (1975).

Whether consent voluntary determined from each case's total circumstances. Whether or not the consent which is given to a search in a particular case is voluntary is a question to be determined from the totality of the circumstances in each case. The circumstances of a case may indicate that a defendant was fully aware that the police were his adversaries and that evidence seized by them could be used against him at trial. Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

Miranda decision not applicable to fourth amendment searches and seizures. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), has no application to the area of fourth amendment searches and seizures, since the ruling therein was designed as a prophylactic rule to correct and prevent abusive police practices in the area of confessions, and the United States Supreme Court has not acted to extend the rule in Miranda to the fourth amendment. Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

But warning that defendant does not have to consent to search constitutionally sufficient. Where a defendant is informed that he does not have to consent to a warrantless search of his premises, such a warning is sufficient to apprise the defendant of his rights under the fourth amendment of the U. S. Constitution and § 7 of art. II, Colo. Const. Phillips v. People, 170 Colo. 520, 462 P.2d 594 (1969).

Resident of a place has the ability to consent to a search of the premises, and a search based on such consent is not illegal. Lanford v. People, 176 Colo. 109, 489 P.2d 210 (1971).

Likewise, one of two or more persons occupying premises may authorize search. When two or more persons have an equal right of ownership, occupancy, or other possessory interest in the premises searched or the property seized, any one of such persons may authorize a search and seizure thereof thereby binding the others, waiving their rights to object. Lanford v. People, 176 Colo. 109, 489 P.2d 210 (1971).

But a landlord is not a proper person to give consent to the search of his tenant's residence. Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971).

After consent has been granted to conduct search, that consent cannot be withdrawn. People v. Kennard, 175 Colo. 479, 488 P.2d 563 (1971).

Prisoner cannot expect to be free from warrantless searches. A prison cell is not a place in which the occupant can expect to be free from all searches unless accompained by a warrant. Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970).

3. Warrant Insufficient on Face.

Affidavits have not been required to be attached to warrants. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

Warrant not insufficient because affidavit does not allege possession of articles is crime. Where an affidavit upon which a search warrant is issued does not allege that possession of the articles in question is a crime, this does not render the warrant insufficient. People v. Whisenhunt, 173 Colo. 109, 476 P.2d 997 (1970).

The fact that the affidavit details activities that are lawful does not cause it to be a bare bones affidavit; a combination of otherwise lawful circumstances may well lead to a legitimate inference of criminal activity. People v. Altman, 960 P.2d 1164 (Colo. 1998).

But, constitutionally, probable cause must appear on face of affidavit. The express Colorado constitutional requirement of a written oath or affirmation makes it clear beyond a doubt that sufficient facts to support a magistrate's determination of probable cause must appear on the face of a written affidavit. People v. Baird, 172 Colo. 112, 470 P.2d 20 (1970).

Otherwise, warrants issued on such fatally defective affidavits are nullities, any search conducted under them was unlawful, and the fruits of such a search are inadmissible in evidence. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Baird, 173 Colo. 112, 470 P.2d 20 (1970); People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

Affidavit in support of warrant held fatally defective. People v. Peschong, 181 Colo. 29, 506 P.2d 1232 (1973).

On review, search warrants are tested and interpreted in common sense and realistic fashion. People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972).

Where statements concerning reliability of informer are not true, warrant cannot stand. Where information attributed to an informer is sufficient upon which to base a warrant, but statements made to the issuing magistrate by a policeman concerning the reliability of the informer are not true, a search warrant issued by the magistrate based on the false allegations of the police officer cannot stand. People v. Massey, 178 Colo. 141, 495 P.2d 1141 (1972).

Warrant's validity cannot be challenged where modified before issuance. Where changes and modifications on a search warrant take place before it is signed and issued by a judge, the validity of the search warrant is not subject to challenge. People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

Warrant not invalidated because descriptions therein vary from affidavit's. That there exists a variation between the descriptions in the warrant and in the affidavit does not in itself render the warrant invalid, unless the variance is material. People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970).

So long as description adequately identifies premises. A slight variation from the description in the affidavit will not affect the validity of a search warrant as long as the remainder of the descriptive language adequately identifies the premises to be searched. People v. Peppers, 172 Colo. 556, 475 P.2d 337 (1970).

And warrant specifically describing premises not rendered insufficient by command portion of warrant. A command portion of search warrant which reads: ''You are therefore commanded to search forthwith the above described property for the property described'' did not render the warrant insufficient on its face where the property to be searched had been specifically described ''above'' in the warrant. People v. Ragulsky, 184 Colo. 86, 518 P.2d 286 (1974).

Test for determining whether the sufficiency of a description in a search warrant is adequate is if the officer executing the warrant can with reasonable effort ascertain and identify the place intended to be searched. People v. Ragulsky, 184 Colo. 86, 518 P.2d 286 (1974).

Where city not specified in warrant, absence not fatal where location clear. Where a warrant specified the place to be searched as to street, county, and state, although not as to city, but the district attorney made a showing to the trial court that the place searched was the only one in the indicated county having such a street address, and the trial court found that there was sufficient clarity as to the location in the minds of all parties involved, then the absence of the name of the city was not fatal or prejudicial. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

But omission of description of property to be seized not excused. Where in the space provided in a warrant for the description of the property to be seized there appears a description of the location of the place to be searched, then, although it may be presumed that this incorrect language doubtless was inserted by mistake and that the person who completed the warrant intended to insert the required description of the property to be seized, this is, however, not the type of mere ''technical omission'' that is excused, since it goes rather to the very essence of the constitutional requirement that a warrant describe ''the person or thing to be seized, as near as may be'' contained in § 7 of art. II, Colo. Const. People v. Drumright, 172 Colo. 577, 475 P.2d 329 (1970).

Warrant commanding officers to enter designated place for certain property valid. A search warrant directed to all peace officers which in essence states that certain articles are concealed at a designated address, that complaint made by a named person set forth reasons which show that probable cause exists, and commands such persons to enter the place and search for certain property fully sets forth the information required by this rule, and is therefore valid. People v. Ferris, 173 Colo. 494, 480 P.2d 552 (1971).

Failure to insert names indicating to whom return to be made is ministerial deficiency. The failure to insert names in blank spaces provided in a search warrant for purpose of indicating to whom return is to be made and to whom written inventory of seized property is to be made is ministerial deficiency and not such as to render a warrant invalid. Brown v. People, 158 Colo. 561, 408 P.2d 981 (1965).

Substantial compliance with contemporary objection rule exists where continuous general objection is made on ground that evidence is product of search under invalid warrant. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968).

But even if objection insufficient, federal habeas relief not precluded. Even if failure to specifically attack insufficiency of affidavit supporting warrant renders objection insufficient under this rule, a state court conviction based thereon will not preclude procuring federal habeas corpus relief. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968).

4. Property Not Described in Warrant.

Description of items to be seized in search warrant must be specific. People v. Clavey, 187 Colo. 305, 530 P.2d 491 (1975).

And items seized under warrant with insufficient description suppressed. All items seized under a search warrant that failed to describe the things to be seized with sufficient particularity should be suppressed. People ex rel. McKevitt v. Harvey, 176 Colo. 447, 491 P.2d 563 (1971).

But the seizure of property not specified does not render specified items inadmissible. People v. Greathouse, 173 Colo. 103, 476 P.2d 259 (1970).

Warrant not too broad where authorizes seizure of "narcotics" and "paraphernalia". The language in a warrant which specifies the

items to be seized is not so broad and ambiguous as to make it a general warrant where the warrant authorizes seizure of: (1) Any and all narcotics and dangerous drugs as defined by the applicable Colorado statutes, the possession of which is illegal; and (2) all implements, paraphernalia, articles, papers, and records pertaining to, or which would be evidence of, the illegal use, possession, or sale of narcotics and/or dangerous drugs. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

And "narcotics" includes marijuana. Where a search warrant authorizes a search for ''narcotics, dangerous drugs, and narcotics paraphernalia'', then, since the word ''narcotics'' includes marijuana, the seizure of marijuana is properly authorized under the warrant. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Term "narcotics paraphernalia" is not so vague as to make document general warrant. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Seized items held sufficiently within warrant description. People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972).

Search must be conducted for specific articles. The search, whether under a valid search warrant or whether as incident to a lawful arrest, must be one in which the officers are looking for specific articles and must be conducted in a manner reasonably calculated to uncover such articles. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Drumright, 172 Colo. 577, 475 P.2d 329 (1970).

And any search more extensive than this constitutes a general exploratory search and is squarely within the interdiction of the constitutional guarantee against unreasonable search and seizure. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963); People v. Drumright, 172 Colo. 577, 475 P.2d 329 (1970); In re People in Interest of B.M.C., 32 Colo. App. 79, 506 P.2d 409 (1972).

Entire search only becomes invalid if general tenor is that of exploratory search for evidence not specifically related to the search warrant. People v. Tucci, 179 Colo. 373, 500 P.2d 815 (1972).

And where execution of warrant in good faith, not all evidence obtained suppressed. Where evidence is without conflict that the persons executing the search warrant were trying in good faith to obtain items relating to that prescribed in the warrant, a ruling requiring suppression of all evidence obtained during the search of defendant's premises is disapproved. People v. Tucci, 179 Colo. 373, 500 P.2d 815 (1972).

Evidence seized during general exploratory search will be suppressed. Where evidence was seized during a general exploratory search for which no probable cause existed, defendant's motion to suppress the evidence will be granted. People v. Valdez, 182 Colo. 80, 511 P.2d 472 (1973).

"Other" articles found in course of "proper" search are admissible. If an officer is conducting a search, either under a valid search warrant or incident to a valid arrest, where the search is such as is reasonably designed to uncover the articles for which he is looking and in the course of such search discovers contraband or articles the possession of which is a crime, other than those for which he was originally searching, he is not required to shut his eyes and refrain from seizing that material under the penalty that if he does seize it, it cannot be admitted in evidence. Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963).

And no suppression of fruits or instruments of crime, and contraband. Harris v. United States, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947), upheld the validity of seizure of fruits of a crime, instrumentalities of a crime, and contraband articles; such items may be referred to as ''Harris articles'', and where items are ''Harris articles'', a trial court is correct in denying a suppression motion with respect to them. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

But burden on state where such articles not connected with crime "per se". When a defendant demonstrates that an article is not specifically described in the search warrant and it is not ''per se'' connected with criminal activity, the burden of showing that it is so connected falls upon the state. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971); People v. Wilson, 173 Colo. 536, 482 P.2d 355 (1971).

And if state sustains burden, the articles should not be suppressed. People v. Wilson, 173 Colo. 536, 482 P.2d 355 (1971).

However, where showing not made, nonspecified articles suppressed. When the district attorney fails to make the requisite showing, the trial court should sustain the motion as it relates to nonspecified articles not ''per se'' connected with criminal activity. People v. Wilson, 173 Colo. 536, 482 P.2d 355 (1971).

"Mere evidence" seized must be shown to have a "nexus" with case and defendant. ''Mere evidence'' consists of articles which are not fruits, instrumentalities, or contraband, and which are not ''per se'' associated with criminal activity, but which an officer executing a warrant has probable cause to believe are associated with criminal activity, and ''mere evidence'' which is seized within the scope of the search authorized by a warrant must be shown to have a ''nexus'' with the case in which a motion to suppress is filed and with at least one of the defendants in the case. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971); People v. LaRocco, 178 Colo. 196, 496 P.2d 314 (1972).

5. No Probable Cause.

Matter of probable cause not "res judicata". The trial court is not bound to conclude that because a search warrant had been issued the matter of the existence of probable cause for the issuance thereof was ''res judicata'', inasmuch as it is for the judge who determines the adversary proceeding to decide all questions relating to the admissibility of the evidence offered by the litigants. Gonzales v. District Court, 164 Colo. 433, 435 P.2d 384 (1967).

Warrant routinely issued at request of accusing officer clearly unconstitutional. Where a search warrant was routinely issued at the request of the accusing officer, without the slightest showing of probable cause, it therefore clearly violates the fundamental principle that the basis for the issuance of a search warrant must be determined by a judicial officer based on facts and not on the conclusion of the applicant. Consequently, such a search warrant is issued in violation of long-established fundamental constitutional standards, and any evidence seized under its authority should be excluded from evidence in the trial court, unless there is other legal basis for its admission. Brown v. Patterson, 275 F. Supp. 629 (D. Colo. 1967), aff'd, 393 F.2d 733 (10th Cir. 1968).

Independent determination of probable cause to search specified place. The fact that the police did not request a warrant to search additional places likely to contain incriminating evidence is irrelevant to the independent determination of probable cause to search the place specified in the warrant. People v. Chase, 675 P.2d 315 (Colo. 1984).

Affidavit introduced where warrant challenged for lack of probable cause. When a search warrant is challenged for lack of probable cause, the supporting affidavit is an essential element to be introduced in evidence. People v. Espinoza, 195 Colo. 127, 575 P.2d 851 (1978).

Where supporting affidavit lacks probable cause, warrant invalid. Where the affidavit upon which a search warrant was issued was not sufficient to establish probable cause, the search and resultant arrest of defendant are part of the illegal fruits of an invalid warrant. Zamora v. People, 175 Colo. 340, 487 P.2d 1116 (1971).

Warrant based on observations of police employee in response to invitation not invalid. Where a visit by a police employee is legitimately in response to an invitation by the defendant, a later search is not invalidated by the fact that the employee made observations which became part of the basis for the warrant. People v. Greathouse, 173 Colo. 103, 476 P.2d 259 (1970).

Affidavit in support of search warrant was not insufficient because it was predicated upon "double hearsay". People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973).

But where the affidavit upon which a search warrant was predicated was based on ''double hearsay'', such does not render the warrant invalid. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

Such as where the information is conveyed by one police officer to another police officer. People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973).

Even if hearsay turns out to be incorrect. If the material in the affidavit is stated to be or appears to be hearsay information obtained from an informant or other person and the information turns out to be incorrect, a court will not use hindsight as a test to determine whether the search warrant should or should not have been issued. People v. Woods, 175 Colo. 34, 485 P.2d 491 (1971).

Reliability of detective need not be shown. The fact that the affidavit did nothing to disclose the reliability of a detective—except the fact that he was a detective—does not affect its validity, since there is nothing requiring a showing of reliability of a detective. People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

Facts held sufficient to establish probable cause. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971); People v. Vigil, 175 Colo. 421, 489 P.2d 593 (1971); Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Facts held not sufficient to establish probable cause. People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971).

6. Illegal Execution.

Trial court erred in assigning to the prosecution the initial burden of proving search warrant was legally executed. As the moving party seeking suppression of evidence seized through a search warrant, the defendant has the burden of alleging and showing that a search or seizure violated his or her right to privacy under the fourth amendment of the U.S. Constitution. If the defendant satisfies this burden, it is then upon the prosecution to show that defendant's fourth amendment rights were not violated. People v. Cunningham, 2013 CO 71, 314 P.3d 1289.

Officers must identify themselves before forced entry. Even with a valid warrant, before police officers attempt a forced entry into a place, they must first identify themselves and make their purpose known. People v. Godinas, 176 Colo. 391, 490 P.2d 945 (1971).

And forceful entries include entries without permission. Forceful entries need not involve the actual breaking of doors and windows, but may include merely entries made without permission. Thus, where officers enter through a door which is ajar without right and

they do not announce their purpose, a subsequent knock on an interior door is made after an illegal entry and without announcing identity and purpose. People v. Godinas, 176 Colo. 391, 490 P.2d 945 (1971).

Copy of warrant need not be left personally with one confined in jail. The argument that the execution of a search warrant did not comply with this rule in that a copy of the warrant was not left with defendant personally is without merit where at the time of the search defendant was confined in jail, the officer upon whose affidavit the warrant was issued exhibited the warrant, receipt, and inventory of what was seized to defendant after seizure, and the copy of the warrant, receipt, and inventory was then placed in defendant's locker in the jail which contained his other personal belongings; in the absence of a showing of any prejudice resulting from this particular procedure, there is no reversible error. People v. Aguilar, 173 Colo. 260, 477 P.2d 462 (1970).

Warrant need not have copy of affidavit attached. There is nothing which requires that a person given a warrant must receive a copy of the underlying affidavit or that a copy thereof must be attached to the copy of the warrant which is served at the time of the search. People v. Papez, 652 P.2d 619 (Colo. App. 1982).

Where one recites he has "duly executed" warrant, authority to execute inferred. Where in the return and inventory made following the execution of a warrant, one recites that he has ''duly executed the within search warrant'', this alone justifies an inference and finding that the individual was authorized by law to execute such, and it thereupon becomes incumbent upon the defendant to show that he was not. People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971).

Warrant not invalidated by failure to follow requirements as to return and inventory. Since the requirements of this rule relating to the making of the return and inventory are ministerial in nature, a failure to comply does not render the search warrant or the seizure of the property pursuant thereto invalid. People v. Schmidt, 172 Colo. 285, 473 P.2d 698 (1970).

Hence, failure to file the return within 10 days does not invalidate a search. People v. Wilson, 173 Colo. 536, 482 P.2d 355 (1971).

D. Hearing.

1. When Motion Made.

Suppression remedy not extended to grand jury proceedings. The remedy of suppression of evidence applies to a trial once an indictment has been returned, but has not been extended to grand jury proceedings considering an indictment. People ex rel. Dunbar v. District Court, 179 Colo. 321, 500 P.2d 819 (1972).

Purpose of rule to prevent introduction of issue of police misconduct into trial. The purpose of this rule is to prevent, whenever possible, the introduction of a collateral issue, that of whether the police acted improperly, into the trial on the issue of guilt. Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968).

Rule on time to serve motions preserves right to raise fourth amendment issues. Crim. P. 45(d), which must be read in conjunction with this rule, can adequately preserve the defendant's right to raise fourth amendment issues, while carrying out the salutary purpose of not commingling the fourth amendment issues with the guilt issue. Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968).

Motion to suppress filed on the morning of the trial is not timely. Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968).

Trial court's consideration of merits of a suppression motion does not render moot ruling by trial court that the motion was untimely. People v. Tyler, 874 P.2d 1037 (Colo. 1994).

Nor is motion filed day before trial, where grounds raised therein previously apparent. Where defendant files his motion to suppress on the afternoon before the day on which the trial is to begin, but all the grounds raised therein were clearly apparent in the record from the very first time counsel appeared, then under such circumstances the motion is not timely filed. Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968).

Motion untimely where defendant possesses all pertinent information prior to trial. Where defendant possessed prior to trial all pertinent information relative to the seizure of evidence and its possible suppression, the trial court did not abuse its discretion in declaring the motion to suppress untimely. People v. Hinchman, 40 Colo. App. 9, 574 P.2d 866 (1977), rev'd on other grounds, 196 Colo. 526, 589 P.2d 917, cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979).

But trial court has discretionary power to entertain a suppression motion at trial. People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973).

And if court rules on untimely motion, matter not waived unless discretion abused. If the trial court elects to rule on a untimely suppression motion raised at trial, an appellate court should not consider the matter waived unless it can be shown that the trial court abused its discretion in ruling on the merits of the motion. People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973).

Defendant not to be penalized because belated motion to suppress heard. There cannot be read into this rule any intendment that the defendant is to be penalized because the court chose to hear and consider his belated motion to

suppress. People v. Voss, 191 Colo. 338, 552 P.2d 1012 (1976).

Where proper pretrial request denied, court errs in not holding hearing at trial. Where the defendant is entitled to such a pretrial hearing which he requests, then a court which fails to grant a pretrial hearing again errs in not holding a hearing at the time the property objected to is offered in evidence by the prosecution; the defendant having made a proper request, the trial court errs in not holding a hearing. Adargo v. People, 173 Colo. 323, 478 P.2d 308 (1970).

Pretrial ruling on a motion to suppress does not necessarily bind the trial judge, and under certain circumstances, the trial court has a duty to consider "de novo" the issue of suppression. Gibbons v. People, 167 Colo. 83, 445 P.2d 408 (1968).

And within judge's discretion to hold additional evidentiary hearing. If it is necessary for the trial judge to hold an additional evidentiary hearing in order to arrive at the truth concerning a suppression of evidence motion, it is within his discretion to do so. People v. Duncan, 179 Colo. 253, 500 P.2d 137 (1972).

2. Procedure.

Rule provides for procedure to be followed when motion to suppress is filed. Adargo v. People, 173 Colo. 323, 478 P.2d 308 (1970).

Motion to suppress is interlocutory in character, and neither res judicata nor collateral estoppel applies to a ruling which is less than a final judgment. People v. Lewis, 659 P.2d 676 (Colo. 1983).

Court makes inquiry and bases determination solely on evidence presented. The trial court shall make an inquiry concerning the validity of the search and base its determination solely upon the evidence presented upon a hearing conducted by it on the motion of the petitioners. Gonzales v. District Court, 164 Colo. 433, 435 P.2d 384 (1967).

Burden is upon the state at a suppression hearing to show a connection between the evidence seized and the criminal activity for which the search was initiated in order that the evidence not be suppressed. People v. LaRocco, 178 Colo. 196, 496 P.2d 314 (1972).

Trial court erred in assigning to the prosecution the initial burden of proving search warrant was legally executed. As the moving party seeking suppression of evidence seized through a search warrant, the defendant has the burden of alleging and showing that a search or seizure violated his or her right to privacy under the fourth amendment of the U.S. Constitution. If the defendant satisfies this burden, it is then upon the prosecution to show that defendant's fourth amendment rights were not violated. People v. Cunningham, 2013 CO 71, 314 P.3d 1289.

When granting or denying a motion, the court should state appropriate findings of fact. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971).

It is the function of the court to determine the factual issues presented by a motion to suppress, and this fact in turn requires the judge to make findings of fact whenever he rules on a motion to suppress. People v. Duncan, 176 Colo. 427, 498 P.2d 941 (1971); People v. Brazzel, 18 P.3d 1285 (Colo. 2001).

And making conclusion of law instead is error. In a suppression hearing, when the court makes a conclusion of law rather than a required finding of fact, there is error. People v. Duncan, 176 Colo. 427, 498 P.2d 941 (1972).

But findings in second case may suffice for findings in identical first case. Where in one case the judge, in denying the motion to suppress, does not make sufficient findings, but in another case the findings upon denial of the motion to suppress are amply sufficient, then where the findings in the second case are by the same court although by a different judge, the rulings by both judges are the same, and the parties and the search — and in substantial effect the testimony — are identical, an appellate court is justified in considering the findings in the second case as governing the first case, for it would be useless to remand the first case for findings. People v. Ramey, 174 Colo. 250, 483 P.2d 374 (1971).

Finding that lesser crimes not included in wiretap statute, grounds for suppression. A finding that lesser crimes are not intended by congress to be included in the class of crimes for which a wiretap can be authorized does not render an entire state statute invalid, but is merely grounds for suppression. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

District judge may reconsider a motion to suppress previously denied by another district judge. People v. Lewis, 659 P.2d 676 (Colo. 1983).

Fourth amendment exclusionary rule is designed to deter police misconduct. Illegal police searches and district attorney preparedness are unrelated. The court ruling granting suppression of all evidence was tantamount to dismissal of the case, which was outside the court's authority to dismiss. People v. Bakari, 780 P.2d 1089 (Colo. 1989).

Suppression for a procedural flaw in argument does not serve the purpose of the exclusionary rule, which is solely to deter police misconduct, not prosecutorial error. People v. Kirk, 103 P.3d 918 (Colo. 2005).

3. Return of Property.

No right to return of illegal property. If property is legally seized and it is designed or

intended for use as a means of committing a criminal offense or the possession of which is illegal, there is no right to have it returned. People v. Angerstein, 194 Colo. 376, 572 P.2d 479 (1977).

A person who has property unlawfully seized by law enforcement officers and who has not been charged with a crime has standing to bring a claim for return of the property under section (e). Boudette v. State, 2018 COA 109, 425 P.3d 1228.

Although there was no criminal complaint or information filed against the property owner, this rule still governs his claim, and section (e) does not require a person to be a criminal defendant to file a motion under this rule. Boudette v. State, 2018 COA 109, 425 P.3d 1228.

Return can be made only upon determination by judge. If certain property is seized under and by virtue of a search warrant, it was incumbent upon the officers seizing same to deal with it only in accordance with the provisions and terms of this rule; consequently, they cannot rightfully restore it to the party from whom taken until a judge has examined witnesses and made a determination. Guyton v. Neal, 48 Colo. 549, 111 P. 84 (1910).

Mandamus lies to compel officer to obey order to return goods. Where goods seized under a search warrant are ordered by the magistrate, on a hearing pursuant to this rule, to be returned by the officer to the person from whose premises they were taken, mandamus lies to compel the discharge of this ministerial duty. Bell v. Thomas, 49 Colo. 76, 111 P. 76, 31 L.R.A. (n.s.) 664 (1910).

But mandamus cannot lie to return goods while proceedings still pending. Mandamus will not lie to compel an officer to surrender goods seized upon a search warrant, in excess of what is described therein, while the proceedings under the search warrant are still pending. Guyton v. Neal, 48 Colo. 549, 111 P. 84 (1910).

A decision on a motion for return of property is ordinarily interlocutory and therefore unappealable, but actions for return of property prior to the initiation of any civil or criminal proceedings may be reviewed. In re Search Warrant for 2045 Franklin, Denver, 709 P.2d 597 (Colo. App. 1985).

4. Judicial Review.

Appellate procedures cannot be invoked to test propriety of suppression order. The order of a trial court by which a motion to suppress evidence is sustained is not a final judgment and, accordingly, does not come within any exceptions provided by rule or statute under which appellate procedures can be invoked to test the propriety of the order. People v. Hernandez, 155 Colo. 519, 395 P.2d 733 (1964).

But interlocutory appeals may be taken pursuant to C.A.R. 4.1. People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970); People v. McNulty, 173 Colo. 491, 480 P.2d 560 (1971); People v. Henry, 173 Colo. 523, 482 P.2d 357 (1971); People v. Patterson, 175 Colo. 19, 485 P.2d 494 (1971); People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971).

Contemporaneous objection rule applies to search and seizure issues. Brown v. People, 162 Colo. 406, 426 P.2d 764 (1967).

Issue of illegal evidence should be brought to attention of the trial court either by a pretrial motion to suppress or at the trial when the prosecution offers evidence which the defendant claims is ''tainted'' because of the manner in which it was obtained by the prosecution. Ferrell v. Vogt, 161 Colo. 549, 423 P.2d 844 (1967).

And failure to raise objection tantamount to waiver. The failure to raise the objection of an illegal search and seizure by proper objection at the trial level is tantamount to a waiver. Brown v. People, 162 Colo. 406, 426 P.2d 764 (1967).

To preserve an issue for appeal, defendant must alert trial court to the particular issue. In case where defendant argued on appeal that search of his vehicle violated the fourth amendment and that trial court erred in admitting evidence found in the vehicle, defendant had waived the issue by failing to contest it at trial. Trial court's ruling that the search and seizure of the evidence was proper did not negate the waiver or preserve the issue for appeal. People v. Cordova, 293 P.3d 114 (Colo. App. 2011).

In absence of motion, ground of error disregarded. In the absence of a motion for return of items or to suppress them as evidence on the ground of illegal search and seizure, an alleged ground of error based thereon will be disregarded. Salazar v. People, 153 Colo. 93, 384 P.2d 725 (1963).

Where defendant denies possessory interest at hearing, cannot later claim possessory interest. At a suppression hearing where a defendant denies that he has a possessory interest in any of the items found, he cannot be allowed to later claim a possessory interest unsupported by the record and in direct contradiction of his own testimony in order to challenge the admission of the seized evidence. People v. Towers, 176 Colo. 295, 490 P.2d 302 (1971).

And guilty plea makes question of search's validity moot. The question of the validity of the search for and seizure of contraband goods becomes moot upon the entry of the plea of guilty. Lucero v. People, 164 Colo. 247, 434 P.2d 128 (1967).

Suppression order sustained where facts not shown on record on appeal. Order sustaining motion to suppress admission in evidence of items seized in execution of search warrant will

be affirmed where record on appeal does not show essential facts on which trial court predicated its ruling. People v. Cram, 180 Colo. 418, 505 P.2d 1299 (1973).

Granting of motion to suppress held invalid. People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972).

Denial of motion to suppress upheld. People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972); People v. Tucci, 179 Colo. 373, 500 P.2d 815 (1972); People v. Cram, 180 Colo. 418, 505 P.2d 1299 (1973).

VIII. RETURN OF PAPERS TO CLERK.

Warrant not invalidated by failure to indicate to whom papers to be returned. The failure to insert the names in the blank spaces provided in a search warrant for the purpose of indicating to whom the return is to be made and to whom a written inventory of the seized property is to be made is a deficiency of a ministerial nature and not such as to render a warrant invalid. Brown v. People, 158 Colo. 561, 408 P.2d 981 (1965).

And where return made to issuing court, no prejudice to defendant. Where the record supports the conclusion that the return was made to the court which issued the warrant, then, such being the state of the record and the obvious intent of the issuing magistrate, there can be no finding of prejudice to the defendant in regard to such an alleged deficiency of the warrant. Brown v. People, 158 Colo. 561, 408 P.2d 981 (1965).

IX. SUPPRESSION OF CONFESSION OR ADMISSION.

A. Grounds.

Confession deemed acknowledgment of truth of guilty fact. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it. Jones v. People, 146 Colo. 40, 360 P.2d 686 (1961).

Statement taken as result of and following an unlawful arrest must be suppressed. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

And no distrinction between "inculpatory" or "exculpatory" statements. No distinction may be drawn between ''inculpatory'' statements made by defendant and statements alleged to be merely ''exculpatory'', following an unlawful arrest. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

Not between formal arrest and police custody. The fact that the defendant is not under formal arrest at the time he made such statements is unimportant where he is in police custody, he is the main suspect, and the accusing finger is surely directed at defendant, in which case the questions of a police officer in this posture are obviously for the main purpose of eliciting incriminating statements from the defendant, and therefore, the trial court should exclude any oral incriminating statements. Nez v. People, 167 Colo. 23, 445 P.2d 68 (1968).

Prosecution has burden at suppression hearing to show that defendant was lawfully arrested. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

Judge may suppress statements made by defendant before he was given "Miranda warning", but deny the suppression of statements made after the warning has been given. People v. Garrison, 176 Colo. 516, 491 P.2d 917 (1971).

Confession obtained after inadequate warning should be suppressed. Where defendant's confession is obtained after a warning of his rights, which does not meet the requirements of Miranda, a motion to suppress the confession should be granted. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971).

Suppression of incriminating statements warranted when defendant was subject to interrogation by police officers before being advised of Miranda rights. A routine encounter turned into a custodial situation, as defendant was physically surrounded by officers, was not free to go during questioning, and had ''objective reasons to believe that he was under arrest''; such circumstances constituted custody. People v. Null, 233 P.3d 670 (Colo. 2010).

Stereotype warning cannot be the sole basis of the court's determination that a statement was voluntary and that the defendant was aware of his rights and waived and relinquished those rights. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

If written confession is direct exploitation of prior illegality, it is inadmissible as the ''fruit of the poisonous tree''. People v. Algien, 180 Colo. 1, 501 P.2d 468 (1972).

Similarly, search conducted pursuant to illegal confession must be suppressed. Where the sole basis of a probable cause for the search of the defendant's home presented in the affidavit is his confession and that confession was illegally obtained, then, under the ''fruit of the poison tree'' doctrine, any articles obtained must be suppressed. People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971).

Good faith basis required to challenge warrant affidavits. As conditions to a veracity hearing testing the truth of averments contained in a warrant affidavit, a motion to suppress must be supported by one or more affidavits reflecting a good faith basis for the challenge and contain a specification of the precise statements challenged. People v. Dailey, 639 P.2d 1068 (Colo. 1982).

Voluntariness should be determined based on the totality of the circumstances, including the occurrences and events surrounding the confession and the presence or absence of official misconduct. People v. Sparks, 748 P.2d 795 (Colo. 1988); People v. Mounts, 801 P.2d 1199 (Colo. 1990).

Confession given after proper warnings not defective just because prior statements illegal. A confession obtained after proper constitutional warnings are given is not defective just because prior statements might be tainted with illegality. People v. Potter, 176 Colo. 510, 491 P.2d 974 (1971).

But time lapse between interrogations found insufficient to remove original taint from confession. People v. Algien, 180 Colo. 1, 501 P.2d 468 (1972).

"Totality of circumstances" standard. Courts must determine whether a confession given in a noncustodial setting is voluntary under the "totality of circumstances" standard. People v. Johnson, 671 P.2d 958 (Colo. 1983).

Confession properly suppressed where defendant's will was overborne by coercive conduct of police. Defendant's statements concerning drugs in his pockets were made after sustaining serious facial fractures and other injuries from the police and while he feared the police would use further force. People v. Vigil, 242 P.3d 1092 (Colo. 2010).

Trial court must consider all attendant circumstances to determine whether coercion of first confession infected second confession. Officers receiving subsequent confessions cannot merely be the beneficiaries of earlier pressure improperly applied to defendant. Defendant declined further medical treatment for his serious injuries, was released to the same officers who had inflicted the injuries, and was interrogated by those officers at 2:00 a.m. The evidence supports the trial court's ruling that defendant's subsequent statements were made under the lingering coercion of the physical force used against him and were thus properly suppressed. People v. Vigil, 242 P.3d 1092 (Colo. 2010).

B. When Motion Made.

Defendant entitled to object to confession's use at some stage in proceedings. A defendant has a constitutional right at some stage in the proceedings to object to the use of a confession and to have a "fair and reliable determination" on the issue of voluntariness. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968); Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

But pretrial hearing not constitutional requirement. While the better practice, at least with questions involving the admissibility of confessions and admissions, is to conduct a hearing before the jury becomes aware that the evidence exists, such has never made a pretrial hearing a constitutional requirement. Whether or not a reference to such evidence before the jury might result in a denial of the defendant's constitutional rights is a matter to be considered on a case-by-case basis. People v. Renfrow, 172 Colo. 399, 473 P.2d 957 (1970).

Issue of timeliness of motion moot when court entertains motion. When the court determines to entertain a motion to suppress and conduct a hearing thereon, the issue of the timeliness of the motion becomes moot and can no longer be a proper ground for denial thereof. People v. Robertson, 40 Colo. App. 386, 577 P.2d 314 (1978).

C. Procedure.

Procedural guidelines same for determining admissibility of confession and "voluntariness" of blood test. It is proper for a trial judge to resolve the matter as to the "voluntariness" of the blood alcohol test along the same procedural lines as would be followed in determining the admissibility, or nonadmissibility, of a confession. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

Express or contemporaneous objection to admission of confession unnecessary where voluntariness issue evident. It is not necessary that there be an express objection by the defendant to the admission of the confession by a motion to suppress or by contemporaneous objection, for the trial judge is required to conduct a hearing when it becomes evident to him that voluntariness is in issue, and an awareness on the part of the trial judge that the defendant is questioning the circumstances under which the statements were obtained is sufficient. Whitman v. People, 170 Colo. 189, 460 P.2d 767 (1969).

Denial of hearing on voluntariness is error. The denial of defense counsel's request for a hearing to determine whether defendant's statements following his arrest were voluntarily made is error. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

Trial judge, and not the jury, determines the admissibility of a confession where objection is made on the ground that the confession was involuntarily made. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

And court must make findings of fact and law. Before incriminating statements or confessions, to which objections have been made, can be admitted in evidence, the court must make findings of fact and law that the statements and confessions under consideration were voluntarily given with full understanding of the accused's rights. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968); Espinoza v. People, 178 Colo. 391, 497 P.2d 994 (1972).

Before a trial court may rule that a confession is voluntary and admissible, or that it is involuntary and must be suppressed, the court must make sufficiently clear and detailed findings of fact and conclusions of law on the record to permit meaningful appellate review. People v. McIntyre, 789 P.2d 1108 (Colo. 1990).

And the mere denial of defendant's motion to suppress, without more, does not satisfy these requirements. Espinoza v. People, 178 Colo. 391, 497 P.2d 994 (1972).

Showings required for admission of confession. On a motion to suppress a confession made to police officers without assistance of an attorney, the prosecution must prove, by clear and convincing evidence, that the defendant knowingly, voluntarily and intelligently waived his right to counsel and his right against self-incrimination and must prove, by a preponderance of the evidence, that the confession was made voluntarily. People v. Fish, 660 P.2d 505 (Colo. 1983).

Court finds whether statement voluntary, and whether defendant voluntarily waived constitutional privileges. Where the defendant makes a motion under this rule, it is incumbent upon the trial court to find whether the statement was given freely and voluntarily without any improper compelling influences and whether the defendant voluntarily, knowingly, and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Espinoza v. People, 178 Colo. 391, 497 P.2d 994 (1972).

And trial judge must find that the statement was voluntary beyond a reasonable doubt. People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

Jury precluded from fully resolving issue of voluntariness. Under the federal constitution, a fair and reliable determination of the voluntariness of a confession precludes the conficting jury from fully resolving the issue. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

Including the taking of a blood alcohol test. The defendant has the right to a ''fair and reliable determination'' on the issue as to whether he gave his consent to the taking of a blood alcohol test, and therefore, it is improper for the trial court to permit the jury to ''fully resolve'' this matter. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

But where issues resolved against defendant, weight given to confession left to jury. Where the trial court conducts a full ''in camera'' hearing to determine whether defendant's confession was voluntary and to ascertain whether defendant was advised of rights afforded him by Miranda v. Arizona, then, where these issues are resolved against defendant, the weight to be given to defendant's confession is properly left to jury. People v. Lovato, 180 Colo. 445, 506 P.2d 361 (1973).

And where evidence not sufficient to require exclusion, confession's voluntariness question for jury. Whenever there is evidence, not sufficient to require exclusion of the alleged confession, but sufficient to raise a question as to the weight to which it is entitled at the hands of the jury, the court must refer the question of the voluntariness of the confession to the jury under proper instructions. Baker v. People, 168 Colo. 11, 449 P.2d 815 (1969) (but see Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968); People v. Lovato, 180 Colo. 445, 506 P.2d 361 (1973).

However, judge must first affirmatively find confession voluntarily given before submitted to jury. The fact that the jury determines the weight to be given a confession, or, as is sometimes the practice, the fact that the issue of the voluntariness of a confession, though already determined by the trial court, is also submitted to the jury under proper instructions, in nowise alters the fundamental rule that before a confession is admitted into evidence the trial judge must first affirmatively find that the confession was voluntarily given. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

Or that blood alcohol test was taken with consent. Where an objection is made by a defendant to the introduction into evidence of the results of a blood alcohol test on the ground that the test was taken without his consent, the trial court, after hearing, must make a specific and affirmative finding that such consent was given before this line of testimony may with propriety be submitted to the jury for its consideration. Compton v. People, 166 Colo. 419, 444 P.2d 263 (1968).

When no evidence on voluntariness, matter not submitted to jury. When there is no evidence which raises a question as to the voluntariness of a confession, the matter need not be submitted to the jury. Baker v. People, 168 Colo. 11, 449 P.2d 815 (1969).

Evidence held sufficient to support finding of voluntary confession. People v. Valencia, 181 Colo. 36, 506 P.2d 743 (1973).

Rule 41.1. Court Order for Nontestimonial Identification

(a) Authority to Issue Order. A nontestimonial identification order authorized by this Rule may be issued by any judge of the Supreme, District, Superior, County Court, or Court of Appeals.

(b) Time of Application. A request for a nontestimonial identification order may be

made prior to the arrest of a suspect, after arrest and prior to trial or, when special circumstances of the case make it appropriate, during trial.

(c) Basis for Order. An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge, or by the procedures set forth in Crim. P. 41(c)(3), and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed;

(2) That there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

(d) Issuance. Upon a showing that the grounds specified in section (c) exist, the judge shall issue an order directed to any peace officer to take the person named in the affidavit into custody to obtain nontestimonial identification. The judge shall direct that the designated nontestimonial identification procedures be conducted expeditiously. After such identification procedures have been completed, the person shall be released or charged with an offense.

(e) Contents of Order. An order to take into custody for nontestimonial identification shall contain:

(1) The name or description of the individual who is to give the nontestimonial identification;

(2) The names of any persons making affidavits for issuance of the order;

(3) The criminal offense concerning which the order has been issued and the nontestimonial identification procedures to be conducted specified therein;

(4) A mandate to the officer to whom the order is directed to detain the person for only such time as is necessary to obtain the nontestimonial identification;

(5) The typewritten or printed name of the judge issuing the order and his signature.

(f) Execution and Return.

(1) Nontestimonial identification procedures may be conducted by any peace officer or other person designated by the judge. Blood tests shall be conducted under medical supervision, and the judge may require medical supervision for any other test ordered pursuant to this section when he deems such supervision necessary. No person who appears under an order of appearance issued pursuant to this section (f) shall be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures unless he is arrested for an offense.

(2) The order may be executed and returned only within 14 days after its date.

(3) The order shall be executed in the daytime unless the issuing judge shall endorse thereupon that it may be served at any time, because it appears that the suspect may flee the jurisdiction if the order is not served forthwith.

(4) The officer executing the order shall give a copy of the order to the person upon which it is served.

(5) No search of the person who is to give nontestimonial identification may be made, except a protective search for weapons, unless a separate search warrant has been issued.

(6) A return shall be made to the issuing judge showing whether the person named has been:

(I) Detained for such nontestimonial identification;

(II) Released or arrested.

(7) If, at the time of such return, probable cause does not exist to believe that such person has committed the offense named in the affidavit or any other offense, the person named in the affidavit shall be entitled to move that the judge issue an order directing that the products of the nontestimonial identification procedures, and all copies thereof, be destroyed. Such motion shall, except for good cause shown, be granted.

(g) Nontestimonial Identification Order at Request of Defendant. A person arrested for or charged with an offense may request a judge to order a nontestimonial identification procedure. If it appears that the results of specific nontestimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the

judge shall order the state to conduct such identification procedure involving the defendant under such terms and conditions as the judge shall prescribe.

(h) Definition of Terms. As used in this Rule, the following terms have the designated meanings:

(1) ''Offense'' means any felony, class 1 misdemeanor, or other crime which is punishable by imprisonment for more than one year.

(2) ''Nontestimonial identification'' includes, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing.

(i) Motion to Suppress. A person aggrieved by an order issued under this Rule may file a motion to suppress nontestimonial identification seized pursuant to such order and the said motion shall be granted if there were insufficient grounds for the issuance or the order was improperly issued. The motion to suppress the use of such nontestimonial identification as evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

Source: (f)(2) amended May 7, 2009, effective July 1, 2009; IP(c) amended and effective February 10, 2011; (f)(2) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For comment, ''Beyond the Davis Dictum: Reforming Nontestimonial Identification Evidence Rules and Statutes'', see 79 U. Colo. L. Rev. 189 (2008).

Limited intrusions into privacy on less than probable cause are constitutional when: (1) There must be an articulable and specific basis in fact for suspecting criminal activity at the outset; (2) the intrusion must be limited in scope, purpose, and duration; (3) the intrusion must be justified by substantial law-enforcement interests; and (4) there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer before the evidence obtained therefrom may be admitted in a criminal proceeding against the accused. People v. Madson, 638 P.2d 18 (Colo. 1981); People v. Harris, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

This rule is limited to nontestimonial identification evidence only and does not authorize the acquisition of testimony of communications protected by the privilege against self-incrimination. People v. Harris, 729 P.2d 1000 (Colo. App. 1986), aff'd, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

And this rule constitutional. This rule does not violate either the fourth amendment to the federal constitution or § 7 of art. II, Colo. Const. People v. Madson, 638 P.2d 18 (Colo. 1981); People v. Harris, 729 P.2d 1000 (Colo. 1986), aff'd, 762 P.2d 651 (Colo. 1988), cert. denied, 485 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988); People v. Wilson, 2012 COA 163M, 411 P.3d 11, rev'd on other grounds, 2015 CO 54M, 351 P.3d 1126.

Voluntary surrender of nontestimonial evidence waives constitutional protections. People v. Mattas, 645 P.2d 254 (Colo. 1982).

Propriety of examination determined by totality of circumstances. When the propriety of an identification is at issue, such as a lineup identification, the question of whether there is a substantial likelihood of irreparable misidentification is determined by examining the totality of the circumstances. People v. Johnson, 653 P.2d 737 (Colo. 1982).

Judicial order necessary only when authorities take someone into custody. Authorities must obtain a judicial order pursuant to this rule only when they take someone presently at liberty into custody for purposes of the nontestimonial identification. People v. Peoples, 200 Colo. 509, 616 P.2d 131 (1980).

And rule not applicable to suspect under arrest. The authority of law-enforcement officers to photograph, fingerprint, and measure a suspect while he is under arrest, confined, or awaiting trial has long been recognized, as well as the propriety of using photographs obtained thereby for identification purposes, and this rule is not applicable under those circumstances. People v. Reynolds, 38 Colo. App. 258, 559 P.2d 714 (1976).

This rule is not applicable to nontestimonial identifications of persons already in police custody pursuant to a lawful arrest. People v. Peoples, 200 Colo. 509, 616 P.2d 131 (1980).

Once probable cause exists to arrest, this rule is inapplicable. People v. Harris, 729 P.2d 1000 (Colo. App. 1986), aff'd, 762 P.2d 651 (Colo. 1988), cert. denied, 488 U.S. 985, 109 S. Ct. 541, 102 L. Ed. 2d 572 (1988).

Nor where defendant voluntarily submits to investigatory procedures. The court need not concern itself with the investigatory procedures of this rule where defendants voluntarily submit to fingerprinting, thereby waiving their constitutional protections. People v. Hannaman, 181 Colo. 82, 507 P.2d 466 (1973).

Rule applies only to obtaining nontestimonial identification from the defendant himself and not to procedures on a third party. People v. Braxton, 807 P.2d 1214 (Colo. App. 1990).

Prosecution could not be sanctioned for police conduct in which it did not participate. Trial court may not preclude prosecution from applying for and obtaining order for nontestimonial identification evidence though blood and hair samples obtained by police through a warrantless search were suppressed. People v. Diaz, 55 P.3d 1171 (Colo. 2002).

Judge may order fingerprints of individual to be obtained when it is shown by an affidavit that: (1) A known criminal offense has been committed; (2) there is reason to suspect that the individual is connected with the perpetration of a crime; and (3) the individual's fingerprints are not in the files of the applying agency. Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971).

Information obtained from anonymous tip may form basis for affidavit used to obtain an order for nontestimonial identification pursuant to this rule. People v. Davis, 669 P.2d 130 (Colo. 1983).

Nontestimonial evidence suppressed where prosecution fails to establish that affidavits sworn to. Where the prosecution fails to establish at trial that the affidavits required by section (c) were sworn to or affirmed before the court which issued the nontestimonial identification order, the nontestimonial evidence is properly suppressed. People v. Hampton, 198 Colo. 566, 603 P.2d 133 (1979).

No deprivation of procedural safeguards when county court issued a nontestimonial identification order even though the offenses involved were committed in another jurisdiction. Ginn v. County Court, 677 P.2d 1387 (Colo. App. 1984).

Admissibility of statements of defendant while in custody for nontestimonial identification procedures. A statement of a suspect who is detained pursuant to an order to obtain nontestimonial evidence may be admissible under circumstances in which the suspect initiates a conversation with police and, despite a lack of coercion or interrogation, voluntarily offers information. People v. Wilson, 841 P.2d 337 (Colo. App. 1992).

This rule not for exclusive use of Colorado officials investigating offenses occurring in Colorado. Where the requirements of this rule are met, it is not an abuse of discretion for a county court to issue a nontestimonial identification order even though the offenses involved were committed in another jurisdiction. Ginn v. County Court, 677 P.2d 1387 (Colo. App. 1984).

Statement in affidavit not a judicial admission. Statement that probable cause for arrest did not yet exist in an affidavit in support of an order for nontestimonial identification is not a judicial admission. People v. Page, 907 P.2d 624 (Colo. App. 1995).

Court erred in suppressing DNA evidence obtained during identification procedure under this rule. Defendant effectively waived right to the presence of counsel appointed in one case through a knowing and voluntary Miranda waiver during an investigation of a crime in another county that may have yielded evidence in the first county's case. Defendant invoked the right to counsel after a proper Miranda warning. The detectives in the second county followed the Edwards v. Arizona (451 U.S. 477 (1981)) bright line rule and ceased questioning defendant until defendant reinitiated contact with the detectives. An effective waiver of fifth amendment rights, including the right to counsel, will usually effect a waiver of sixth amendment rights, even after appointment of counsel, so long as the defendant is aware of the particular offense being investigated. People v. Luna-Solis, 2013 CO 21, 298 P.3d 927.

Applied in People v. Morgan, 619 P.2d 64 (Colo. 1980); Richardson v. District Court, 632 P.2d 595 (Colo. 1981); People v. District Court, 664 P.2d 247 (Colo. 1983).

Rule 41.2. Interlocutory Appeal from the County Court

Repealed July 16, 1992, effective November 1, 1992.

Rule 41.3. Interlocutory Appeal from District Court

See Colorado Appellate Rules.

Rule 42. No Colorado Rule

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the preliminary hearing, at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

(1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) At a conference or argument upon a question of law.

(3) At a reduction of sentence under Rule 35.

(d) Waiver. The voluntary failure of the defendant to appear at the preliminary hearing may be construed by the court as an implied waiver of his right to a preliminary hearing.

(e) Presence of the Defendant by Interactive Audiovisual Device.

(1) Definitions. As used in this Rule 43:

(I) ''Interactive audiovisual device'' means a television or computer based audiovisual system capable of two-way transmission and of sufficient audio and visual quality that persons using the system can view and converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device, in lieu of the defendant's physical presence, for the following hearings:

(I) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;

(II) Further appearances for the filing of charges or for setting the preliminary hearing;

(III) Hearings to modify bail;

(IV) Entry of pleas and associated sentencing or probation violation hearings in misdemeanor, petty offense, and traffic cases where the offense charged is not included within those offenses enumerated in C.R.S. 24-4.1-302 (I).

(V) Waivers of preliminary hearing;

(VI) Restitution hearings;

(VII) Appeal bond hearings;

(VIII) Crim.P. 35(B) hearings.

(3) Minimum standards. Every use of an interactive audiovisual device must comply with the following minimum standards in addition to those set forth in Crim.P. 43(e)(l):

(I) If defense counsel appears, such appearance shall be at the same physical location as the defendant if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

(II) No defendant shall be compelled to appear by interactive video device at a hearing pursuant to subsection (e)(2)(III), (VI) or (VIII) of this rule.

(III) Installation of the interactive audiovisual device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe, and, where appropriate, participate in the hearing.

(IV) Any hearing held pursuant to Crim.P. 43(e)(2)(IV) shall be conducted with the written consent of the defendant. The court shall advise a defendant of the following prior to obtaining a defendant's written consent and prior to any plea discussions being conducted:

(a) The rights enumerated in Crim.P. 5(2).

(b) The defendant has the right to appear in person and will not be prejudiced if he chooses to do so.

(c) The defendant has the right to have his or her counsel appear with him or her at the same physical location.

(d) The defendant's decision to appear by use of an interactive audiovisual device must be voluntary on the defendant's part and must not be the result of undue influence or coercion on the part of anyone.

(e) If the defendant is pro se, the identity and role of all individuals with whom the defendant may have contact through the interactive audiovisual device.

(V) An interactive audiovisual system used for hearings pursuant to Crim.P. 43(e)(2)(IV) shall include the ability to electronically transfer documents between the defendant and the court and such transferred documents shall be considered the same as originals.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device.

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring under Crim.P. 5, the court may conduct the hearing by use of an interactive audiovisual procedure which does not comply with the minimum standards set forth in subsection (3).

Source: (e) added and adopted December 19, 1996, effective March 1, 1997; (e) amended and adopted and comment added and adopted May 11, 2006, effective July 1, 2006; (e) amended and effective June 17, 2010.

COMMENT

The court recommends that defendants be informed of their rights pursuant to this rule by showing such defendants a pre-recorded video containing the judicial advisement contained in this rule. The video should be shown prior to any jail authorities asking whether a defendant planned to elect to participate by audiovisual device. The court recognized that such audiovisual devices will be used to conduct plea discussions. Accordingly, the pre-recorded video should also explain the plea discussion process.

ANNOTATION

Waiver required for absence from trial. The trial court must establish a voluntary and intelligent waiver by a defendant concerning an absence from trial. People v. Campbell, 785 P.2d 153 (Colo. App. 1989), rev'd on other grounds, 814 P.2d 1 (Colo. 1991).

Waiver must be knowing, intelligent, and voluntary. Waiver is knowing and intelligent when a defendant has had notice of the consequences of not appearing. People v. Stephenson, 165 P.3d 860 (Colo. App. 2007).

Absence from trial compelled by medical necessity may generally be deemed voluntary, and the determination of whether defendant is ''voluntarily absent'' requires a fact-specific inquiry into the type of medical condition, the circumstances surrounding the absence, and defendant's conduct and statements. People v. Stephenson, 165 P.3d 860 (Colo. App. 2007).

A defendant's absence may be deemed voluntary when the record establishes that defendant created the medical necessity by attempting suicide in order to effect his or her absence from trial. People v. Price, 240 P.3d 557 (Colo. App. 2010).

Removal of defendant from court during trial did not abridge defendant's constitutional rights. Where defendant had been warned numerous times about his courtroom behavior including getting up from his seat and moving towards judge on one occasion and physically attacking a witness on the witness stand on another so that court would either have to shackle, bind, and gag defendant in court or remove him to another room where he could watch the trial via closed-circuit television and freely talk to his attorney by telephone, trial court used constitutionally permissible method pursuant to (b)(2) to deal with disruptive defendant. People v. Davis, 851 P.2d 239 (Colo. App. 1993).

Removing defendant from the courtroom, rather than the child witness, violated defendant's due process right where defendant did not stipulate to the removal. People v. Aldridge, 2018 COA 131, __ P.3d __.

Although the trial court failed to include the mandatory parole period during the sentencing period and mittimus, it is not a violation of the defendant's right to be present at sentencing to subsequently correct the mittimus to include the mandatory parole period. People v. Nelson, 9 P.3d 1177 (Colo. App. 2000).

Trial court's action in making its resentencing decision the subject of a written order, rather than reconvening a hearing to announce that decision, was harmless. Defendant was present at both his sentencing and resentencing hearings when the information relied upon by the court for its sentencing decision was presented, and defendant raised no objection when, at the completion of the resentencing hearing, the court reserved its decision on resentencing and stated its intention to announce that decision at a later date. People v. Luu, 983 P.2d 15 (Colo. App. 1998).

Due process does not require the defendant's presence when his presence would be useless, or the benefit nebulous. People v. Luu, 983 P.2d 15 (Colo. App. 1998).

Applied in People v. Trefethen, 751 P.2d 657 (Colo. App. 1987).

Rule 44. Appearance of Counsel

(a) Appointment of Counsel. If the defendant appears in court without counsel, the court shall advise the defendant of the right to counsel. In an appropriate case, if, upon the defendant's affidavit or sworn testimony and other investigation, the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent the defendant at every stage of the trial court proceedings. In any misdemeanor case the court may appoint as counsel law students who shall act under the provisions of C.R.C.P. 205.7. No lawyer need be appointed for a defendant who, after being advised, with full knowledge of his rights thereto, elects to proceed without counsel. Except in a case in which a law student has been appointed, unless good cause exists otherwise, the court shall appoint the state public defender.

(b) Multiple Representation by Counsel. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

(c) Request for Withdrawal of a Lawyer During Proceedings. Except as provided in section (e), withdrawal of a lawyer in a criminal case is a matter within the sound discretion of the court. In exercising such discretion, the court shall balance the need for orderly administration of justice with the facts underlying the request.

(d) Procedure for Withdrawal During Proceedings.

(1) A lawyer may withdraw from a case only upon order of the court. In the discretion of the court, a hearing on a motion to withdraw may be waived with the consent of the prosecution and if a written substitution of counsel is filed which is signed by current counsel, future counsel and the defendant. A request to withdraw shall be in writing or may be made orally in the discretion of the court and shall state the grounds for the request. A request to withdraw shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Advance notice of a request to withdraw shall be given to the defendant before any hearing, if practicable. Such notice to withdraw shall include:

(I) That the attorney wishes to withdraw;

(II) The grounds for withdrawal;

(III) That the defendant has the right to object to withdrawal;

(IV) That a hearing will be held and withdrawal will only be allowed if the court approves;

(V) That the defendant has the obligation to appear at all previously scheduled court dates;

(VI) That if the request to withdraw is granted, then the defendant will have the obligation to hire other counsel, request the appointment of counsel by the court or elect to represent himself or herself.

(2) Upon setting of a hearing on a motion to withdraw, the lawyer shall make reasonable efforts to give the defendant actual notice of the date, time and place of the hearing. No hearing shall be conducted without the presence of the defendant unless the motion is made subsequent to the failure of the defendant to appear in court as scheduled. A hearing need not be held and notice need not be given to a defendant when a motion to withdraw is filed after a defendant has failed to appear for a scheduled court appearance and has not reappeared within six months.

(e) Termination of Representation.

(1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate at the conclusion of trial court proceedings and after a final determination of restitution. Trial court proceedings shall conclude at the point in time:

(I) When dismissal is granted by the court and no timely appeal has been filed;

(II) When an order enters granting a deferred prosecution, deferred sentence, or probation;

(III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim.P. 35(b) or such motion so filed is ruled on; or

(IV) When a notice of appeal is filed by the defendant.

(2) At the time a deferred prosecution or deferred sentence is granted or at the time sentence is imposed upon conviction, the court shall inform the defendant when representation shall terminate.

Source: Entire rule amended June 19, 1986, effective January 1, 1987; entire rule amended and adopted December 19, 1996, effective March 1, 1997; (e) amended and adopted September 10, 2009, effective January 1, 2010; (a) amended and effective March 25, 2015.

ANNOTATION

Law reviews. For note, ''Right to Counsel in Colorado'', see 34 Rocky Mtn. L. Rev. 343 (1962). For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses cases relating to the right to counsel, see 15 Colo. Law. 1578 (1986).

Annotator's note. For other annotations concerning legal counsel for the indigent, see § 16 of art. II, Colo. Const., and § 18-1-403.

Court to advise defendant of right to counsel and to make financial inquiry. The rule imposes upon the trial court an affirmative duty to advise all criminal defendants, whether affluent or indigent, who appear without counsel of the right to counsel, and to inquire into the defendant's financial ability to employ counsel if pertinent. Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965).

However, a defendant is not entitled to a presumption of poverty. Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965).

Defendant with sufficient means accorded reasonable opportunity to employ attorney. If it appears that a defendant has sufficient means to employ an attorney of his own choosing, then he must be accorded a reasonable opportunity to do so. Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965).

Attorney assigned to represent indigent defendant at every stage of trial court proceedings. If upon the defendant's affidavit or sworn testimony and other investigation the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent him at every stage of the trial court proceedings. Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965).

Including imposition of sentence. This rule provides that in the case of an indigent defendant in a criminal proceeding, an attorney shall be assigned to represent him at every stage of the trial court proceedings, which includes imposition of sentence. The imposition of sentence is certainly one stage of the proceedings before the trial court; indeed, it is perhaps the most critical stage of the proceeding. John Doe v. People, 160 Colo. 215, 416 P.2d 376 (1966); Gehl v. People, 161 Colo. 535, 423 P.2d 332 (1967).

So, if a defendant later insists on this right, he is entitled to have the sentence vacated and a new one imposed, at which time he should be represented by an attorney and provided counsel if he is unable to employ his own lawyer. Gehl v. People, 161 Colo. 535, 423 P.2d 332 (1967).

Right to counsel extended to contempt proceedings resulting in imprisonment. The right to counsel must be extended to all con-

tempt proceedings, whether labeled civil or criminal, which result in the imprisonment of the witness. Padilla v. Padilla, 645 P.2d 1327 (Colo. App. 1982).

Previously, appointment of counsel on appeal was generally denied to indigents in all cases except capital. In re Petition of Griffin, 152 Colo. 347, 382 P.2d 202 (1963).

Court must establish that waiver of right made knowingly and intelligently. Once it is established that a defendant has a right to counsel, the court must establish that any waiver of that constitutional right is made knowingly and intelligently. Padilla v. Padilla, 645 P.2d 1327 (Colo. App. 1982).

Court obligated to see that appointed counsel of sufficient ability and experience. When a court is called upon to appoint counsel for a defendant in a criminal case, it is its duty to see that counsel of sufficient ability and experience is assigned to fairly represent the defendant. Carlson v. People, 91 Colo. 418, 15 P.2d 625 (1932).

Structural error applies when defendant's counsel was allowed to withdraw in violation of sections (c) and (d)(2) because permitting counsel to withdraw over defendant's objection, based on information provided to the court outside of defendant's presence, and without balancing the need for orderly administration of justice with the facts underlying the request, denied him his counsel of choice. People v. Cardenas, 2015 COA 94M, 411 P.3d 956.

Failure to include defendant in hearing on his attorney's motion to withdraw requires reversal of convictions. Defendant was not present in chambers when his attorney spoke to the judge about withdrawal. Because defendant's presence was required by section (d)(2), the judge abused his discretion in granting the motion without including defendant in the proceedings. People v. Cardenas, 2015 COA 94M, 411 P.3d 956.

Failure to inquire about defendant's objections to or confusion about attorney's motion to withdraw before allowing attorney to withdraw requires reversal of convictions. People v. Cardenas, 2015 COA 94M, 411 P.3d 956.

One consenting to representation by counsel employed by another cannot complain counsel ineffective. One who has knowledge that he could have court appoint counsel if desired but consents to representation by counsel employed by another for him, cannot complain that counsel was ineffective without a showing of substantial prejudice to the defendant because of counsel's representation. Bresnahan v. People, 175 Colo. 286, 487 P.2d 551 (1971).

Joint representation does not result in a per se violation of the right to effective counsel. Neither defendant testified, so defense counsel was not faced with the possibility of commenting on the credibility of one to the detriment of the other. People v. Tafoya, 833 P.2d 841 (Colo. App. 1992).

Trial counsel was counsel of record at the time the 45-day period for filing a notice of appeal under C.A.R. 4(b) expired where trial counsel filed a Crim. P. 35(b) motion before appellate counsel was appointed and trial counsel had not moved to withdraw. People v. Baker, 104 P.3d 893 (Colo. 2005).

Counsel's representation of defendant did not terminate pursuant to the fee agreement between counsel and defendant. Counsel's representation terminates upon the occurrence of an event set forth in section (e) of this rule. Counsel may not enter into an agreement with defendant to terminate representation at an earlier date than prescribed by section (e). People v. Lancaster, 2018 COA 168, __ P.3d __.

After trial court found that defendant was engaging in trial-delaying conduct, it abused its discretion by denying defense counsels' motion to withdraw. The court arbitrarily, unreasonably, and unfairly determined that defense attorneys could effectively represent defendant despite his discharge of them and the court's previous finding that a conflict of interest existed between defense counsel and defendant because of a malpractice and breach of contract lawsuit defendant had commenced against them. The court should have granted defense counsels' motion to withdraw and advised defendant, in accordance with section (a), that he had the obligation to hire other counsel, request the appointment of counsel by the court, or elect to represent himself. In view of defendant's delay-causing conduct, the court should have explained to defendant the consequences of engaging in the conduct, which can result in an implied waiver of the right to counsel, and explained the risks of proceeding without counsel. People v. DeAtley, 2014 CO 45, 333 P.3d 61.

Applied in Buckles v. People, 162 Colo. 51, 424 P.2d 774 (1967).

Rule 45. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, the day of the event from which the designated period of time begins to run is not to be included. Thereafter, every day shall be counted including holidays, Saturdays, and Sundays. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day

which is not a Saturday, a Sunday, or a legal holiday. The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. As used in these Rules, ''legal holiday'' includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement. When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order; or,

(2) Upon motion, permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect.

(c) to (e) Repealed.

(f) Inmate Filings. A document filed by an inmate confined in an institution is timely filed with the court if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; (a) and (e) amended and Comment added May 7, 2009, effective July 1, 2009; (a) amended, (c), (d), and (e) repealed, and comment deleted and adopted December 14, 2011, effective July 1, 2012; comment added and adopted June 21, 2012, effective July 1, 2012.

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

Time computation is sometimes ''forward,'' meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting ''backward'' means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

Law reviews. For article, '''Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines'', see 41 Colo. Law. 33 (January 2012).

Rule preserves defendant's right to raise fourth amendment issue. Section (d) of this rule which must be read in conjunction with Rule 41(e), Crim. P., adequately preserves a defendant's right to raise a fourth amendment issue, while carrying out the salutary purpose of not commingling the fourth amendment issue with the guilt issue. Morgan v. People, 166 Colo. 451, 444 P.2d 386 (1968).

Purpose of section (d) is to allow time for adequate preparation. People v. District Court, 189 Colo. 159, 538 P.2d 887 (1975).

And notice served same day as pretrial hearing clear violation of rule. Where notice of motion to disqualify the district attorney

from further participation in a criminal case is given to the district attorney's office the same morning that the hearing on the motion was held, the consideration of this motion by the trial court when the district attorney did not have fair notice and an opportunity to defend himself is a clear violation of the provisions of this rule. People v. District Court, 189 Colo. 159, 538 P.2d 887 (1975).

But failure to object to lack of notice constitutes waiver. If defendant fails to object to the lack of notice at the hearing prior to trial or fails to request a continuance, his silence constitutes a waiver of the five-day notice. Maraggos v. People, 175 Colo. 130, 486 P.2d 1 (1971).

Timely motion for new trial is not jurisdictional in the sense that without it the court would lack authority to adjudicate the subject matter. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Rather, it is a procedural prerequisite intended to assure that the matters appealed have been considered by the trial court. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

And prosecution's failure to object waives timeliness issue on appeal. The people, by failing to object to the trial court's hearing and deciding the new trial motion, waived their right to raise the timeliness issue on appeal. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Excusable neglect. A trial court may extend the time for filing a motion on the basis that failure to act on time was the result of excusable neglect if there was a factual finding to support a claim of ineffective assistance of counsel. Swainson v. People, 712 P.2d 479 (Colo. 1986).

Excusable neglect does not include family considerations or lack of knowledge of the law for purposes of extending the time to file a Crim. P. 35 motion. People v. Delgado, 83 P.3d 1144 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 634 (Colo. 2005).

Burden of showing excusable neglect under section (b) is upon the defendant. People v. Dillon, 655 P.2d 841 (Colo. 1982).

Defendant wrongfully believing appeal being processed by attorney allowed to file untimely motion. In light of the defendant's uncontroverted belief that his attorney is processing his appeal, the trial court abuses its discretion when it later denies defendant's motion to file an untimely motion and thereby perfect his appeal. People v. Dillon, 631 P.2d 1153 (Colo. App. 1981).

Considerations governing determination of effect of time limitations in criminal cases and in civil cases. People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Mere speculation regarding the court's disposition of a motion for a continuance or to recall a witness does not obviate the defendant's duty to seek such procedures if the defendant is to base his claim of prejudice on the inability to prepare new theories of defense or to cross-examine past witnesses in light of previously undisclosed evidence. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Applied in People v. Masamba, 39 Colo. App. 187, 563 P.2d 382 (1977); People v. Houpe, 41 Colo. App. 253, 586 P.2d 241 (1978); People v. Peterson, 656 P.2d 1301 (Colo. 1983).

Rule 46. Bail

In considering the question of bail, the Court shall be governed by the statutes and the Constitution of the State of Colorado and the United States Constitution.

Source: Entire rule repealed and readopted April 2, 1987, effective September 1, 1987.

Cross references: For right to bail and exceptions thereto, see § 19 of article II of the state constitution; for prohibition on excessive bail, see § 20 of article II of the state constitution; for bailable offenses, see article 4 of title 16, C.R.S.

ANNOTATION

Rule does not authorize setting aside a judgment on a forfeiture of a bond. People v. Caro, 753 P.2d 196 (Colo. 1988) (decided under rule before 1987 repeal and readoption).

Rule 46.1. Bail — County Courts

Repealed April 2, 1987, effective September 1, 1987.

Rule 47. Motions

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

(b) A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than 7 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time.

Source: Entire rule amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Court is justified in considering statements in affidavits in support of motion to dismiss indictments as evidence of the facts asserted. People v. Lewis, 183 Colo. 236, 516 P.2d 416 (1973).

If party disagrees with allegations in affidavits attached to motion to dismiss indictments, he should file counter affidavits or call witnesses to dispute the allegations. People v. Lewis, 183 Colo. 236, 516 P.2d 416 (1973).

Applied in People v. Martinez, 43 Colo. App. 419, 608 P.2d 359 (1979); People v. Buggs, 631 P.2d 1200 (Colo. App. 1981).

Rule 48. Dismissal

(a) By the State. No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and with the court's consent and approval. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be filed during the trial without the defendant's consent.

(b) By the Court.

(1) If, after the filing of a complaint, there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a district court, the court may dismiss the prosecution. Except as otherwise provided in this Rule, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, the pending charges shall be dismissed, whether he is in custody or on bail, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(2) If trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months period from the date upon which the continuance was granted.

(3.5) If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, the period in which the trial shall be had is extended for an additional six months' period from the date of the defendant's next appearance.

(4) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The

time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(5) To be entitled to a dismissal under subsection (b)(1) of this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this section.

(5.1) If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this rule.

(6) In computing the time within which a defendant shall be brought to trial as provided in subsection (b)(1) of this Rule, the following periods of time shall be excluded:

(I) Any period during which the defendant is incompetent to stand trial or is unable to appear by reason of illness or physical disability or is under observation or examination at any time after the issue of insanity, incompetency or impaired mental condition is raised;

COMMITTEE COMMENT

This amendment to Crim. P. 48(b)(6)(I) is designed to bring this Rule into conformity with its corresponding statute, Section 18-1-405(6)(A), 8B C.R.S. (1994 Supp.).

(II) The period of delay caused by an interlocutory appeal, an appeal from an order that dismisses one or more counts of a charging document prior to trial, or after issuance of a rule to show cause in an original action brought under Colorado Appellate Rule 21, whether commenced by the defendant or by the prosecution;

(III) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(IV) The period or delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial;

(V) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

(VI) The period of delay caused at the instance of the defendant;

(VII) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(A) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(B) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court entered specific findings with respect to the justification.

(VIII) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs (I), (II), (III), (IV), and (V) of this subsection (6), not to exceed three months.

(IX) The period of delay between the filing of a motion pursuant to section 18-1-202 (11) and any decision by the court regarding such motion, and if such decision by the court transfers the case to another county, the period of delay until the first appearance of all the parties in a court of appropriate jurisdiction in the county to which the case has been transferred, and in such event the provisions of subsection (7) of this section shall apply.

(7) If a trial date has been fixed by the court and the case is subsequently transferred to a court in another county, the period within which trial must be had is extended for an

additional three months from the date of the first appearance of all of the parties in a court of appropriate jurisdiction in the county to which the case has been transferred.

Source: (b)(3.5), (b)(5.1), (b)(6)(VIII), (b)(6)(IX), and (b)(7) added February 4, 1993, effective April 1, 1993; (b)(6)(I) amended and committee comment added, effective January 26, 1995; entire rule amended and adopted June 27, 2002, effective July 1, 2002.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Criminal Procedure'', which discusses a Tenth Circuit decision dealing with dismissal of indictments without prejudice, see 62 Den. U. L. Rev. 185 (1985). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses cases relating to speedy trials, see 15 Colo. Law. 1595 and 1617 (1986). For article, ''The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part I'', see 31 Colo. Law. 115 (July 2002). For article, ''The Ins and Outs, Stops and Starts of Speedy Trial Rights in Colorado—Part II'', see 31 Colo. Law. 59 (Aug. 2002).

Annotator's note. For other annotations concerning speedy trials, see § 16 of art. II, Colo. Const., and § 18-1-405.

Intent of rule. This rule was designed to render the federal and state constitutional rights to a speedy trial more effective. Sweet v. Myers, 200 Colo. 50, 612 P.2d 75 (1980); People v. Sanchez, 649 P.2d 1049 (Colo. 1982).

An accused person's right to a speedy trial is ultimately grounded on the federal and state constitutions, and statutes relating to speedy trial are intended to render these constitutional guarantees more effective. Simakis v. District Court, 194 Colo. 436, 577 P.2d 3 (1978).

This rule was designed to substantially conform to § 18-1-405. Carr v. District Court, 190 Colo. 125, 543 P.2d 1253 (1975).

Both simplify constitutional parameters. This rule and § 18-1-405 clarify and simplify the parameters of the constitutional right to a speedy trial. Carr v. District Court, 190 Colo. 125, 543 P.2d 1253 (1975); People v. Cisneros, 193 Colo. 141, 563 P.2d 355 (1977); People v. Chavez, 779 P.2d 375 (Colo. 1989).

Policies underlying this rule and § 18-1-405, are the same as those relative to the uniform mandatory disposition of detainers act, §§ 16-14-101 to 16-14-108. People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Applied in People v. Flowers, 190 Colo. 453, 548 P.2d 918 (1976); Murphy v. District Court, 195 Colo. 149, 576 P.2d 163 (1978); Reliford v. People, 195 Colo. 549, 579 P.2d 1145 (1978); People v. District Court, 196 Colo. 420, 586 P.2d 1329 (1978); People v. Gonzales, 198 Colo. 546, 603 P.2d 139 (1979); People v. Wimer, 43 Colo. App. 237, 604 P.2d 1183 (1979); Jeffrey v. District Court, 626 P.2d 631 (Colo. 1981); People v. Small, 631 P.2d 148 (Colo. 1981); People v. Jones, 631 P.2d 1132 (Colo. 1981); People v. District Court, 632 P.2d 1022 (Colo. 1981); People v. Marquez, 644 P.2d 59 (Colo. App. 1981); People v. Velasquez, 641 P.2d 943 (Colo. 1982); People v. Ashton, 661 P.2d 291 (Colo. App. 1982); People v. Olds, 656 P.2d 705 (Colo. 1983); People v. Watson, 666 P.2d 1114 (Colo. App. 1983); People v. Harding, 671 P.2d 975 (Colo. App. 1983); People v. Castango, 674 P.2d 978 (Colo. App. 1983).

II. BY THE STATE.

District attorney's common-law power to enter nolle prosequi. Prior to the enactment of this rule, the common-law rule was that the district attorney had the power to enter a nolle prosequi in a criminal case without the consent of the court. People v. Lichtenstein, 630 P.2d 70 (Colo. 1981).

Dismissal is function of district attorney. Neither the complaining witness nor the trial judge may dismiss a prosecution on behalf of the state; that is the function of the district attorney. People v. Dennis, 164 Colo. 163, 433 P.2d 339 (1967).

Trial court's discretion in reviewing motion to dismiss. In exercising its discretion in reviewing a motion to dismiss charges, the trial court should not serve merely as a rubber stamp for the prosecutor's decision. People v. Lichtenstein, 630 P.2d 70 (Colo. 1981).

The trial court's refusal to consent to a dismissal of charges is appropriate only where the evidence is clear and convincing that the interests of the defendant or the public are jeopardized by the district attorney's refusal to prosecute. People v. Lichtenstein, 630 P.2d 70 (Colo. 1981).

Court abused its discretion in denying prosecution's motion to dismiss absent finding that prosecution was not acting in good

faith in seeking to dismiss charges. The question is not whether there may be good reasons to deny the prosecution's motion to dismiss, such as the victim's opposition to dismissal, but whether the prosecution sought to dismiss the charges based upon a good faith exercise of prosecutorial discretion, in this case, a candid assessment of the strength of the victim's and potential witnesses' testimony. While the prosecution's evidentiary concerns might not be insurmountable, it is not the trial court's role to determine whether those weaknesses may be overcome, but whether the prosecution's analysis was conducted in good faith. People v. Storlie, 2014 CO 47, 327 P.3d 243.

III. BY THE COURT.

A. In General.

Rule is independent of constitutional provisions. This rule is tied to the historical right and the inherent power of the court to dismiss a case for want of prosecution and is separate and independent of the constitutional right to a speedy trial. People ex rel. Coca v. District Court, 187 Colo. 280, 530 P.2d 958 (1975).

The right to a speedy trial is guaranteed by § 16 of art. II, Colo. Const., and this constitutional protection is independent of any right established by statute or rule. People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975).

Provisions of this rule and the constitutional issue as to denial of speedy trial are mutually exclusive, and the resolution of one does not necessarily determine the resolution of the other. Potter v. District Court, 186 Colo. 1, 525 P.2d 429 (1974).

The obvious purpose of this rule is to prevent ''dillydallying'' on the part of the district attorney or the court in a criminal proceeding. People v. Bates, 155 Colo. 277, 394 P.2d 134 (1964); Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Dismissal of charges sufficient to protect defendant's rights. Where defendant's trial took place within six months of defendant's plea of not guilty to the charges in the second indictment, and while the trial was not held until more than six months after defendant's plea to the charges of the original indictment, those charges were dismissed by the trial court, such dismissal was sufficient to protect defendant's rights under § 18-1-405 and section (b)(1) of this rule. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Speedy trial is calculated separately for each criminal complaint. When charges in a complaint are properly dismissed within the speedy trial period without prejudice, they are a nullity. If defendant is arraigned under new charges, even if they are identical to the dismissed charges, the speedy trial period begins anew. Huang v. County Court of Douglas County, 98 P.3d 924 (Colo. App. 2003).

No dismissal where not authorized by rule or due process. The trial court may not, on its own motion, dismiss an action on behalf of the defendant prior to trial over the objection of the district attorney where such dismissal is not authorized under the rules and is not required by due process. People v. Butz, 37 Colo. App. 212, 547 P.2d 262 (1975).

Outrageous governmental conduct need not be prejudicial to defendant to constitute a violation of due process. People v. Auld, 815 P.2d 956 (Colo. App. 1991).

Trial court had no authority to dismiss case based on the theory that it was an abuse of prosecutorial discretion to retry the case. A district attorney has broad discretion in determining who shall be prosecuted and what crimes shall be charged, and such discretion may not be controlled or limited by judicial intervention, except in unusual circumstances which result in a denial of a particular defendant's due process right to fundamental fairness. People v. Schwartz, 678 P.2d 1000 (Colo. 1984).

Court's practice of postponing arraignment until all pretrial matters are concluded thwarts purpose of this rule and § 18-1-405. People v. Chavez, 779 P.2d 375 (Colo. 1989).

It is the joint responsibility of the district attorney and the trial court to assiduously avoid any occasion for a useless and unnecessary delay in the trial of a criminal case. People v. Murphy, 183 Colo. 106, 515 P.2d 107 (1973).

Relief in nature of prohibition appropriate remedy. Relief in the nature of prohibition under C.A.R. 21, is an appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. Marquez v. District Court, 200 Colo. 55, 613 P.2d 1302 (1980).

Relation of section (b) to Rule 248(b), C.M.C.R. Section (b) is the parallel rule to Rule 248(b), C.M.C.R. Bachicha v. Municipal Court, 41 Colo. App. 198, 581 P.2d 746 (1978).

Uniform Mandatory Disposition of Detainers Act controls in conflict with rule. When there is a conflict with the general speedy trial provisions of the Uniform Mandatory Disposition of Detainers Act and this rule, the provisions of the uniform act control. People v. Swazo, 199 Colo. 486, 610 P.2d 1072 (1980).

B. Right to Speedy Trial.

Right to a speedy trial is not only for the benefit of the accused, but also for the protection of the public. It is essential that an early determination of guilt be made so that the innocent may be exonerated and the guilty punished. Jaramillo v. District Court, 174 Colo. 561, 484

P.2d 1219 (1971); People v. Martin, 732 P.2d 1210 (Colo. 1987).

Speedy trial provisions are designed to foster more effective prisoner treatment and rehabilitation by eliminating, as expeditiously as possible, the uncertainties surrounding outstanding criminal charges. Simakis v. District Court, 194 Colo. 436, 577 P.2d 3 (1978).

Court lacks jurisdiction to try defendant in violation of speedy trial right. A court would be proceeding without jurisdiction if it were to try criminal defendant in violation of his rights under the Colorado speedy trial statute and the rules of the Colorado supreme court. Hampton v. District Court, 199 Colo. 104, 605 P.2d 54 (1980).

Determination of denial of speedy trial is judicial question. The question of determining when an accused has been denied a speedy trial under this rule, or under the constitution, is necessarily a judicial question. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Appealability. Where determination that delays in bringing defendant to trial involved resolutions of fact questions, the district attorney could not appeal such determinations. People v. Murphy, 183 Colo. 106, 515 P.2d 107 (1973).

Speedy public trial is a relative concept requiring judicial determination on a case-by-case basis. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

Determined by circumstances of each case. A speedy public trial is a relative concept, because the circumstances of each case determine whether it has been afforded. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

The circumstances of each case must be examined to determine whether a speedy trial has been afforded, and in making this determination the court must consider the length of the pretrial delay, the reasons for it, whether the defendant has demanded a speedy trial, and whether any prejudice actually resulted to the defendant. All of these factors are interrelated and must be considered together with any other relevant circumstances. Gelfand v. People, 196 Colo. 487, 586 P.2d 1331 (1978).

Such as defendant's understanding of when six-month period begins to run. Where defendant's expressed understanding was that the six-month period of the speedy trial statute would commence to run at the end of his continuance, the failure to try defendant within six months of the granting of the continuance does not entitle him to dismissal of charges. Baca v. District Court, 198 Colo. 486, 603 P.2d 940 (1979).

The speedy trial statute (§ 18-1-405) is intended to implement the constitutional right to a speedy trial by requiring dismissal of the case whenever the defendant is not tried within the six-month period and the delay does not qualify for one of the express exclusionary categories set out in the statute. People v. Deason, 670 P.2d 792 (Colo. 1983).

Section (b) and § 18-1-405 are virtually identical. Since section (b) of this rule is the procedural counterpart to the speedy trial statute and is virtually identical to § 18-1-405, the resolution of a speed trial issue if the same whether the analysis proceeds from the statute or the rule. People v. Deason, 670 P.2d 792 (Colo. 1983).

Section 18-1-405 refers to trial resolving ultimate guilt or innocence. The phrase ''brought to trial on the issues raised by the ... information'', as used in § 18-1-405, refers to a trial which resolves the ultimate guilt or innocence of the accused as to the charges filed against him and not a sanity trial, even when the defendant pleads not guilty by reason of insanity. People v. Deason, 670 P.2d 792 (Colo. 1983).

And commencement of a sanity trial is not the functional equivalent of a trial on the merits for purposes of satisfying the state's speedy trial obligation. People v. Deason, 670 P.2d 792 (Colo. 1983).

Constitutional right to speedy trial not controlled by six-month statutory period. A defendant is not precluded from asserting her constitutional right to a speedy trial simply because the trial was held within the required statutory period; the defendant, however, has the burden of proving that her constitutional speedy trial right has been denied. Gelfand v. People, 196 Colo. 487, 586 P.2d 1331 (1978).

Simply because a trial is held within six months, the defendant is not precluded from raising his right to a speedy public trial as embodied in § 16 of art. II, Colo. Const. Casias v. People, 160 Colo. 152, 415 P.2d 344, cert. denied, 385 U.S. 979, 87 S. Ct. 523, 17 L. Ed. 2d 441 (1966).

For the six-month proscription of this rule defines the outside limits for prosecution. People v. Small, 177 Colo. 118, 493 P.2d 15 (1972).

This rule is not a statement of the minimum time that must expire before a defendant can look for relief for denial of a speedy trial. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972).

The six-month provision sets up a maximum limitation beyond which a defendant shall not be tried for the offense charged, provided the delay was not occasioned by his action or request. Casias v. People, 160 Colo. 152, 415 P.2d 344, cert. denied, 385 U.S. 979, 87 S. Ct. 523, 17 L. Ed. 2d 441 (1966).

Prejudice to the defendant could dictate that a case be dismissed for failure to grant a speedy trial, even though the six-month period

set forth in the rule has not expired. People v. Small, 177 Colo. 118, 493 P.2d 15 (1972).

Six-month limitation begins to run. The six-month limitation of both § 18-1-405 and section (b)(1) of this rule runs from the date that defendant's plea is entered. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Section (b)(1) plainly requires that the defendant be brought to trial within six months of the date upon which he enters a plea of not guilty to the charges set forth in the information. People v. Romero, 196 Colo. 520, 587 P.2d 789 (1978).

The six-month period commences upon the arraignment for the last information. People v. Dunhill, 40 Colo. App. 137, 570 P.2d 1097 (1977).

The six-month period, provided for in section (b), commences to run upon the defendant's arraignment on the last of three informations where two prior informations have been dismissed. People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Record to show compliance. The burden of establishing compliance with the speedy trial statute includes making a record sufficient for an appellate court to determine such statutory compliance. Marquez v. District Court, 200 Colo. 55, 613 P.2d 1302 (1980).

Court cannot dismiss on own motion. Where defendant and counsel failed to appear at trial date, this rule does not authorize a district court, on its own motion, to dismiss a criminal case over the district attorney's objection, even though it appears that further prosecution will be useless and unnecessarily costly. People v. Hale, 194 Colo. 503, 573 P.2d 935 (1978).

Speedy trial requirements apply in juvenile proceedings. Trial courts are bound by the statutory and constitutional speedy trial requirements in juvenile as well as adult proceedings; fundamental fairness requires no less. P.V. v. District Court, 199 Colo. 357, 609 P.2d 110 (1980).

A trial court conducting a juvenile proceeding is bound by the same statutory and constitutional speedy trial requirements that are applicable in adult proceedings. People in Interest of T.F.B., 199 Colo. 474, 610 P.2d 501 (1980).

But not in trial de novo for violation of ordinance. Six-month speedy trial rule does not apply in a trial de novo in the county court for violation of a municipal ordinance. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Special time limitations of § 24-60-501 prevail, when conflicts arise, over the more general criminal procedure provisions of § 18-1-405 and this rule. Simakis v. District Court, 194 Colo. 436, 577 P.2d 3 (1978).

Defendant must enter plea before he may take advantage of the restriction of § 18-1-405 and section (b)(1) of this rule. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

Where no plea has been entered, there has been no violation of the rule. Potter v. District Court, 186 Colo. 1, 525 P.2d 429 (1974).

Defendant only required to move for dismissal. The burden of insuring compliance with the time requirements of section (b) is on the prosecution and the trial court, to the point that the only affirmative action required on the part of the defendant is that he move for a dismissal prior to trial. People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978).

To properly raise the question, the accused may apply for his discharge or for dismissal for lack of a speedy trial. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

And must show he was not afforded speedy trial. A motion for discharge or for dismissal for want of due prosecution of a charge of crime must be sustained by the accused, as he has the burden of showing that he was not afforded a speedy trial. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

The burden is upon the defendant to show that an expeditious trial was denied him. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969); Ziatz v. People, 171 Colo. 58, 465 P.2d 406 (1970).

The burden is upon the defendant to establish that he has been denied a speedy trial in violation of the statute or rule or that his constitutional right to a speedy trial requires dismissal. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975); People v. Chavez, 779 P.2d 375 (Colo. 1989).

Although there is considerable delay in bringing the defendants to trial, such is immaterial where it is still accomplished within the six-month requirement, and defendants fail to meet the burden of showing they were denied an expeditious trial, and that they were prejudiced thereby. Casias v. Patterson, 398 F.2d 486 (10th Cir. 1968), cert. denied, 393 U.S. 1108, 89 S. Ct. 918, 21 L. Ed. 2d 804 (1969).

Although not because bail is granted. The right to a speedy trial is not dissipated by the fact that the defendant is granted bail. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Consistent with court's trial docket. The burden is upon defendant who asserts denial of speedy trial to show facts establishing that, consistent with court's trial docket conditions, he could have been afforded trial. Rowse v. District Court, 180 Colo. 44, 502 P.2d 422 (1972).

As a speedy trial envisions a public trial consistent with the court's business. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

The constitutional right to a speedy trial means a trial consistent with the court's busi-

ness. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972).

And not immediately after apprehension and indictment. Speedy public trial does not mean trial immediately after the accused is apprehended and indicted, but public trial consistent with the court's business. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

Congestion of docket must be considered. One circumstance to be considered in determining whether the defendant received a speedy trial is the extent of congestion of the docket of the trial court. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

Although it is clear that docket congestion would not warrant a retrial later than the three-month maximum period for delay caused by a mistrial, it is a factor in determining the reasonableness of the delay within the statutory and procedural time periods of § 18-1-405 (6)(e) and section (b)(6)(V) of this rule. Pinelli v. District Court, 197 Colo. 555, 595 P.2d 225 (1979).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. Hills v. Westminster Mun. Court, 245 P.3d 947 (Colo. 2011).

Delays which are occasioned by a district attorney are to be considered by a trial court in determining whether defendant had been denied his constitutional right to a speedy trial. People v. Mayes, 178 Colo. 429, 498 P.2d 1123 (1972).

Deliberate election of district attorney to postpone trial is denial. Where the facts clearly establish that a defendant was denied a speedy trial through no fault of his own and as a result of the deliberate election of the district attorney to postpone the trial, the defendant has been denied a speedy trial under the provisions of section (b) of this rule. Jaramillo v. District Court, 174 Colo. 561, 484 P.2d 1219 (1971).

Delay caused by change of venue. When a change of venue is granted after arraignment, it is incumbent upon the prosecuting attorney to make a motion to obtain additional time to bring the defendant to trial because of the exceptional circumstances of the case, and the trial court must then make specific findings with respect to the justification. People v. Colantonio, 196 Colo. 242, 583 P.2d 919 (1978).

State cannot dismiss and refile charges indiscriminately and avoid the mandate of this rule. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

The prosecution cannot indiscriminately dismiss and refile charges in order to avoid the mandate of § 18-1-405 and section (b)(1) of this rule. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

And subsequent indictment charging same offense must be dismissed. Where defendant was charged with an offense in one indictment and was subject to jurisdiction of court for more than one year, a subsequent indictment charging the defendant with same offense had to be dismissed for lack of speedy trial. Rowse v. District Court, 180 Colo. 44, 502 P.2d 422 (1972).

Provided defendant proves presecution's course of action. To be entitled to dismissal on these grounds, the defendant must affirmatively establish the existence of such a course of action on the part of the prosecution. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

The burden of establishing that the prosecution indiscriminately dismissed and refiled charges in order to avoid the mandate of § 18-1-405 and section (b)(1) of this rule is not satisfied by proof only that the district attorney sought and obtained a subsequent indictment for different offenses arising from the same transaction. People v. Wilkinson, 37 Colo. App. 531, 555 P.2d 1167 (1976).

But where actions of district attorney in refiling are result of change in circumstances which justify that action, no violation of this rule occurs. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

As where federal sanctions are nullified after state action is dismissed. Where the district attorney was acting for the benefit of the defendant when he dismissed the original information based on the assumption that the defendant should not be punished twice for the same transaction, then when it becomes apparent that the defendant is to escape federal sanctions by reason of a technical objection, it is certainly proper for the district attorney to refile the state charges, and the actions of the district attorney are within the spirit of this rule. Schiffner v. People, 173 Colo. 123, 476 P.2d 756 (1970).

Effect of prosecution's filing amended complaint. When the prosecution files an amended complaint charging new material after the defendant's initial guilty plea, the period of time for dismissal under the speedy trial provisions is measured from the second guilty plea unless the prosecution has shown bad faith in amending the complaint. If the amended complaint does not charge new material, the time period is measured from the original guilty plea. Amon v. People, 198 Colo. 172, 597 P.2d 569 (1979).

Mistrials due to prosecutor's actions not treated differently. Neither subparagraph (b)(6)(V) of this rule nor § 18-1-405 (6)(e), treats mistrials due to the prosecutor's actions

differently from mistrials due to other reasons. People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

For purposes of six-month period, new trial order similar to reversal. A new trial order pursuant to a new trial motion is similar to a reversal on appeal for purposes of the speedy trial provisions and results in a six-month speedy trial period. People v. Jamerson, 196 Colo. 63, 580 P.2d 805 (1978).

Failure to demand dismissal waives speedy trial objection. Failure to bring defendant to trial within the allotted time does not automatically deprive the trial court of jurisdiction, because defendant's failure to demand dismissal prior to trial waives any speedy trial objection. People v. Anderson, 649 P.2d 720 (Colo. App. 1982).

In accordance with the express language of § 18-1-405 (5), defendant waived his right to a speedy trial by failing to move for dismissal of charges prior to entering a guilty plea. This did not, however, automatically waive the defendant's constitutional right to a speedy trial. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Delay caused by briefing and determining defendant's motion to dismiss properly charged to defendant. Williamsen v. People, 735 P.2d 176 (Colo. 1987).

Determination that delay was caused by substitution of counsel not supported by record and not properly chargeable to defendant. Defendant's actions did not require a substitution of counsel, he was not counseled by the court on a need for a continuance, and court did not attempt to find other counsel who could meet the deadline. People ex rel. Gallagher v. District Court, 933 P.2d 583 (Colo. 1997).

Express waiver or other affirmative conduct evidencing a waiver of the right to a speedy trial must be shown before a trial court may deny a dismissal motion. People v. Gallegos, 192 Colo. 450, 560 P.2d 93 (1977); Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977); People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978).

Mere silence by a defense counsel to a trial setting beyond the speedy trial period shall not be construed as a waiver of a defendant's right to a speedy trial. Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977); People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978); People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Defendant's waiver limited. Where petitioner moved to continue his arraignment date, his written motion contained a statement to the effect that "the defendant waives his right to a speedy trial", this statement was intended only as a waiver of the right to challenge any speedy trial violation caused by the request for a continuance of the arraignment date and was not effective with respect to any subsequently occurring statutory speedy trial violation. Sweet v. Myers, 200 Colo. 50, 612 P.2d 75 (1980).

Failure of each defendant to interpose any objection to a trial setting in county court beyond the six-month speedy trial period did not waive his right to a speedy trial. Rance v. County Court, 193 Colo. 220, 564 P.2d 422 (1977).

Waiver after six-month period questionable. It is questionable whether a waiver of the right to a dismissal for failure to be granted a speedy trial could ever occur after the right to dismissal has already accrued. People v. Abeyta, 195 Colo. 338, 578 P.2d 645 (1978).

Presence of defendant or counsel for section (b)(6)(VII)(A) continuance. It is not clear under section (b)(6)(VII)(A) whether the presence of the defendant or his counsel in open court is required. People v. Baker, 38 Colo. 101, 556 P.2d 90 (1976).

Showing required by section (b)(6)(VII)(A). Section (b)(6)(VII)(A) requires a showing not only that the evidence is material and unavailable but also that the prosecuting attorney has exercised due diligence to obtain it. People v. Baker, 38 Colo. 101, 556 P.2d 90 (1976).

C. Exclusion of Periods of Delay.

Exclusion of delay caused by defendant. This rule excludes delay which is caused by, agreed to, or created at the instance of the defendant. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975).

Where the delay has been initially caused by the defendant, he cannot invoke this rule. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

A defendant is not entitled to be discharged if he requests a postponement of his trial or otherwise causes the delay. People v. Bates, 155 Colo. 277, 394 P.2d 134 (1964).

Where attributable to affirmative action by defendant. In computing the time within which a defendant must be brought to trial, in order for the delay to be charged to the defendant, it must be attributable to affirmative action on defendant's part, or to defendant's express consent to the delay, or to other affirmative conduct evidencing such consent. Tassett v. Yeager, 195 Colo. 190, 576 P.2d 558 (1978).

An express consent to the delay or other affirmative conduct evidencing such consent must be shown before the delay is chargeable to the defendant. People v. Lopez, 41 Colo. App. 206, 587 P.2d 792 (1978).

Since the six-month provision of this rule is conditioned upon the proposition that the delay is not caused by the action or request of the defendant. Lucero v. People, 171 Colo. 167, 465 P.2d 504 (1970).

Factors authorized a continuance and thereby extended the speedy trial time where a period of delay was attributable to the inability of the prosecution, despite its exercise of due diligence, to obtain the victim's presence for trial and prosecution demonstrated the victim would be available to testify at a later date. People v. Grenemyer, 827 P.2d 603 (Colo. App. 1992).

Period of delay was excluded from the speedy trial period under the provisions of section (b)(6)(III). The trial court did not abuse its discretion in refusing to grant a severance, therefore the continuance granted to the codefendant was chargeable to the defendant, and the defendant was not denied his right to a speedy trial. People v. Backus, 52 P.2d 846 (Colo. App. 1998).

Exclusion applies to entire period fairly attributed to absence. The exclusion provision applicable to the defendant's voluntary absence or unavailability applies to the entire period of delay that may be fairly attributed to such absence. People v. Sanchez, 649 P.2d 1049 (Colo. 1982); People v. Gray, 710 P.2d 1149 (Colo. App. 1985).

Defendant confined to mental institution. When a defendant is confined to a mental institution or hospital for observation or examination prior to a determination of mental competency, he cannot complain of a denial of his constitutional right to a speedy trial because of the delay occasioned by that confinement, People v. Jones, 677 P.2d 383 (Colo. App. 1983), aff'd in part, rev'd in part on other grounds, 711 P.2d 1270 (Colo. 1986).

Excludable period may be longer than period of absence. The excludable period of delay resulting from defendant's absence, may, in some cases, be longer than merely the period of defendant's absence. People v. Alward, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984).

The period between a mistrial and commencement of a completed trial is properly excludable from the statutory speedy trial period requirement. People v. Martinez, 712 P.2d 1070 (Colo. App. 1985).

Short delay is of no consequence where there have been numerous appearances already. The record is devoid of any showing that the trial was not held as soon as consistent with the court's business or that defendant suffered any prejudice by reason of the short delay when, between the date of charge and the date of trial, defendant, with his counsel, made numerous appearances in court to dispose of various pretrial matters. Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

Prearrest delay excluded from computation. Section (b)(1) supports a motion to dismiss only when the delay occurs after charges are made or an arrest has been effected and is not directed to delay which transpires prior to arrest. People ex rel. Coca v. District Court, 187 Colo. 280, 530 P.2d 958 (1975).

Where a complaint was filed against defendant and a warrant for his arrest was issued, but there was no evidence that defendant was in the county during the period between the complaint and his arrest, the defendant was not entitled to a dismissal under this rule. People v. Tull, 178 Colo. 151, 497 P.2d 3 (1972).

Period tolled by defendant's failure to make court appearance. When a defendant fails to make a scheduled bond appearance before the trial court, the six-month speedy trial period is tolled until he makes himself available to the court, even where some of time that he is unavailable he is incarcerated in another jurisdiction. People v. Moye, 635 P.2d 194 (Colo. 1981).

Where defendant's criminal behavior causes him to be in the penitentiary when his case is set for trial, the delay that occurs cannot be interpreted to be a violation of his constitutional rights. Scott v. People, 176 Colo. 289, 490 P.2d 1295 (1971).

Period of delay caused by mistrial not included. The computation of the six-month period allowed for in section (b)(1) shall not include any period of delay caused by a mistrial, nor the extension provided following a mistrial, being part of the delay caused thereby. Pinelli v. District Court, 197 Colo. 555, 595 P.2d 225 (1979).

The length of delay "caused by any mistrial" must be calculated to include the days on which the aborted trial or trials were in progress. People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

Three-month exclusion following mistrial. Section 18-1-405(6)(e) and section (b)(6)(V) of this rule grant the prosecution a three-month exclusion in which to retry a case after a mistrial, provided that the delays are reasonable. People v. Pipkin, 655 P.2d 1360 (Colo. 1982); Mason v. People, 932 P.2d 1377 (Colo. 1997).

The general assembly intended to grant no more than three months as an exclusion from the speedy trial period, which is one-half of the statutory speedy trial period, following a mistrial. People v. Pitkin, 655 P.2d 1360 (Colo. 1982).

Whether jeopardy has attached is irrelevant. If the court is forced to dismiss the jurors, or prospective jurors, and reschedule the trial, whether jeopardy has yet attached is irrelevant in computing the length of delay excluded due to mistrial. People v. Erickson, 194 Colo. 557, 574 P.2d 504 (1978).

Where continuances requested to effect plea bargain. A defendant was not denied a speedy trial when the trial was held more than one year after he was charged where the delay was occasioned, to a large extent, by the defen-

dant who requested and obtained numerous continuances in an attempt to effectuate a plea bargain. Maynes v. People, 178 Colo. 88, 495 P.2d 551 (1972).

Speedy trial period tolled by appeal. The period of time necessary to go through the appellate process, where the appeal stems from a dismissal upon the defendant's motion, tolls the statutory speedy trial period. People v. Jamerson, 198 Colo. 92, 596 P.2d 764 (1979).

This rule excludes from the computation of the time for speedy trial purposes the period of delay caused by an interlocutory appeal, but an original proceeding under C.A.R. 21 is, technically speaking, not an interlocutory appeal. People v. Medina, 40 Colo. App. 490, 583 P.2d 293 (1978).

And for filing of psychiatric reports. When a defendant pleads not guilty by reason of insanity, the period from the time of commitment until the filing of the final psychiatric report, if filed within a reasonable time, is excludable for purposes of the six-month period. People v. Renfrow, 193 Colo. 131, 564 P.2d 411 (1977).

The defendant need not be committed to an institution for examination before a reasonable time can be excluded from the speedy trial computation for the filing of psychiatric reports. People v. Brown, 44 Colo. App. 397, 622 P.2d 573 (1980).

Tactical decision to seek continuance chargeable to defendant, absent prosecutor's bad faith. For purposes of section (b), a tactical decision to seek a continuance is chargeable to the defendant in the absence of a showing of bad faith on the part of the prosecutor. People v. Medina, 40 Colo. App. 490, 583 P.2d 293 (1978).

In the absence of a showing of bad faith on the part of the prosecutor in endorsing a witness on the day of the trial, the delay resulting from the defendant's tactical decision to seek a continuance as a result of the late endorsement is chargeable to her. People v. Steele, 193 Colo. 87, 563 P.2d 6 (1977).

Defense counsel's action held tantamount to request for continuance. When defense counsel insists he could not try the case prior to expiration of the six-month speedy trial period, this is tantamount to a request for a continuance. People v. Chavez, 650 P.2d 1310 (Colo. App. 1982).

Counsel may obtain continuance without defendant's consent. Defendant's attorney, without defendant's personal consent, may obtain a continuance of a trial setting subject to the discretion of the trial court,and the continuance will extend the speedy trial deadline an additional six months from the granting of the continuance. People v. Anderson, 649 P.2d 720 (Colo. App. 1982).

Defendant's speedy trial rights were not violated when, in response to the testimony of defendant's mental health expert during a suppression hearing that defendant's statements were involuntary because of a mental disorder, prosecution requested, and was granted, three month continuance in order to arrange for expert testimony and analyze the alleged mental disorder. People v. Whalin, 885 P.2d 293 (Colo. App. 1994).

Rule 49. Service and Filing of Papers

(a) Service — When Required. Written motions other than those which are heard ex parte, written notices, and similar papers shall be served upon the adverse parties. A motion or other pleading that includes a claim alleging a state statute or municipal ordinance is unconstitutional shall also be served upon the Attorney General.

(b) Service — How Made. Whenever under these Rules or by court order service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for civil actions unless otherwise ordered by the court.

(c) Notice of Orders. Immediately upon entry of any order made out of the presence of the parties after the information or indictment is filed, the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket.

Source: (a) amended and effective October 18, 2007.

Cross references: For the manner of service in civil actions, see C.R.C.P. 5.

ANNOTATION

Reversal of verdict on the basis of failure to disclose certain information to the defendant is mandated only where the information might have affected the outcome of the trial. However, failure of prosecution to give notice to defendant of grants of immunity to two wit-

nesses was not reversible error in that the ex parte order was available to the defense counsel in court records and there was nothing to indicate that the defense counsel's lack of knowledge regarding the grants of immunity might have in any way prejudiced the defendant so as to have affected the outcome of the trial. People v. Hickam, 684 P.2d 228 (Colo. 1984).

Rule 49.5. Electronic Filing and Service System

(a) Types of Cases Applicable. E-Filing and E-Service may be used for certain cases filed in the courts of Colorado as the service becomes available.

(b) E-Filing May be Mandated. With the permission of the Chief Justice, a chief judge may mandate E-Filing within a county or judicial district for specific case classes or types of cases. A judicial officer may mandate E-Filing and E-Service in that judicial officer's division for specific cases, for submitting documents to the court, and for serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-System Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the chief judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(c) Definitions.

(1) **Document.** A pleading, motion, writing, or other paper filed or served under the E-System.

(2) **E-Filing/Service System.** The E-Filing/Service System (**"E-System"**) approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System Provider.

(3) **Electronic Filing.** Electronic filing (**"E-Filing"**) is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) **Electronic Service.** Electronic service (**"E-Service"**) is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service of filings via the E-System, except when personal service is required.

(5) **E-System Provider.** The E-Filing/E-Service System Provider authorized by the Colorado Supreme Court.

(6) **Signatures.**

(I) **Electronic Signature.** An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-Filed or E-Served document.

(II) **Scanned Signature.** A graphic image of a handwritten signature.

(d) To Whom Applicable.

(1) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5 may register to use the E-System. The E-System Provider will provide an attorney permitted to appear pursuant to C.R.C.P 205.3 or 205.5 with a special user account for purposes of E-Filing and E-Service only in the case identified by a court order approving pro hac vice admission. In districts where E-Filing is mandated pursuant to Subsection (b) of this Rule 49.5, attorneys must register and use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(e) E-Filing — Date and Time of Filing. Documents filed in cases on the E-System may be filed under Crim. P. 49 through E-Filing. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(f) E-Service — When Required — Date and Time of Service. Documents submitted to the court through E-Filing shall be served in accordance with Crim. P. 49 by E-Service to parties who have subscribed to the E-System. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g) Filing Party to Maintain the Signed Copy — Paper Document Not to be Filed -Duration of Maintaining of Document. A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. Documents shall be maintained in accordance with the Rules of Professional Conduct.

(h) Documents Requiring E-Filed Signatures. For E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be affixed electronically or hand-written and scanned.

(i) Documents Under Seal. A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court, if filed electronically, must be submitted separately from the Motion to Seal.

(j) Transmitting of Orders, Notices, and Other Court Entries. Courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(k) Form of E-Filed Documents. C.R.C.P. 10 shall apply to E-Filed documents.

(l) Relief in the Event of Technical Difficulties. (1) The court may enter an order permitting a document to be filed nunc pro tunc to the date it was first attempted to be sent electronically upon satisfactory proof that E-Filing or E-Service of the document was not completed because of:

(I) an error in the transmission of the document to the E-System Provider which was unknown to the sending party;

(II) a failure of the E-System Provider to process the E-Filed document(s) when received; or

(III) other technical problems experienced by the filer or E-System Provider.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(m) Form of Electronic Documents.

(1) **Electronic Document Format, Size, and Density.** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(2) **Multiple Documents.** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(3) **Proposed Orders.** Proposed orders shall be E-Filed in editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the clerk's office and must be resubmitted. In courts where proposed orders are not required, a proposed order need not be filed with the court.

(n) Document Security Level. Documents filed in a criminal case will not be electronically available to persons other than the parties until reviewed and provided by the clerk of court or his or her designee.

(o) Protective Orders. Nothing in these rules shall prohibit a court from ordering the limitation or prohibition of a nonparty's remote electronic access to a document filed with the court.

Source: Entire rule added and effective September 24, 2014; entire rule amended and effective December 29, 2014; (a) and comments amended and effective March 2, 2017; (a), (m)(3), and comments amended and effective September 6, 2018.

COMMENTS

2014

[1] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces).

[2] ''Editable Format'' is one which is subject to modification by the court using standard means, such as Word or WordPerfect format.

[3] C.R.C.P. 77 provides that courts are always open for business. This rule is intended to

comport with that rule.

2017

[4] Effective November 1, 2016, the name of the court authorized service provider changed from the ''Integrated Colorado Courts E-Filing System'' to ''Colorado Courts E-Filing'' (www.jbits.courts.state.co.us/efiling/).

2018

[5] The website for the Colorado Courts E-filing system is now www.courts.state.co.us/efiling.

Rule 50. Calendars

The courts of record may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings.

Rule 51. Exceptions Unnecessary

Exceptions to ruling or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the court ruling or order is made or sought, makes known to the court the action which he desires the court to take or his objection to the court's action and the grounds therefor. But if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

ANNOTATION

Allegation of prejudice gives standing for review, regardless of lack of objection. A defendant's claim that the trial court's ruling adversely affected the exercise of his right to testify in his own defense alleges sufficient prejudice to give him standing to seek review of that ruling, whether or not he objected when the ruling was made. People v. Evans, 630 P.2d 94 (Colo. App. 1981).

Court must allow contemporaneous objections to evidence and the court's rulings. Without a contemporaneous record of the grounds that a party stated at the time of a objection, disputes as to the grounds asserted for error may arise. Jones v. District Court, 780 P.2d 526 (Colo. 1989).

Applied in People v. Peterson, 656 P.2d 1301 (Colo. 1983).

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

ANNOTATION

I. General Consideration.
II. Harmless Error.
III. Plain Error.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''United States Supreme Court Review of Tenth Circuit Decisions'', which discusses attorney misconduct as harmless error, see 63 Den. U. L. Rev. 473 (1986). For article, ''Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986'', which discusses a case relating to harmless error, see 15 Colo. Law. 1616 (1986). For article, ''Standards of Appellate Review in State Versus Federal Courts'', see 35 Colo. Law. 43 (April 2006). For article, ''Raising New Issues on Appeal, Waiver and Forfeiture in Colorado's Federal and State Appellate Courts'', see 46 Colo. Law. 25 (July 2017).

Applied in Ruark v. People, 164 Colo. 257, 434 P.2d 124 (1967), cert. denied, 390 U.S. 1044, 88 S. Ct. 1644, 20 L. Ed. 2d 306 (1968); Morehead v. People, 167 Colo. 287, 447 P.2d 215 (1968); Wiseman v. People, 179 Colo. 101, 498 P.2d 930 (1972); Scott v. People, 179 Colo. 126, 498 P.2d 940 (1972); People v. Baca, 179 Colo. 156, 499 P.2d 317 (1972); People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972); People v. Spinuzzi, 184 Colo. 412, 520 P.2d 1043 (1974); People v. Mullins, 188 Colo. 23, 532 P.2d 733 (1975); People v. McClure, 190 Colo. 250, 545 P.2d 1038 (1976); People v. LeFebre, 190 Colo.

307, 546 P.2d 952 (1976); People v. Bastardo, 191 Colo. 521, 554 P.2d 297 (1976); Chandler Trailer Convoy, Inc. v. Rocky Mt. Mobile Home Towing Servs., Inc., 37 Colo. App. 520, 552 P.2d 522 (1976); People v. Brionez, 39 Colo. App. 396, 570 P.2d 1296 (1977); People v. Thorpe, 40 Colo. App. 159, 570 P.2d 1311 (1977); People v. Stitt, 40 Colo. App. 355, 575 P.2d 446 (1978); People v. Taylor, 191 Colo. 161, 591 P.2d 1017 (1979); People v. Reyes, 42 Colo. App. 73, 589 P.2d 1385 (1979); People v. Am. Health Care, Inc., 42 Colo. App. 209, 591 P.2d 1343 (1979); People v. Davenport, 43 Colo. App. 41, 602 P.2d 871 (1979); People v. Glenn, 200 Colo. 416, 615 P.2d 700 (1980); People v. Smith, 620 P.2d 232 (Colo. 1980); People v. Hallman, 44 Colo. App. 530, 624 P.2d 347 (1980); People v. Massey, 649 P.2d 1112 (Colo. App. 1980), aff'd, 649 P.2d 1070 (Colo. 1982); People v. Nisted, 653 P.2d 60 (Colo. App. 1980); People v. Small, 631 P.2d 148 (Colo. 1981); People v. Christian, 632 P.2d 1031 (Colo. 1981); People v. Padilla, 638 P.2d 15 (Colo. 1981); People v. Swanson, 638 P.2d 45 (Colo. 1981); People v. Founds, 631 P.2d 1166 (Colo. App. 1981); People v. Dillon, 633 P.2d 504 (Colo. App. 1981); People v. Roark, 643 P.2d 756 (Colo. 1982); People v. Gallegos, 644 P.2d 920 (Colo. 1982); People v. Handy, 657 P.2d 963 (Colo. App. 1982); People v. Jones, 665 P.2d 127 (Colo. App. 1982); People v. Hart, 658 P.2d 857 (Colo. 1983); People v. Cisneros, 665 P.2d 145 (Colo. App. 1983); People v. Priest, 672 P.2d 539 (Colo. App. 1983); People v. Beasley, 683 P.2d 1210 (Colo. App. 1984); Callis v. People, 692 P.2d 1045 (Colo. 1984); People v. Armstrong, 704 P.2d 877 (Colo. App. 1985); Williams v. People, 724 P.2d 1279 (Colo. 1986); People v. Wieghard, 727 P.2d 383 (Colo. App. 1986); People v. Rivers, 727 P.2d 394 (Colo. App. 1986); People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991); People v. Schuett, 833 P.2d 44 (Colo. 1992); People v. Corpening, 837 P.2d 249 (Colo. App. 1992); People v. Ornelas, 937 P.2d 867 (Colo. App. 1996); People v. Thompson, 950 P.2d 608 (Colo. App. 1997); People v. Gallegos, 950 P.2d 629 (Colo. App. 1997).

II. HARMLESS ERROR.

No reversal where insufficient error. Where there is no error of sufficient magnitude, reversal of judgment of conviction is not required. Early v. People, 178 Colo. 167, 496 P.2d 1021 (1972).

Ordinary, not constitutional, harmless error applies in determining whether an error requires reversal under People v. Novotny, 2014 CO 18, 320 P.3d 1194, because the deprivation of a right to use peremptory challenges is statutory, not derived from the constitution. People v. Wise, 2014 COA 83, 348 P.3d 482.

The mere loss of a peremptory challenge alone is insufficient to require reversal. A defendant must show that a biased or incompetent juror participated in deciding his or her guilt. People v. Wise, 2014 COA 83, 348 P.3d 482.

Harmless, constitutional error. The admission of an in-court identification without first determining that it is not tainted by an illegal lineup but is of independent origin may be constitutional error; but such error may be considered harmless even if there has been an illegal lineup confrontation, if the identification witness makes an in-court identification based on sufficient independent observations of the defendant, disassociated from the pretrial lineup. Espinoza v. People, 178 Colo. 391, 497 P.2d 994 (1972).

Constitutional errors may be characterized as harmless only when the case against a defendant is so overwhelming that the constitutional violation is harmless beyond a reasonable doubt. People v. Matthews, 662 P.2d 1108 (Colo. App. 1983); People v. Jensen, 747 P.2d 1247 (Colo. 1987); Topping v. People, 793 P.2d 1168 (Colo. 1990); People v. Denton, 91 P.3d 388 (Colo. App. 2003); People v. Delgado-Elizarras, 131 P.3d 1110 (Colo. App. 2005).

Before an error affecting a defendant's constitutional right to testify in his own behalf can be deemed harmless, an appellate court must determine beyond a reasonable doubt that the error did not contribute to the verdict. People v. Evans, 630 P.2d 94 (Colo. App. 1981); Crespin v. People, 721 P.2d 688 (Colo. 1986); Topping v. People, 793 P.2d 1168 (Colo. 1990).

Absence of defense counsel at critical stage of proceedings, which is a constitutional error, can be harmless if the error is a ''trial error'' that can be quantitatively assessed on appellate review as opposed to ''structural defect'' that affects the framework within which the trial proceeds. Key v. People, 865 P.2d 822 (Colo. 1994).

The standard for harmless error is the prosecution must show that the error did not contribute to a defendant's conviction. If there is reasonable probability from review of the entire record that a defendant could be prejudiced the error is not harmless. Key v. People, 865 P.2d 822 (Colo. 1994).

An ex parte scheduling conference with jurors during deliberations occurred at a critical stage of the criminal proceedings and was not harmless error. Key v. People, 865 P.2d 822 (Colo. 1994).

Markings from codefendant's trial on exhibits harmless. Fact that certain exhibits used in defendant's trial had court reporter's identification marks on them remaining from their use in the codefendant's trial, did not result in

any prejudice and, at most, the marks constituted harmless error which is not ground for reversal. People v. Gallegos, 181 Colo. 264, 509 P.2d 596 (1973).

As may be use of void prior convictions for impeachment. The error implicit in the use of void prior convictions for impeachment purposes need not necessarily require reversal, particularly where the error is found to be harmless beyond a reasonable doubt. People v. Neal, 187 Colo. 12, 528 P.2d 220 (1974).

Or failure to properly instruct jury. Where jury instruction failed to include an essential part of the two-witness rule in prosecution for perjury, i.e., that the corroborating evidence must be deemed of equal weight to the testimony of another witness, this omission was harmless error inasmuch as there was direct testimony by three witnesses contradicting the defendant's grand jury testimony. People v. Mazza, 182 Colo. 166, 511 P.2d 885 (1973).

Where the admissions of a defendant as either extrajudicial statements or a confession is not an issue of significance, the giving of an instruction on them is not grounds for relief. Yerby v. People, 176 Colo. 115, 489 P.2d 1308 (1971).

Where one is benefited by an error in submitting or failing to submit an instruction, he cannot claim prejudicial error. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Where evidence of a petty offense by defendants is introduced during a felony trial, the trial judge should instruct the jury as to its limited purpose, but his failure to do so is harmless error, considering the nature of the petty offense as compared with the gravity of the charge against the defendants. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Where a court errs in giving an instruction that prejudices the state rather than the defendant in that it increases the state's burden beyond that required, no grounds for reversal are created. Early v. People, 178 Colo. 167, 496 P.2d 1021 (1972).

While it is unnecessary and poor practice to give the jury a separate instruction on the credibility of a defendant as a witness, the giving of such an instruction does not constitute reversible error. People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

Where there is overwhelming evidence of the defendant's deliberation in a first degree murder case, the use of an outmoded jury instruction on the law of deliberation is harmless error. People v. Key, 680 P.2d 1313 (Colo. App. 1984).

Inclusion of allegation of aggravation in jury instruction for simple robbery charge which was basis of felony murder charge constituted harmless error as instruction inured to benefit of defendant. People v. Driggers, 812 P.2d 702 (Colo. App. 1991).

Or admission of challenged statement. Where the defendant's substantial rights were not affected by the admission into evidence of a challenged statement, no reversible error occurs. People v. McKnight, 626 P.2d 678 (Colo. 1981).

Or improper questioning concerning coconspirator's guilty plea. While a prosecutor should not elicit testimony concerning a coconspirator's guilty plea, when the evidence of a defendant's guilt is overwhelming, reference to the guilty plea is harmless error, especially when defense counsel questions the witness about this guilty plea in an effort to impeach his credibility. People v. Craig, 179 Colo. 115, 498 P.2d 942, cert. denied, 409 U.S. 1077, 93 S. Ct. 690, 34 L. Ed. 2d 666 (1972).

Or error in admitting testimony of codefendant. Error, if any, in admitting testimony as to admissions which were made by codefendant who under prosecution theory was principal perpetrator of robbery and murder that constituted basis for first-degree murder charge of defendant as an accessory, which indicated that another person was present and the admission of which allegedly violated defendant's sixth amendment right of confrontation was harmless, where additional evidence consisting of testimony of three eyewitnesses also established that the robbery was committed by two men. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

It is not reversible error to admit evidence concerning a description of defendants just because it is testimony of a codefendant as to whom the severance has been granted, thereby operating so as either to deprive defendants of an opportunity to cross-examine or to require a waiver of the benefits of a severance to which they are entitled, where in view of the inconclusive nature of the identification, it cannot be said that there is any prejudice to the defendants from the admission of this evidence, although it would clearly be a better procedure to conceal the source of the extrajudicial identifications. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Failure to grant continuance or mistrial where witness fails to appear held harmless error. People v. Lee, 180 Colo. 376, 506 P.2d 136 (1973).

Failure to provide definition of "custody" and "confinement" to the jury was harmless error under the circumstances portrayed by the record. A trial court is under an obligation to instruct the jury properly, and a failure to do so as to every element of a crime charged is error. However, the lack of instruction by the court as to the meanings of ''custody'' and ''confinement'' inured to the defendant's benefit and thus the instructional failure here constituted harmless error. People v. Atkins, 885 P.2d 243 (Colo. App. 1994).

Failure to grant motion for mistrial not an abuse of discretion where trial court sustained defendant's objection to question suggesting prior criminal conduct, defendant did not request that a curative instruction be given to the jury and none was given, and no substantial prejudice to defendant was demonstrated. People v. Talley, 677 P.2d 394 (Colo. App. 1983).

Improper admission of defendant's refusal to sign a written Miranda advisement held harmless error. People v. Mack, 638 P.2d 257 (Colo. 1981).

Improper admission of evidence to which hearsay exceptions did not apply held harmless error since the admission did not contribute to defendant's conviction, nor did it prejudice the proceedings. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

When misstatements at trial do not require reversal. Where misstatements do not so inflict the trial as to require more than an admonition given to the jury by the trial judge in the exercise of his discretion and no motion for mistrial on these grounds is made at the time of the statements, there are not substantial grounds for reversal. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

Nor improper argument by prosecutor. A prosecutor's argument is not prejudicial and does not require reversal when the trial judge tells the prosecution to terminate the line of argument and instructs the jury that argument is not evidence. People v. Motley, 179 Colo. 77, 498 P.2d 339 (1972).

Attorney prohibited from characterizing a witness's testimony or his character for truthfulness with any form of the word ''lie''. A violation of this prohibition, although sanctionable in other ways, does not warrant reversal if it was harmless. Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005); Crider v. People, 186 P.3d 39 (Colo. 2008).

Prosecutor prohibited from making generic tailoring arguments, which are improper because they are not based on reasonable inferences from evidence in the record. Martinez v. People, 244 P.3d 135 (Colo. 2010).

Prosecutor's closing argument that defendant who testified at trial had an opportunity to listen to all of the testimony and tailor his testimony to fit that of other witnesses improper. Martinez v. People, 244 P.3d 135 (Colo. 2010).

Prosecutor's generic tailoring comments harmless, however, because defendant commented on and expressly incorporated testimony of prior witnesses and because of substantial evidence calling into question defendant's credibility. No reasonable probability existed that prosecutor's generic tailoring argument, even though improper, influenced jury's determination of defendant's credibility or guilt. Martinez v. People, 244 P.3d 135 (Colo. 2010).

Nor giving of stock instruction. The giving of a stock instruction on the presumption of innocence does not constitute reversible error just because of its historical use. Jorgensen v. People, 178 Colo. 8, 495 P.2d 1130 (1972).

Nor failure to allow examination of grand jury testimony. The failure of a trial judge to grant a defendant and his counsel the right to examine grand jury testimony is not reversible error. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Nor inclusion of hearsay. The admission of a death certificate containing the statement that the victim was ''helping neighbor investigate burglary of neighbor's store and was shot by one of the burglars during this investigation'' is not reversible error, particularly when the court later instructs the jury to ignore that portion of the certificate, although it would be much better practice to delete such included hearsay. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Even if extrajudicial identifications are inadmissible hearsay, when in light of the other material evidence relating defendants to the crime, such identification is clearly cumulative, and any error is harmless. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Nor verbal slip by judge. A defendant is not prejudiced by the trial judge's use of the word ''offense'' when the judge gives the jury a cautionary oral instruction at the time evidence of another transaction is introduced, and it is not reversible error. Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Nor failure to administer an oath or affirmation of true translation to interpreter. People v. Avila, 797 P.2d 804 (Colo. App. 1990).

Nor failure to conduct a hearing on the admissibility of scientific evidence. Where DNA evidence relates solely to similar transaction evidence, the admission of such evidence, absent a preliminary hearing on its admissibility, is harmless error. People v. Groves, 854 P.2d 1310 (Colo. App. 1992).

Nor failure to swear jury prior to beginning of testimony where jury sworn before deliberations. People v. Clouse, 859 P.2d 228 (Colo. App. 1992).

Nor where comment on defendant's failure to testify. A comment by the district attorney on defendant's failure to testify was not prejudicial enough to warrant reversal because the trial court properly instructed the jury that the defendant's failure to testify cannot be considered as evidence of guilt or innocence and it is generally accepted that defense counsel may by improper argumentative comment open the door to a response by the prosecuting attorney. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

When the prosecution calls oblique attention to the possible silence of the defendant, but does not make direct reference to the defendant's silence, there is error, but not reversible error. People v. Calise, 179 Colo. 162, 498 P.2d 1154 (1972).

Nor admission of defendant's mug shot. Where the evidence of guilt is substantial, the sole error of admitting the defendant's mug shot does not, in and of itself, constitute reversible error. People v. Bugarin, 181 Colo. 57, 507 P.2d 879 (1973).

If testimony accompanying introduction of a mug shot does not imply that defendant has a past criminal history, the introduction of the mug shot does not necessitate the granting of a mistrial. People v. Borghesi, 40 P.3d 15 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 66 P.3d 93 (Colo. 2003).

Nor where material witness functions as officer of court. Where the court, over defendants' objection, allowed the sheriff, who was a material witness for the state, to take part in the conduct of the trial by daily calling the court to order as well as select a few prospective jurors on open venire and the court also refused to give an instruction to the effect that no particular weight was to be attached to the sheriff's testimony by reason of his court functions, but he was not placed in charge of the jury at any time, then reversible error was not committed, although it is a better practice not to permit a material witness to function as an officer of the court. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Nor limitation of cross-examination of defendant's coconspirator by refusing to allow inquiry into coconspirator's subjective understanding of his plea arrangement is not reversible error. People v. McCall, 43 Colo. App. 117, 603 P.2d 950 (1979), rev'd on other grounds, 623 P.2d 397 (Colo. 1981).

Variance between charge and proof held not fatal. People v. Incerto, 180 Colo. 366, 505 P.2d 1309 (1973).

Where transaction charged and the one proved are substantially the same, although not all those allegedly involved in conspiracy are found to have participated, and the object of conspiracy is proved as laid, variance is not reversible error as substantial rights of defendant are not affected. People v. Incerto, 180 Colo. 366, 505 P.2d 1309 (1973).

Witness's statement that defendant had been in jail several times held not prejudicial. People v. Gallegos, 179 Colo. 211, 499 P.2d 315 (1972).

Failure to record final arguments in a trial to the court is not prejudicial error. People in Interest of B.L.M. v. B.L.M., 31 Colo. App. 106, 500 P.2d 146 (1972).

Despite defendant's contention that unauthorized persons were allowed in grand jury room and proceedings were not kept secret, the alleged violations did not affect defendant's substantial rights. Petit jury's subsequent guilty verdict made alleged error in grand jury proceeding harmless beyond a reasonable doubt. People v. Cerrone, 867 P.2d 143 (Colo. App. 1993); aff'd on other grounds, 900 P.2d 45 (Colo. 1995).

Presence of alternate juror amounts to harmless error when the evidence supporting the defendant's guilt was overwhelming and the juror was only present for jury's deliberations for approximately ten minutes. James v. People, 2018 CO 72, 426 P.3d 336.

Prejudicial opening statement made in bad faith reversible. Error cannot be predicated upon opening statement of attorney as to what he expects to prove, although his statement is not completely supported by evidence adduced at trial, unless unsupported portion of statement was made in bad faith and was manifestly prejudicial. People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972).

Trial judge to determine effect of potentially prejudicial evidence on jury. The trial judge is in preeminent position to determine potential effects of allegedly prejudicial statements on jurors, and his judgment will only be overturned upon an abuse of discretion. People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972).

Where the judge examines the jury as to the effect certain knowledge would have upon their ability to render a fair and impartial verdict in a criminal proceeding and is satisfied that their ability would not be impaired, his denial of motion for mistrial is not an abuse of discretion and will not be disturbed on review. Atwood v. People, 176 Colo. 183, 489 P.2d 1305 (1971).

Error may be rendered harmless and therefore become not reversible by subsequent proceedings in the case or by the result thereof. Walker v. People, 175 Colo. 173, 489 P.2d 584 (1971).

A harmless error argument does not apply when the trial court erroneously disqualifies a defendant's retained counsel of choice. Anaya v. People, 764 P.2d 779 (Colo. 1988).

Since testimony implicated another person and not defendant, the testimony was not prejudicial to defendant. Any error in the admission of such testimony is harmless. People v. Mapps, 231 P.3d 5 (Colo. App. 2009).

Admission of testimony was harmless since it did not substantially influence the verdict or impair the fairness of defendant's trial. People v. Mapps, 231 P.3d 5 (Colo. App. 2009).

Error was not harmless when the court permitted the jury to adopt the prosecutor's misstated version of the law that effectively imposed a duty to retreat on the defendant, when no such duty existed. People v. Monroe, 2018 COA 110, __ P.3d __.

III. PLAIN ERROR.

Authority of appellate court to consider plain error. Section (b) permits an appellate court to consider an alleged error which was not brought to the attention of the trial court, if the error affects the substantial rights of the defendant and it is ''plain error''. Vigil v. People, 196 Colo. 522, 587 P.2d 1196 (1978).

A trial error to which no objection is made is forfeited and, therefore, not reviewable. However, such errors can be reviewed for plain error, which means an error must be plain and must affect a substantial right of a party. People v. O'Connell, 134 P.3d 460 (Colo. App. 2005).

If no contemporaneous objection to alleged prosecutorial misconduct is made at trial, section (b) limits appellate review to a determination of plain error. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Appellate court cannot correct an error pursuant to section (b) unless the error is clear under current law. People v. O'Connell, 134 P.3d 460 (Colo. App. 2005).

If the law is unsettled at the time of trial, the plain error analysis will be conducted using the status of the law at the time of trial. People v. O'Connell, 134 P.3d 460 (Colo. App. 2005).

Relief under section (b) is a matter of discretion, not of right. People v. Butcher, 2018 COA 54M, __ P.3d __.

"Plain error" means error both obvious and substantial and those grave errors which seriously affect substantial rights of the accused. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972); People v. Koon, 724 P.2d 1367 (Colo. App. 1986); People v. Roberts, 738 P.2d 380 (Colo. App. 1986).

''Plain'' is synonymous with ''clear'' or, equivalently, ''obvious''. People v. O'Connell, 134 P.3d 460 (Colo. App. 2005).

A plain error is an error seriously affecting substantial rights of the accused. People v. Miller, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977); People v. Constant, 44 Colo. App. 544, 623 P.2d 63 (1980), rev'd on other grounds, 645 P.2d 843 (Colo. 1982); People v. Green, 759 P.2d 814 (Colo. App. 1988); Harris v. People, 888 P.2d 259 (Colo. 1995).

Only error which is obvious and grave can rise to the status of plain error. People v. Mills, 192 Colo. 260, 557 P.2d 1192 (1976); People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

Plain error is error which is ''obvious and grave''. People v. Peterson, 656 P.2d 1301 (Colo. 1983); People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

The proper inquiry in determining a harmless error question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Plain error occurs when, after review of entire record, the error so undermined trial's fundamental fairness as to cast serious doubt on reliability of conviction. People v. Kruse, 839 P.2d 1 (Colo. 1992); People v. Hampton, 857 P.2d 441 (Colo. App. 1992), aff'd, 876 P.2d 1236 (Colo. 1994); People v. Herr, 868 P.2d 1121 (Colo. App. 1993); Harris v. People, 888 P.2d 259 (Colo. 1995); People v. Kerber, 64 P.3d 930 (Colo. App. 2002); People v. Mullins, 104 P.3d 299 (Colo. App. 2004).

An error is generally not obvious when nothing in state statutory or prior case law would have alerted the trial court to the error. An error is not obvious when the supreme court or a division of the court of appeals has previously rejected an argument being advanced by a subsequent party who is asserting plain error. Scott v. People, 2017 CO 16, 390 P.3d 832.

A plain error analysis requires a consideration of various factors including the strength of the evidence against the defendant, the posture of the defense, and any persistent, improper remarks by the defendant. People v. Mullins, 104 P.3d 299 (Colo. App. 2004).

To meet the burden of plain error, there must be a reasonable possibility that the alleged error contributed to the defendant's conviction. People v. Valdez, 725 P.2d 29 (Colo. App. 1986), aff'd, 789 P.2d 406 (Colo. 1990).

No definition of plain error will fit every case, and each case must be resolved on the particular facts or laws which are in issue. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

Each case must be resolved on the particular facts and law at issue. People v. Miller, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977).

Each case in which it is argued that plain error has been committed must be resolved in light of its particular facts and the law that applies to those facts. People v. Mills, 192 Colo. 260, 557 P.2d 1192 (1976); People v. Peterson, 656 P.2d 1301 (Colo. 1983).

And reviewing court to determine existence of plain error. It is incumbent upon a reviewing court, from its own reading of the record, to determine whether ''plain error'' occurred. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

Even though raised for first time on appeal. Where plain error affecting substantial rights appears, an appellate court, in the interest of justice, may, and should, deal with it, even though it is raised for the first time on appeal. People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972); People v. Meller, 185 Colo. 389, 524 P.2d 1366 (1974); People v. Bridges, 620 P.2d 1 (Colo. 1980).

Issues not properly preserved at trial can serve as a basis for reversal only if they involve plain error. People v. Mattas, 44 Colo. App. 139, 618 P.2d 675 (1980), aff'd, 645 P.2d 254 (Colo. 1982).

Unpreserved double jeopardy claims are reviewable for plain error. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816; Scott v. People, 2017 CO 16, 390 P.3d 832; Zubiate v. People, 2017 CO 17, 390 P.3d 394.

An error in trial proceedings to which the accused fails to make a contemporaneous objection will not support reversal unless it casts serious doubt upon the basic fairness of the trial. Wilson v. People, 743 P.2d 415 (Colo. 1987); People v. Winters, 765 P.2d 1010 (Colo. 1988); People v. Lybarger, 790 P.2d 855 (Colo. App. 1989); Woertman v. People, 804 P.2d 188 (Colo. 1991); People v. Schuett, 833 P.2d 44 (Colo. 1992).

Where defendant did not object to use of photocopy, its use did not so undermine the fundamental fairness of trial as to cast serious doubt on the reliability of conviction. People v. Chavez, 764 P.2d 371 (Colo. App. 1988).

If a plain error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings, an appellate court, exercising its discretion, may still decline to reverse the trial court. People v. Butcher, 2018 COA 54M, __ P.3d __.

Miscalculation of interest on restitution award was plain error but did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Therefore, the judgment was not reversed. People v. Butcher, 2018 COA 54M, __ P.3d __.

Because defendant did not object to a jury instruction at trial the court's action is reviewed pursuant to section (b) under a plain error standard, with a finding of error only if review of the entire record demonstrates a reasonable possibility that the improper instruction contributed to the defendant's conviction. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

The court committed harmless error in failing to give the jury cautionary hearsay instructions after each hearsay witnesses' testimony. Three hearsay witnesses testified in sequence, the court gave the cautionary instruction following the testimony of the last hearsay witness and during the general charge to the jury, and the hearsay testimony corroborated the testimony of other witnesses. People v. Valdez, 874 P.2d 415 (Colo. App. 1994.)

If a defendant does not object to statements he feels are prejudicial, a plain error standard of review applies. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991); People v. Mendez, 897 P.2d 868 (Colo. App. 1995); People v. Kerber, 64 P.3d 930 (Colo. App. 2002).

No error where witness stated defendant was out of prison and that defendant had previously threatened him, where statements were part of the total picture surrounding the offense, the witness's description of defendant's threats were mentioned during defendant's cross-examination of witness, and defendant made no objections or mistrial motions. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

As long as a fundamental or substantial right has purportedly been violated. Although defendant's trial counsel did not make any contemporaneous objections nor raise the issue in his post-trial motion, an appellate court will consider, nevertheless, alleged error where it involves a fundamental right which has purportedly been violated. Hines v. People, 179 Colo. 4, 497 P.2d 1258 (1972).

Even though defendant's counsel neither tendered an instruction on the presumption of innocence nor objected to the court's failure to instruct the jury on the presumption of innocence, because the failure to instruct on the presumption of innocence affects such a substantial right, the supreme court may take cognizance of the error pursuant to section (b). People v. Hill, 182 Colo. 253, 512 P.2d 257 (1973).

To constitute reversible error, the introduction of the statement of aggravating factors which was not objected to at trial must affect the substantial rights of a defendant. People v. McKnight, 626 P.2d 678 (Colo. 1981).

Whether a defendant has received effective assistance of counsel is a question concerning a fundamental right. Armstrong v. People, 701 P.2d 17 (Colo. 1985).

Which is prejudicial. An appellate court will consider issues not raised below where serious prejudicial error was made and justice requires the consideration. Larkin v. People, 177 Colo. 156, 493 P.2d 1 (1972).

Effect of failure to object at trial. Where instructions used by the trial court failed to define the statutory terms, failure to object to the tendered instructions or raise any constitutional objection to the statute at the trial court level raises the standard of review to one of ''plain error''. People v. Cardenas, 42 Colo. App. 61, 592 P.2d 1348 (1979); People v. Campbell, 678 P.2d 1035 (Colo. App. 1983).

Where the issue is raised for the first time on appeal, review is confined to a consideration of whether the error falls within the definition of plain error. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

Where a defendant failed to object to the adequacy of the jury instructions in his motion for a new trial, a judgment will not be reversed unless plain error occurred. People v. Frysig, 628 P.2d 1004 (Colo. 1981).

Failure to make timely and sufficient objection at trial prevents consideration of issue on

appeal unless it involves plain error. People v. Kruse, 839 P.2d 1 (Colo. 1992).

Unless a prosecutor's misconduct is ''glaringly or tremendously'' improper, it is not plain error under section (b) where no objection to the behavior was raised. People v. Jensen, 55 P.3d 135 (Colo. App. 2001).

And review limited when issue not cited in motion for new trial. Where defense counsel objected to the admission of certain evidence, but failed to cite its admission in his motion for a new trial, it may not be considered on appeal unless the introduction of that evidence constituted plain error. People v. Abbott, 638 P.2d 781 (Colo. 1981).

Reversal justified where error contributed to conviction. Only when there is at least a reasonable possibility that the action claimed to be plain error contributed to the defendant's conviction can it justify reversal. People v. Aragon, 186 Colo. 91, 525 P.2d 1134 (1974); People v. Mills, 192 Colo. 260, 557 P.2d 1192 (1976).

Unless there is a reasonable possibility that the alleged error contributed to defendant's conviction, reversal of the proceedings below is not required. People v. Miller, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977).

Where the minds of an average jury would not have found the prosecution's case significantly less persuasive by the elimination of the error and the evidence of guilt of the defendant is overwhelming, a defendant is not entitled to reversal based on plain error. People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972).

In order for the court to find plain error, there must be a reasonable possibility that an alleged erroneous instruction contributed to the defendant's conviction. The existence of this possibility must be determined by an examination of the particular facts of the case. People v. Dillon, 655 P.2d 841 (Colo. 1982).

Plain error affects substantial rights of the accused, and the record must demonstrate a reasonable possibility that the alleged erroneous instruction contributed to defendant's conviction. People v. Cowden, 735 P.2d 199 (Colo. 1987); People v. Lybarger, 790 P.2d 855 (Colo. App. 1989).

Plain error is present only if an appellate court, after reviewing the entire record, can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Deprivation of affirmative defense deemed plain error. The contention that a defendant has been deprived of an affirmative defense, if meritorious, is plain error. People v. Beebe, 38 Colo. App. 80, 557 P.2d 840 (1976).

Improper testimony regarding the procedure for obtaining an arrest warrant and the prosecutor's mistaken statements that only defendant could claim self-defense sufficiently undermined confidence in the reliability of the judgment of conviction. These errors constituted plain error entitling defendant to a new trial. People v. Mullins, 104 P.3d 299 (Colo. App. 2004).

To allege insufficiency of evidence as to indispensable element of a crime is to assert plain error. People v. Harris, 633 P.2d 1095 (Colo. App. 1981).

But admission of uncounseled statements by defendant may not be plain error. Fact that defendant's attorney was not notified that questioning of his client was going to take place did not make the admission of statements made by defendant during such questioning plain error since the record did not show that the interrogator knew that the defendant had an attorney, and the defendant took the stand and repeated his statements. People v. Pool, 185 Colo. 131, 522 P.2d 102 (1974).

Trial court's failure to submit instruction to defense counsel for review prior to reading the instruction to the jury is not plain error. People v. Martin, 670 P.2d 22 (Colo. App. 1983).

Prosecutor's argument did not result in plain error. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003); People v. Kendall, 174 P.3d 791 (Colo. App. 2007).

''Plain error'' rule must be read in harmony with Crim. P. 30, which provides that no party may assign as error the giving of an instruction to which he has not objected before the instructions are submitted to the jury. People v. Green, 178 Colo. 77, 495 P.2d 549 (1972); People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972); People v. Aragon, 186 Colo. 91, 525 P.2d 1134 (1974).

Unless manifest prejudice or plain error. Where defendant does not object to the instruction given or tender any alternate instruction which might more adequately set forth the law, an assignment of error is not valid unless there is manifest prejudice amounting to plain error. People v. Bercillio, 179 Colo. 383, 500 P.2d 975 (1972).

Because a defendant must make all objections he has to instructions prior to their submission to the jury, where the defendant failed to make any such objection prior to submission of the instructions, absent plain error, the court would not consider the defendant's arguments on review. People v. Tilley, 184 Colo. 424, 520 P.2d 1046 (1974).

Where no specific objection was made prior to submission of instructions to the jury as required by Crim. P. 30, absent plain error, reviewing court will not consider these arguments

on appeal. People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

Where defendant only made a general objection to jury instructions, and failed to make a timely specific objection, supreme court on appeal will not consider argument by defendant that instructions were in error absent plain error. People v. O'Donnell, 184 Colo. 104, 518 P.2d 945 (1974).

No prejudicial error if jury is adequately informed. Where the defendant objected to various instructions given to the jury by the trial court, but under the instructions as a whole the jury is adequately informed as to the law, there is no prejudicial error. People v. Lovato, 181 Colo. 99, 507 P.2d 860 (1973).

Where instruction on trespass was given to jury in statutory language and instructions were, as a whole, adequate to inform jury of the law on these issues and defendant did not request or tender proposed instruction to define term ''unlawfully'', failure to instruct on that term did not rise to the level of plain error. People v. Wortham, 690 P.2d 876 (Colo. App. 1984).

Prosecutor's comment that evidence of prior similar transactions between the sexual assault victim and the defendant, her father, explained the victim's response to two assaults and her failure to report them earlier is not improper considering the testimony of the victim and the limiting instructions given by the trial court regarding the proper use of the similar transaction evidence. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Doctrine of invited error precludes defendant from challenging jury instruction as prejudicial error since defendant approved and submitted comparable instruction to court. People v. Driggers, 812 P.2d 702 (Colo. App. 1991).

Although failure to instruct on essential elements constitutes plain error. The trial court has a duty to properly instruct the jury on every issue presented, and the failure to do so with respect to the essential elements of the crime charged constitutes plain error. People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972); People v. Hardin, 199 Colo. 229, 607 P.2d 1291 (1980); People v. Mattas, 645 P.2d 254 (Colo. 1982); People v. Williams, 707 P.2d 1023 (Colo. App. 1985).

As does erroneous instruction. Where a given instruction permits the jury to convict without proof of essential element of the crime, there is plain error, and reversal is required. People v. Butcher, 180 Colo. 429, 506 P.2d 362 (1973).

The giving of an instruction which allows the jury to find the defendant guilty upon a lesser degree of culpability than that required by the statute constitutes plain error. People v. Etchells, 646 P.2d 950 (Colo. App. 1982).

Or inadequate instruction. Where a general instruction on specific intent does not particularly direct the jury's attention to defendant's theory that he could not have possessed the requisite specific intent, it is the duty of the court either to correct the tendered instruction or to give the substance of it in an instruction drafted by the court, and a court's refusal to give such an adequate instruction is error. Nora v. People, 176 Colo. 454, 491 P.2d 62 (1971).

Under some circumstances, a court's failure to instruct sua sponte on intoxication may result in reversible error. People v. Mattas, 645 P.2d 254 (Colo. 1982).

But not failure to instruct on lesser included offense. Failure of the court to instruct on a lesser included offense does not affect the substantial rights of defendant and is therefore not cognizable as plain error. People v. Chavez, 179 Colo. 316, 500 P.2d 365 (1972); People v. Sharpe, 183 Colo. 64, 514 P.2d 1138 (1973); People v. Brown, 677 P.2d 406 (Colo. App. 1983).

Failure to instruct on element of "knowingly". The trial court's failure to include the element of ''knowingly'' in a second-degree kidnapping instruction is plain error. People v. Clark, 662 P.2d 1100 (Colo. App. 1982).

It was not plain error for trial court to submit to the jury the ''result'' factor and omit the ''conduct-and-circumstance'' factor in the definitional instruction of ''knowingly'' in a first degree criminal trespass case because the instruction could neither mislead nor confuse the jury. People v. Wortham, 690 P.2d 876 (Colo. App. 1984).

Failure to give definition of "attempt". The trial court's failure to include the definition of attempt found in the criminal attempt statute in instructions for the pertinent provisions of the second degree assault statute was not plain error. People v. Weller, 679 P.2d 1077 (Colo. 1984).

Omission of the definition of "sexual penetration" from jury instructions did not rise to the level of plain error because the issue of whether sexual penetration occurred was not contested at trial. People v. Lozano-Ruiz, 2018 CO 86, 429 P.3d 577.

Jury instruction on aggravated robbery did not constitute plain error as defendant was given notice by language in the information that he was being charged with both methods of committing crime even though instruction differed from language in the information. People v. Driggers, 812 P.2d 702 (Colo. App. 1991).

Failure to give definition of "without lawful justification". Where this phrase appeared in second-degree kidnapping statute without further definition, and defendant made no claim of legal authority to transport nonconsenting victim, trial court's instruction to jury to give phrase ''the common meaning that the words

imply'' was not plain error. People v. Schuett, 833 P.2d 44 (Colo. 1992).

Trial court's failure to ascertain reasons for defendant's waiver of right to testify not plain error where defendant did not raise issue in his motion for a new trial and did not allege or present evidence that the waiver was not knowing, intelligent, or voluntary. People v. Wortham, 690 P.2d 876 (Colo. App. 1984).

Failure to issue a contemporaneous limiting instruction. Failure of the court to issue a limiting instruction contemporaneously with the history of arrest testimony, which testimony related to a crime separate and unrelated to the crime for which defendant was being tried, did not constitute plain error. People v. White, 680 P.2d 1318 (Colo. App. 1984).

Failure to instruct the jury on gender bias was not a ''structural defect'' or plain error requiring reversal of third degree sexual assault conviction where gender bias was not raised during the trial and the jury was instructed sympathy or prejudice should not influence its decision. People v. Johnson, 870 P.2d 571 (Colo. App. 1993).

Although the general rule is that there may be no appellate review of issues not raised in a new trial motion, there is an exception for claims that the trial court committed plain error. People v. Ullerich, 680 P.2d 1306 (Colo. App. 1983).

Where court presented the jury with irreconcilable statements about the requisite culpability for a securities fraud violation, a conviction cannot be permitted to rest on such an equivocal direction to the jury on one of the basic elements of the crime. People v. Riley, 708 P.2d 1359 (Colo. 1985).

The cumulative effect of a proper jury instruction with improper jury instructions that contained erroneous statements of law which relegated to the jury the function of determining whether an affirmative defense was available in a case and which had the effect of relieving the prosecution of its burden of proof in regard to the affirmative defense was insufficient to dispel the potential harm created by the erroneous jury instructions and was, therefore, plain error. Lybarger v. People, 807 P.2d 570 (Colo. 1991).

Joint operation instruction does not remove case from plain error rule. When the jury was told that specific intent applies to every element of aggravated robbery, that specific intent applies only to the intention to kill, maim, or wound, and that ''knowingly'' applies if the intent was to put the victim in fear of death or bodily injury, jury could not be expected to know what, if any, culpable mental state applied. People v. Pickering, 725 P.2d 5 (Colo. App. 1985).

Error of constitutional dimension. Ordinarily, plain error requires reversal only if there is a reasonable possibility that it contributed to the defendant's conviction. However, if the asserted error is of constitutional dimension, reversal is required unless the court is convinced that the error was harmless beyond a reasonable doubt. Graham v. People, 705 P.2d 505 (Colo. 1985).

An error in the admission of evidence, even if of constitutional dimension, does not require reversal of a criminal conviction if the error was harmless beyond a reasonable doubt. People v. Martinez, 83 P.3d 1174 (Colo. App. 2003).

Trial court's actions cannot be considered as harmless error where the court's removal of the determination of the authority of a defendant charged with theft to borrow the victim's money from the province of the jury violated the defendant's sixth amendment right to a jury trial. People v. Gracey, 940 P.2d 1050 (Colo. App. 1996).

In determining whether prosecutorial impropriety mandates a new trial, appellate courts are obliged to evaluate the severity and frequency of the misconduct, any curative measures taken to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant's conviction. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Reversible error exists if there are grounds for believing that the jury was substantially prejudiced by improper conduct. Where the prosecutor's ill-advised and improper comments were so numerous and highly prejudicial, the defendant was deprived of a fair trial requiring that the judgment of conviction be reversed. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Prosecution's comments during closing argument did not rise to the level of reversible error where comments were small part of lengthy closing; prosecutor fairly summarized the evidence; prosecutor emphasized the jury's prerogative to make an independent determination of the facts; and trial court sustained defense counsel's objections and prosecutor withdrew her comments. People v. Griffith, 58 P.3d 1111 (Colo. App. 2002).

Prosecutor's use of Burke quotation was an improper attempt to persuade jurors; however, the error was harmless as it was an isolated incident in an otherwise proper closing argument in which the prosecutor repeatedly urged the jury to apply the rules of law to the evidence adduced at trial. People v. Clemons, 89 P.3d 479 (Colo. App. 2003).

The determination of whether a prosecutor's statements constitute inappropriate prosecutorial argument is generally a matter for the exercise of trial court discretion; however, if an appellate court concludes that prejudice created by a prosecutor's conduct was so great as to result in a miscarriage of justice, a new trial may be granted notwithstanding the

trial court's failure to impose such sanction. Harris v. People, 888 P.2d 259 (Colo. 1995).

A new trial is the appropriate remedy for the deprivation of the defendant's right to a fair trial where, in view of the prosecutor's repeated remarks, the temporal context of the trial, and the critical role of witness credibility in the case, there was substantial likelihood that the prosecutor's improper comments impermissibly prejudiced the defendant's right to have his guilt determined by an impartial jury applying applicable legal standards to facts found on an objective evaluation of the evidence. Harris v. People, 888 P.2d 259 (Colo. 1995).

The sufficiency of evidence presented at trial will be considered on appeal when evaluating claims of prosecutorial misconduct. The conclusion that the prosecutor's comments, repeated over the course of the entire closing argument, were substantially prejudicial was compelled when the conflicting and inconclusive nature of the evidence presented at trial was taken into consideration. Harris v. People, 888 P.2d 259 (Colo. 1995).

In determining whether prosecutor's improper statements so prejudiced the jury as to affect the fundamental fairness of the trial, the court shall consider the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction. Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005); Crider v. People, 186 P.3d 39 (Colo. 2008).

Only through examining the totality of the circumstances can the court determine whether the error, prosecutorial misconduct, affected the fundamental fairness of the trial. The court evaluates the cumulative effect of the prosecutor's statements by considering the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt. People v. Fortson, 2018 COA 46M, 421 P.3d 1236.

In light of evidence demonstrating defendant's guilt, prosecutor's conduct was not flagrant or tremendously improper. Although prosecutor made improper statements implying that defendant had a bad character, evidence of the defendant's guilt was strong, defense counsel made no contemporaneous objections to the statements, and the statements were infrequent and a small part of prosecutor's argument. Therefore, the statements did not so undermine the trial's fundamental fairness as to cast doubt on the reliability of the judgment of conviction. People v. Cordova, 293 P.3d 114 (Colo. App. 2011).

In light of evidence demonstrating defendant's guilt, prosecutor's conduct was not so glaringly improper as to warrant reversal under the plain error standard. Although the prosecutor erred in continually referring to the toothbrush as a dangerous instrument and attempting to elicit testimony to that effect, the defendant acknowledged the toothbrush was his and could be used to injure someone. People v. Jamison, 2018 COA 121, 436 P.3d 569.

It is prosecutorial misconduct for an attorney to characterize a witness's testimony or his character for truthfulness with any form of the word "lie". A violation of this prohibition, although sanctionable in other ways, does not warrant reversal if it was harmless. Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005); Crider v. People, 186 P.3d 39 (Colo. 2008).

Review of jury instruction for constitutional error where such instruction was submitted by the defendant is barred by application of invited error doctrine. People v. Zapata, 779 P.2d 1307 (Colo. 1989).

Failure to instruct jury as to presumption of innocence is plain error. People v. Aragon, 665 P.2d 137 (Colo. App. 1982).

Instructions held not to constitute "plain error". People v. Otwell, 179 Colo. 119, 498 P.2d 956 (1972); People v. Majors, 179 Colo. 204, 499 P.2d 1200 (1972); People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972); People v. Eades, 187 Colo. 74, 528 P.2d 382 (1974).

Instruction to the jury on the credibility of the witnesses, where the words ''including the defendant'' were crossed out but were not totally obliterated and could be deciphered by the jury, did not constitute plain error. People v. Miller, 37 Colo. App. 294, 549 P.2d 1092 (1976), aff'd, 193 Colo. 415, 566 P.2d 1059 (1977).

Where the defendant is charged with aggravated robbery and conspiracy to commit aggravated robbery, and is not entitled to an instruction on theft, an error in a theft instruction is harmless. Graham v. People, 199 Colo. 439, 610 P.2d 494 (1980).

Trial court's failure to instruct the jury that voluntary intoxication may apply to sexual assault on a child does not constitute plain error for there is doubt whether the issue is yet settled. People v. O'Connell, 134 P.3d 460 (Colo. App. 2005).

No plain error where jury instruction did not identify the particular victim named in the charging document. People v. Smith, 2018 CO 33, 416 P.3d 886.

Challenges to interpreter must be made. When an interpreter is necessary for the court to translate testimony and the defense makes no challenge to the interpreter's qualifications or competency, the doctrine of plain error may not be applied in motion for new trial. People v. Bercillio, 179 Colo. 383, 500 P.2d 975 (1972).

As must challenge of medical expert, unless plain error. Where defendant failed to interpose a timely objection to the trial court's qualification of a prosecution witness as a medical expert, any error in this regard did not rise

to the level of plain error and thus was not recognized on appeal. People v. Litsey, 192 Colo. 19, 555 P.2d 974 (1976).

As well as objections to admonishment of defense counsel. Where the trial court recesses in the middle of the cross-examination and admonishes defense counsel in the presence of the jury to the effect that counsel should change his attitude, and defendant's counsel does not object to the recess or the admonishment, it is not of a level to be ''plain error''. People v. Lovato, 181 Colo. 99, 507 P.2d 860 (1973).

Determination of whether the misconduct at trial was plain error turns not on the nature of the misconduct but on the impact of the misconduct upon the result. People v. Constant, 44 Colo. App. 544, 623 P.2d 63 (1980), rev'd on other grounds, 645 P.2d 843 (Colo. 1982).

Prosecutorial misconduct provides a basis for reversal because of plain error only where there is a substantial likelihood that it affected the verdict or deprived a defendant of a fair and impartial trial. People v. Constant, 645 P.2d 843 (Colo. 1982).

Prosecutor's statement in closing argument held not to be plain error as comment in context was not calculated or intended to direct attention to defendant's failure to testify in his own behalf. People v. Wieghard, 727 P.2d 383 (Colo. App. 1986).

Prosecutor's remark not plain error where remark may have been invited by defense counsel, remark was tangential and could not have prejudiced defendant, and there was overwhelming evidence of defendant's guilt. People v. Joyce, 68 P.3d 521 (Colo. App. 2002).

Although prosecutor's remark during summation that the defendant had lied during his testimony and allusions to defendant's friends' cocaine habit was inappropriate, it did not constitute plain error. The improper comments were isolated ones included in a lengthy summation and could not have affected the verdict. People v. Herr, 868 P.2d 1121 (Colo. App. 1993).

The scope of final arguments rests in the sound discretion of the trial court and its ruling will not be disturbed on appeal in the absence of gross abuse of discretion resulting in prejudice and a denial of justice. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

Prosecutorial misconduct must be flagrantly improper to be classified as plain error. Prosecutor's comment that the evidence of similar transactions between the victim and her father explained the victim's response to the assaults and her failure to report them earlier was not error considering the testimony of the victim and the limiting instructions given by the trial court regarding the proper use of similar transactions evidence. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Prosecutor's characterization of defendant's statement held "plain error". The prosecutor's characterization in his summation of defendant's written pretrial statement as ''riddled with lies'' constituted plain error affecting defendant's substantial rights. People v. Trujillo, 624 P.2d 924 (Colo. App. 1980).

As is exposure of handcuffed defendant. A denial of a fair trial occurs where a defendant appears before a jury in handcuffs when the exposure was unnecessary and prejudicial. People v. Rael, 199 Colo. 201, 612 P.2d 1095 (1980).

As is improper admission of evidence of other offenses. Admission into evidence of offenses not alleged as basis of habitual criminality during the second phase of a bifurcated trial constitutes reversible error. People v. Lucero, 200 Colo. 335, 615 P.2d 660 (1980).

The giving of a "time-fuse" instruction (which grants the jury a time limit to finish its deliberations, at the end of which the jury will be dismissed) constitutes plain error and requires reversal. Allen v. People, 660 P.2d 896 (Colo. 1983).

Failure to provide transcript of prior mistrial is of such magnitude that it requires a new trial. People v. St. John, 668 P.2d 988 (Colo. App. 1983).

Where enhancement of sentence for crime of violence is plain error. Where a defendant is convicted of first-degree murder, and the mittimus reads that he was found to have committed a ''crime of violence'', but the jury was not instructed on the elements of crime of violence nor given a separate verdict form or interrogatory as required, enhancement of sentence for having committed a crime of violence would be plain error. The cause must be remanded for correction of the mittimus to show conviction of first-degree murder only, and for imposition of sentence on that crime only. People v. Thrower, 670 P.2d 1251 (Colo. App. 1983).

Fact that testimony of hospital employee regarding defendant's statements made while confined for sanity examination used to rebut defendant's self-defense theory was given in prosecution's case-in-chief rather than as rebuttal testimony did not constitute plain error. People v. Kruse, 839 P.2d 1 (Colo. 1992).

Because the trial record contained significant evidence of defendant's guilt, any error by the trial court in admitting certain testimony was not plain error. People v. Mapps, 231 P.3d 5 (Colo. App. 2009).

Testimony by the victim and police officer describing the robber does not constitute plain error. The evidence corroborated other properly admitted evidence and although arguably cumulative, did not have a tendency to confuse or inflame the jury's passions or undermine the fairness of the trial. People v. Boehmer, 872 P.2d 1320 (Colo. App. 1993).

Allowing a jury unsupervised access to videotape and transcript of a drug transaction between the defendant and a police informant was not plain error. People v. Aponte, 867 P.2d 183 (Colo. App. 1993).

Prejudicial error found. People v. Snook, 729 P.2d 1026 (Colo. App. 1986), aff'd, 745 P.2d 647 (Colo. 1987).

Allowing defendant to stand trial in orange jump suit, which defendant described as prison garb, was not plain error. People v. Green, 759 P.2d 814 (Colo. App. 1988).

Declaration of mistrial to correct error at trial. Zamora v. People, 175 Colo. 340, 487 P.2d 1116 (1971); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972); People v. Medina, 185 Colo. 101, 521 P.2d 1257 (1974); People v. Lankford, 185 Colo. 445, 524 P.2d 1382 (1974); People v. Goff, 187 Colo. 103, 530 P.2d 514 (1974); People v. Rogers, 187 Colo. 128, 528 P.2d 1309 (1974); People v. Becker, 187 Colo. 344, 531 P.2d 386 (1975).

Rule 53. Regulation of Conduct in the Courtroom

Conduct in the courtroom pertaining to the publication of judicial proceedings shall conform to Canon 3 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Colorado.

Rule 54. Application and Exception

(a) Courts. These Rules apply to all criminal proceedings in all courts of record in the state of Colorado. These Rules do not apply to municipal ordinance and charter violations.

(b) Proceedings.

(1) **Peace Bonds.** These Rules do not alter the power of judges to hold for security of the peace and for good behavior as provided by law, but in such cases the procedure shall conform to these rules so far as they are applicable.

(2) **Other Proceedings.** These Rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute or the collection of fines and penalties; nor to any other special proceedings where a statutory procedure inconsistent with these Rules is provided.

(c) Application of Terms. ''Law'' includes statutes and judicial decisions. ''Civil action'' refers to a civil action in a court of record. ''Oath'' includes affirmations. ''Prosecuting attorney'' means the attorney general, a district attorney or his assistant or deputy or special prosecutor. The words ''demurrer'', ''motion to quash'', ''plea in abatement'', ''plea in bar'', and ''special plea in bar'', or words to the same effect in any statute, shall be construed to mean the motion raising a defense or objection provided in Rule 12.

(d) Numbering — Meaning of "No Colorado Rule". Insofar as practicable, the order and numbering of these Rules follows that of the Federal Rules of Criminal Procedure. In some instances, usually because of differences in judicial systems or of jurisdiction, there is no Colorado rule corresponding in number with an existing federal rule. In these instances to maintain the general numbering scheme, the phrase ''No Colorado Rule'' appears opposite the number for which there is a federal rule but not a Colorado rule. The phrase ''No Colorado Rule'' means only that there is no rule included in these Rules covering the subject of the federal rule bearing that number. The phrase does not imply either that there is or that there is not constitutional, statutory or case law in Colorado covering the subject of the corresponding federal rule.

ANNOTATION

Rules of criminal procedure not applicable to extradition proceedings. Allowing full discovery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. Temen v. Barry, 695 P.2d 745 (Colo. 1984).

Rules of criminal procedure govern all proceedings in criminal actions in courts of record. People ex rel Shinn v. District Court, 172 Colo. 23, 469 P.2d 732 (1970).

But not trial de novo for violation of ordinance. The municipal court rules and not the rules of criminal procedure apply in a trial de novo in the county court for violation of a municipal ordinance. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules of criminal procedure not applicable to extradition proceedings. Allowing full dis-

covery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. Temen v. Barry, 695 P.2d 745 (Colo. 1984).

Applied in People v. Brisbin, 175 Colo. 423, 488 P.2d 63 (1971); People v. Reliford, 39 Colo. App. 474, 568 P.2d 496 (1977).

Rule 55. Records

(a) Register of actions (criminal docket). The clerk shall keep a record known as the register of actions and shall enter those items set forth below. The register of actions may be in any form or style prescribed by chief justice directive or approved by the State Court Administrator.

A register of actions shall be prepared for each case filed. The file number of each case shall be entered in the court case management system. All documents filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. The entries shall be brief but shall show the date and title of each document filed, order or writ issued, data transfer submitted or received, and the substance of each order or judgment of the court and the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. The notation of the judgment in the register of actions shall constitute the entry of judgment.

(b) Criminal Record. Repealed effective September 4, 1974.

(c) Indices; Calendars. The clerk shall keep indices of all records. The clerk shall also keep as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any form or style prescribed by chief justice directive or approved by the State Court Administrator.

(d) Files. Repealed effective June 6, 2019.

(e) Reporter's Notes; Custody, Use, Ownership, Retention. For proceedings in district court, the practice and procedure concerning court reporter notes and electronic or mechanical recordings shall be as prescribed in Chief Justice Directive 05-03, Management Plan for Court Reporting and Recording Services. For proceedings in county court, that practice and procedure shall be as prescribed in C.R.C.P. 380.

(f) Retention and Disposition of Records. The clerk shall retain and dispose of all court records in accordance with the Colorado Judicial Department's records retention manual.

Source: (e) amended February 14, 2019, effective immediately; (a), (c), and (f) amended and (d) repealed effective June 6, 2019.

ANNOTATION

Court of record has an affirmative duty to contemporaneously record all proceedings. Reconstruction of the record at a later time is not an adequate substitute for a contemporaneous record. Jones v. District Court, 780 P.2d 526 (Colo. 1989).

Bench or side-bar conferences are not to be conducted off the record unless the parties so request or so consent. Jones v. District Court, 780 P.2d 526 (Colo. 1989).

But a failure to record all trial proceedings will not always result in reversible error. Trial court's failure to record certain bench conferences and pretrial conference was harmless where defense counsel never objected to unrecorded proceedings, defendant cannot show how error prejudiced her, and there is sufficient information on the record to rule on appeal. People v. Pineda, 40 P.3d 60 (Colo. App. 2001).

The court did not err by taking judicial notice of defendant's probation status after determining the status from the state computer system. Since § 13-1-119 and this rule expressly approve of records kept and maintained in a state computer system, the court may take judicial notice of the court records contained in the system. People v. Linares-Guzman, 195 P.3d 1130 (Colo. App. 2008).

Rule 56. Courts and Clerks

(a) All Courts Deemed Open. All courts of record shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making

motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays, legal holidays and such other days as the courthouse of the particular court shall be closed as provided by federal or state statute.

(b) County Courts Away from County Seat. When a county court is held regularly at a location other than the county seat, the county judge shall designate by rule when such place shall be open for the transaction of court matters. The clerk's office, with the clerk or ex officio clerk or a deputy in attendance, shall be open during business hours on all days except Sundays, legal holidays, and such other days as the courthouse of the particular court shall be closed as provided by federal or state statute.

Rule 57. Rules of Court

(a) Rules of Courts of Record. All local court rules, including local county court procedures and standing orders having the effect of local court rules regarding the criminal courts, enacted before February 1, 1992, are hereby repealed. Each court, by a majority of its judges, may from time to time propose local court rules and amendments of the local court rules. A proposed local rule or amendment shall not be inconsistent with the Colorado Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in criminal courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local court rules is required. Numbering and format of any local court rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. Upon approval by the Supreme Court of the local rule or amendment, a copy shall be furnished to the office of the Judicial Administrator to the end that all rules as provided herein may be published promptly and that copies may be available to the public. The Supreme Court's approval of a local court rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of a court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of Criminal Procedure.

(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rules of Civil Procedure and to the applicable law if no Rule of Criminal Procedure exists.

Source: Entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Applied in Sollitt v. District Court, 180 Colo. 114, 502 P.2d 1108 (1972).

Rule 58. Forms

See the Appendix to Chapter 29 for illustrative forms.

Rule 59. Effective Date

These Rules, except as noted on specific rules, take effect on April 1, 1974. Amendments take effect on the date indicated. They govern all proceedings in criminal actions brought after they take effect and also all further proceedings in actions then pending.

ANNOTATION

Applied in People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975).

Rule 60. Citation

These Rules may be known and cited as the ''Colorado Rules of Criminal Procedure'', or ''Crim. P.''.

APPENDIX TO CHAPTER 29

The Colorado Rules of Criminal Procedure

APPENDIX TO CHAPTER 29

FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

(See Rules 16, 35, and 37)

Forms of captions are to be consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us/.)

SPECIAL FORM INDEX

Form 1.

☐ County Court _____County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO: v. **Defendant:**	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NOTICE OF APPEAL	

To: The County Court in and for the County of _____, State of Colorado and the above named _____.

Please take notice that the undersigned counsel for the _____ will file an appeal on behalf of the _____ herein, _____

Said appeal will be docketed in the District Court pursuant to Rule _____, Rules of _____ Procedure in the County Courts.

Done this _____ day of _____, 20_____ .

By _____
Attorney

I, _____, hereby certify that I have served a copy of the above Notice of Appeal and a copy of the Designation of Record on Error by depositing a true copy of each in the United States mail, with sufficient postage prepaid and addressed to _____, whose address is _____ on this _____ day of _____, 20_____ .

Form 2.

☐ County Court _____County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO: v. **Defendant:**	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
DESIGNATION OF RECORD ON APPEAL	

The Clerk will prepare for the District Court a record of error which shall include the following:

1. All original Process and Pleadings on file in the trial court.
2. All Exhibits.
3. Jury Instructions.
4. Judgments and Orders of the Court.
5. Reporter's Original Transcript—excluding transcript of Jury Voir Dire, Opening Statements and Closing Summation, but including all evidence.

_____

_____

_____

Please prepare and certify with all convenient speed.
Requested this _____ day of _____, 20_____ .

(Signed) _____
Appellant or Attorney for Appellant

Amount deposited $_____ for Record.
Appeal Bond in the amount of $_____ filed.

Form 3.

☐ County Court _____County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO: v. **Defendant:**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
CHECKLIST FOR ACTION TAKEN AT OMNIBUS HEARING	

A. DISCOVERY BY DEFENDANT

(Number circled shows action taken)

1. The defense states it has obtained full discovery and (or) has inspected the prosecution file, (except)

   (If prosecution has refused discovery of certain materials, defense counsel shall state nature of material.

_____

_____

2. The prosecution states it has disclosed all evidence in its possession, favorable to defendant on the issue of guilt.
3. The defendant requests and moves for—
   - 3(a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the prosecution. (Granted) (Denied)
   - 3(b) Discovery of the names of prosecution witnesses and their statements. (Granted) (Denied)
   - 3(c) Inspection of all physical or documentary evidence in plaintiff's possession. (Granted) (Denied)
4. Defendant, having had discovery of Items #2 and #3, requests and moves for discovery and inspection of all further or additional information coming into the plaintiff's possession as to Items #2 and #3. (Granted) (Denied)
5. The defense requests the following information and the plaintiff states—
   - 5(a) The prosecution (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
   - 5(b) Expert witness (will) (will not) be called:
     - (1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.
   - 5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.
   - 5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.
   - 5(e) Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution—
     - (1) obtained from or belonging to the defendant, or
     - (2) which will be used at the hearing or trial, (have been) (will be) supplied to defendant.
   - 5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

5(g) Prosecution to use prior felony conviction for impeachment of defendant if he testifies,
Date of conviction _____ Offense _____
(1) Court rules it (may) (may not) be used.
(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information government has, indicating entrapment of the defendant (has been) (will be) supplied.

B. MOTIONS REQUIRING SEPARATE HEARING

The defense moves—-

6(a) To suppress physical evidence in plaintiff's possession on the grounds of:
(1) Illegal search
(2) Illegal arrest

6(b) Hearing of motions to suppress physical evidence set for _____

6(c) To suppress admissions or confessions made by defendant on the grounds of
(1) Delay in arraignment
(2) Coercion or unlawful inducement
(3) Violation of the Miranda Rule
(4) Unlawful arrest
(5) Improper use of Line-up (Wade & Gilbert)

6(d) Hearing to suppress admissions or confessions set for
(1) Date of trial. (or) (2)_____

Prosecution to state:—

6(e) Proceedings before the grand jury (were) (were not) recorded;

6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied;

6(g) Hearing re supplying transcripts set for _____

6(h) The prosecution to state:
(1) There (was) (was not) an informer (or lookout) involved;
(2) The informer (will) (will not) be called as a witness at the trial;
(3) It has supplied the identity of the informer; (or)
(4) It will claim privilege of non-disclosure.

6(i) Hearing on privilege set for _____

6(j) The prosecution to state:—
There (has) (has not) been any—
(1) Electronic surveillance of the defendant or his premises;
(2) Leads obtained by electronic surveillance of defendant's person or premises;
(3) All material will be supplied, or

6(k) Hearing on disclosure set for _____

C. MISCELLANEOUS MOTIONS

The defense moves—

7(a) To dismiss for failure of the indictment (or information) to state an offense. (Granted) (Denied)

7(b) To dismiss the indictment or information (or count _____ thereof) on the ground of duplicity. (Granted) (Denied)

7(c) To sever case of defendant _____ and for a separate trial. (Granted) (Denied)

7(d) To sever count _____ of the indictment or information and for a separate trial thereon. (Granted) (Denied)

7(e) For a Bill of Particulars. (Granted) (Denied)

7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)

7(g) To require the prosecution to secure the appearance of witness _____ who is subject to state direction at the trial or hearing. (Granted) (Denied)

7(h) To inquire into the reasonableness of bail. Amount fixed _____ (Affirmed) (Modified to _____).

D. DISCOVERY BY THE PROSECUTION

D.1. STATEMENTS BY THE DEFENSE IN RESPONSE TO PROSECUTION REQUESTS

8. Competency, Insanity and Diminished Mental Responsibility

8(a) There (is) (is not) any claim of incompetency of defendant to stand trial;

8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense;

8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;

8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;

8(e) Defendant (will) (will not) submit to a psychiatric examination by a court-appointed doctor on the issue of his sanity at the time of the alleged offense;

9. Alibi

9(a) Defendant (will) (will not) rely on an alibi;

9(b) Defendant (will) (will not) furnish a list of his alibi witnesses;

10. Scientific Testing

Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests;

11(a) Nature of the Defense

Defense counsel states the general nature of the defense is—

(1) lack of knowledge of contraband

(2) lack of special intent

(3) diminished mental responsibility

(4) entrapment

(5) general denial. Put prosecution to proof.

11(b) Defense counsel state there (is) (is not) (may be) a probability of a disposition without trial;

11(c) Defendant (will) (will not) waive a jury and ask for a court trial;

11(d) Defendant (may) (will) (will not) testify;

11(e) Defendant (may) (will) (will not) call additional witnesses.

11(f) Character witnesses (may) (will) (will not) be called.

11(g) Defense counsel will supply the prosecution names of additional witnesses for defendant _____ days before trial.

D.2. RULINGS ON PROSECUTION REQUEST AND MOTIONS

The defendant is directed by the court, upon timely notice to defense counsel,

12(a) to appear in a lineup

12(b) to speak for voice identification by witnesses

12(c) to be fingerprinted

12(d) to pose for photographs (not involving a reenactment of the crime)

12(e) to try on articles of clothing

12(f) to permit taking of specimens of material under fingernails;

12(g) to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion;

12(h) to provide samples of his handwriting

12(i) to submit to a physical external inspection of his body.

E. STIPULATIONS

It is stipulated between the parties:

13(a) That if _____ was called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen; that he never gave the defendant or any other person permission to take the motor vehicle.

13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).

13(c) That if _____ the official state chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or the information) has been chemically tested and is _____, contains _____, and the weight is _____

13(d) That there has been a continuous chain of custody in state agents from the time of the seizure of the contraband to the time of the trial.

13(e) Miscellaneous stipulations:

_____

_____

_____

F. CONCLUSION—DEFENSE COUNSEL STATES

14(a) That defense counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal search or arrest, or any other constitutional problem, except as set forth above.

14(b) That defense counsel has inspected the check list on this Action Taken form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.

Approved:

Dated:_____

SO ORDERED

_____

Attorney for the State of _____

_____

JUDGE

_____

Attorney for Defendant

Form 4.

District Court _____County, Colorado Court Address: **People of the State of Colorado** **v.** **Defendant**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(c)	

CONVICTION UNDER ATTACK

1. What was the date of your conviction? _____(day/month/year).

2. Which of the following resulted in your conviction? ❑PLEA, ❑JURY TRIAL, OR ❑COURT TRIAL.

3. Were you represented by an attorney? ❑YES ❑NO

If yes, list the names and addresses of any attorney who has ever represented you in this case. Attach additional sheets if necessary.

Name: _____ Name: _____

Address: _____ Address: _____

_____ _____

_____ _____

Nature of Representation (for example: preliminary hearing, plea, trial)

_____ _____

_____ _____

DIRECT APPEAL

4. Was this case appealed? ❑YES ❑NO If yes, please provide the following:

Appeal Case Number: _____

Appellate Court: _____

Result: _____ Date: _____

Date of mandate from the appellate court: _____

POSTCONVICTION PROCEEDINGS

5. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal, such as Rule 35(a), Rule 35(c), or a Writ of Habeas Corpus? ❑YES ❑NO

6. If your answer to 5 was "YES" give the following information for each petition filed:

   a. FIRST petition, application or motion.

      (1) Name of court _____

      (2) Nature of proceeding (for example, Rule 35(a), Rule 35(c), § 2254 Writ of Habeas Corpus)

      _____

      (3) Claims raised

      _____

      _____

      (4) Name of attorney if any _____

      (5) Did you receive an evidentiary hearing on your petition, application, or motion? ❑YES ❑NO

      (6) Result _____

      (7) Date of Result _____

      (8) Did you appeal the result? ❑YES ❑NO

         i) If you did appeal, what was the result and date of the court's decision (or attach a copy of the court's opinion or order)?

         _____

         _____

         ii) If you did not appeal, briefly explain why you did not.

         _____

         _____

   b. For a second or subsequent petition, please answer the questions listed in (6)(a)(1) through (7) above. Attach a separate sheet of paper and state at the top that you are listing other motions or petitions filed in this case.

REQUEST FOR COUNSEL

7. Are you requesting that counsel be appointed to represent you on this petition?

❑YES ❑NO If yes, please attached an indigency application (JDF 208).

CLAIMS

Briefly specify every ground on which you claim that you are being held unlawfully.

- STATE THE FACTS RELATED TO YOUR CLAIM ON ONE PAGE AND PUT ANY LEGAL AUTHORITY ON A SEPARATE PAGE.
- YOU SHOULD RAISE IN THIS PETITION ALL THE CLAIMS FOR RELIEF THAT RELATE TO THE CONVICTION OR SENTENCE UNDER ATTACK. IF YOU DO NOT RAISE ALL CLAIMS HERE, THE COURT MAY NOT HAVE TO ENTERTAIN LATER MOTIONS FOR SIMILAR RELIEF.

GROUNDS OF PETITION

Specify every ground on which you claim that you are being held unlawfully, by placing a check mark in the appropriate box below and providing the required information. Include all facts. Attach pages stating the grounds and the facts referenced to each claim.

8. The grounds for this Petition are as follows: (check all that apply)

a. ❑ The Defendant has sought appeal of a conviction within the time prescribed, and judgment on that conviction has not then been affirmed upon appeal, and there has been a significant change in the law which if applied to this conviction or sentence, the interests of justice allow the retroactive application of the changed legal standard. (In other words, there was a change in the law and the Defendant is allowed the positive retroactive effect of the change.)

b. No review of a conviction of crime was sought by appeal within the time prescribed therefore, or a judgment of conviction was affirmed upon appeal. However, in good faith the Defendant alleges one or more of the following:

(1) ❑ That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state.

(2) ❑ That the Defendant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected.

(3) ❑ That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter.

(4) ❑ That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the Defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

(5) ❑ Any other ground otherwise properly the basis for collateral attack upon a criminal judgment.

(6) ❑ That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

For any box checked, YOU MUST attach a separate sheet of paper with the ground listed at the top of the page and number it accordingly, 8(a), 8(b)(1), 8(b)(2), 8(b)(3), 8(b)(4), 8(b)(5), 8(b)(6), and/or 8(b)(7). On each separate sheet of paper list each and every fact you feel supports that claim. Be specific and give details.

9. Colorado Revised Statutes §16-5-402(1) provides that a person who has been convicted under a criminal statute in Colorado or another state may collaterally attack the validity of that conviction only if such attack is brought within a specified time period or completion of the direct appeal process for that conviction, unless one of the exceptions listed in §16-5-402(2), C.R.S. are applicable. The specified time periods are as follows:

All class 1 felonies:	No limit
All other felonies:	Three years
Misdemeanors:	Eighteen months
Petty offenses:	Six months

a. Was this petition filed within the time limits set forth in §16-5-402(1), 6 C.R.S. (above)?

❑ YES ❑ NO

b. If not, check any applicable exceptions listed in §16-5-402(2), 6 C.R.S., and state the FACTS that relate to the exception. DO NOT MAKE LEGAL ARGUMENTS.

(1) ❑ The court entering judgment of conviction did not have jurisdiction over the subject matter of the alleged offense;

(2) ❑ The court entering judgment of conviction did not have jurisdiction over the person of the Defendant;

(3) ❑ The failure to seek relief within the applicable time period was caused by an adjudication of incompetence or by commitment of the Defendant to an institution for treatment as a mentally ill person; or

(4) ❑ The failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect.

❑ By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

❑ By checking this box, I am acknowledging that I have made a change to the original content of this form. (Checking this box requires you to remove JDF number and copyright at the bottom of the form)

For every ground you checked as grounds for this petition not being filed within the statutory time limits, YOU MUST attach a separate sheet of paper with that ground listed at the top of the page and numbered accordingly* 9(b)(1), 9(b)(2), 9(b)(3), *and/or 9(b)(4). On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

SUCCESSIVE PETITIONS

Important Notice Regarding Additional Petitions:

With specific exceptions provided for in Criminal Procedure Rule 35(c)(3)(VII), the court shall deny any claim that could have been presented in an appeal or postconviction proceeding previously brought.

Therefore, all claims related to the conviction under attack in this petition must be listed in this petition, or future motions may be denied.

Wherefore, petitioner prays that the Court grant relief to which petitioner may be entitled in this proceeding.

_____ _____ (date)
PETITIONER'S ORIGINAL SIGNATURE

_____
PETITIONER'S PRINTED NAME

_____
ADDRESS

_____
CITY, STATE, ZIP CODE

_____
PHONE NUMBER

INDEX TO
COLORADO RULES OF CRIMINAL PROCEDURE

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CHAPTER 29.3

The Colorado Rules Governing the Creation, Appointment, Terms, and Procedure for the Public Defender Commission

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Adopted by the

SUPREME COURT OF COLORADO

Effective September 13, 1979

CHAPTER 29.3

COLORADO RULES GOVERNING THE CREATION, APPOINTMENT, TERMS, AND PROCEDURE FOR THE PUBLIC DEFENDER COMMISSION

(1) Pursuant to Section 21-1-101, Colorado Revised Statutes, as amended, the Colorado Supreme Court hereby creates and establishes the Colorado Public Defender Commission. The commission shall have the following duties:

a. To appoint the Colorado State Public Defender;

b. To receive and act upon complaints made against the Public Defender; and

c. To remove the Public Defender upon a showing of adequate cause as set forth in these rules.

(2) The commission shall consist of five members appointed by the Chief Justice for staggered five-year terms beginning July 1, 1979. The Chief Justice shall determine the length of the initial term of each member, if such term is less than five years, to create the staggered full terms. In making appointments to the commission, the Chief Justice shall adhere to the qualifications and disqualifications set forth in Section 21-1-101(2), Colorado Revised Statutes, as amended, and shall take into consideration those matters set forth in the statute regarding place of residence, sex, race, and ethnic background.

(3) Any vacancy in the membership of the commission shall be filled by appointment by the Chief Justice in accordance with the membership qualifications stated above, and for the balance of the term remaining for the vacant position. A member of the commission shall be deemed to have resigned if that member is absent from three consecutive commission meetings.

(4) Any member of the commission may be reappointed for one full term following that member's initial term.

(5) The commission shall select a chairman from among its members. The chairman shall serve at the pleasure of the commission, and the chairman shall suffer no disqualification or impediment to his vote as a consequence of his occupying the position of chairman of the commission. The commission shall keep minutes of its meeting.

(6) The commission shall meet at least annually, and also upon the call of the chairman when necessary to consider appointment, tenure, or removal of the Public Defender.

(7) Three members shall constitute a quorum of the commission. The affirmative vote of four members of the commission is required for a decision to appoint or remove the Public Defender. Any other act of the commission requires the affirmative vote of a majority of the quorum, or, if more than a quorum is present, of the members present.

(8) In accordance with the procedure set forth below, the person serving as the Public Defender may be removed for permanent physical or mental disability seriously interfering with the performance of his duties, willful misconduct in office, willful or persistent failure to perform his duties, conduct prejudicial to the administration of justice, documented incompetence, or violation of any applicable canon or disciplinary rule contained in the Code of Professional Responsibility.

(9) Members of the Public Defender Commission shall serve without compensation but shall be reimbursed for actual and reasonable expenses incurred in the performance of their duties.

(10) **Procedure for Appointment of the Public Defender.** Any time a vacancy exists in the position of Public Defender, either by removal or resignation of the person serving as Public Defender or at the expiration of the term of any incumbent Public Defender, the commission shall select and appoint a person to serve as Colorado State Public Defender. The commission may reappoint an incumbent Public Defender. The selection and appoint-

ment of the Public Defender shall be based solely upon the merit of the appointee, pursuant to such procedures as the commission may adopt and in conformity with the qualifications set forth in section 21-1-102, C.R.S., as amended.

(11) **Hearing Examiner.** The commission may appoint one or more hearing examiners to conduct hearings in removal cases. Each hearing examiner shall be an attorney who has practiced law in Colorado for at least five years. A hearing examiner may be appointed for a two-year term to handle cases referred to him during his term by the commission. He shall be compensated on the basis of the actual time spent on commission matters at a rate to be established by the commission, in addition to reimbursement for actual expenses incurred. A hearing examiner and any commission member shall have the power to administer oaths and to issue subpoenas and subpoenas duces tecum for hearings conducted under these rules.

(12) **Procedure for Removal of the Public Defender.**

a. Any person seeking discharge of the Public Defender shall file a written complaint with the commission chairman requesting the Public Defender's discharge and stating all facts the complainant deems necessary to justify the discharge of the Public Defender. The complainant shall transmit copies of his complaint to the Public Defender.

b. The Public Defender shall file a response to the complaint with the commission chairman within ten days following receipt of the complaint, responding to the allegations of the complaint, and justifying whatever action is the subject of the complaint.

c. One member of the commission, selected by rotation of the commission members, shall consider the complaint and response and shall recommend to the commission either that the allegations and response justify a hearing or that the matter should be ruled upon by the commission without a hearing. The commission shall thereupon decide whether or not to hold a hearing. The Public Defender shall not be discharged unless a hearing is held.

d. If the commission determines not to hold a hearing, it shall so notify the parties, stating the matters considered and reasons for denying the hearing. The commission shall then decide the matter of the complaint upon the documents submitted by the parties without a hearing and shall dismiss the complaint or order such remedial action as the commission deems appropriate under the circumstances. The commission shall notify the complainant and the Public Defender of the commission's decision.

e. If the commission determines to hold a hearing, it shall so notify the parties, the hearing examiner, and all the interested and concerned parties. The hearing examiner shall set a convenient date and place for the hearing, to be held within thirty days after notification by the commission. Hearings shall be open to the public, unless a closed hearing is requested by the complainant or the Public Defender and ordered by the hearing examiner, and shall be recorded verbatim either stenographically or electronically.

f. Hearings shall be conducted in accordance with the provisions and procedures prescribed by Section 24-4-105, C.R.S., as amended, and the hearing examiner shall have the power therein granted, except that where such provisions are in conflict with the provisions of these rules, these rules shall control.

g. The hearing examiner shall conduct the hearing and shall afford the parties opportunity to introduce evidence, including testimony and statements of the complainant, his representative, if any, the Public Defender, his representative, if any, and other witnesses, and to cross-examine witnesses. The testimony received shall be under oath or affirmation.

h. Rules of evidence shall not be applied strictly, but the hearing examiner shall exclude irrelevant or unduly repetitious evidence.

i. The burden of initially going forward to show jurisdiction of the commission and the factual basis for the requested discharge of the Public Defender shall be upon the complainant. If the hearing examiner is satisfied that the complainant has met this burden after hearing the complainant's evidence, the hearing examiner shall so rule, and the burden of going forward shall then shift to the Public Defender to show that the action complained of did not occur, or if it did occur, that it was based upon good or justifiable cause.

j. Upon hearing the evidence and statements of the parties, and after such deliberation as necessary, the hearing officer shall make findings and a recommended decision on the issue of whether the Public Defender should be discharged, or whether the complaint

should be dismissed. Any recommended decision of the hearing examiner to discharge the Public Defender shall be based upon clear and convincing evidence.

k. The hearing examiner shall issue a written decision and shall send copies thereof to the commission and to the parties and their representatives, if any. The decision shall contain findings, recommendations for any action, and notification of the right of either party to appeal directly to the commission. The decision shall include an analysis of the findings and a statement of the reasons for the conclusions reached. The commission, on its own motion or upon petition to review by an interested party, may affirm, modify, reverse, or set aside any decision of a hearing examiner on the basis of the evidence previously submitted in the case. The commission may also take additional evidence, or it may remand to the hearing examiner for the taking of additional evidence and a new decision. Unless the commission acts to the contrary, the decision of the hearing examiner shall become the decision of the commission and shall be carried into effect within twenty calendar days after issuance by the hearing examiner.

l. Either party may appeal the decision of the hearing examiner to the full commission. Such appeal shall be filed with the chairman of the commission. An appeal to the commission shall be in writing, setting forth the reasons for the appeal, and shall be filed with the commission within fifteen calendar days after the receipt of the decision of the hearing examiner. The commission may extend this time limit when a party shows that circumstances beyond his control prevent the filing of the appeal within the time limit. If an appeal is filed, the decision shall not be given effect until the commission has decided the appeal.

m. The commission shall review the record of the proceedings, all relevant written representations, and the decision of the hearing examiner. The record of proceedings may include such portions of the transcript of the hearing as may be necessary to consider the exceptions. Transcripts shall be furnished by the party appealing. The commission, may, in its discretion, afford the parties opportunity to appear and present oral arguments and representations.

n. The commission shall issue a written decision, which may consist of an affirmation without comment of the decision of the hearing examiner, and shall send copies thereof to the parties and their representatives, if any. Such decision of the commission shall be subject to court review, as provided below.

(13) **Court Review.**

a. No action, proceeding, or suit to set aside a commission decision or to enjoin the enforcement thereof shall be brought unless the petitioning party has first petitioned the commission for review of its decision, and no matter not brought to the commission's attention in the petition for review shall be considered on judicial review.

b. Actions, proceedings, or suits to set aside, vacate, or amend any final decision of the commission or to enjoin the enforcement of any final decision of the commission shall be on the record only and commenced in the Supreme Court within twenty days after notification of the final decision.

c. The commission may certify to the Supreme Court questions of law involved in any of its decisions.

d. In judicial proceedings under this article, the findings of the commission as to the facts, if supported by substantial evidence and in the absence of fraud, shall be conclusive.

e. Actions, proceedings, and suits to review any final decision of the commission or questions certified to the Supreme Court by the commission shall be heard in an expedited manner and shall be given precedence over all other civil cases.

f. A commission decision may be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers;

2. That the decision was procured by fraud;

3. That the findings of fact do not support the decision;

4. That the decision is erroneous as a matter of law.

g. In any action in which the plaintiff seeks judicial review of a commission final decision made after a hearing, the parties shall file briefs within the time periods specified in the Colorado appellate rules, and the matter shall be set promptly for oral argument.

h. Pending judicial review of a final decision of the commission discharging the Public Defender, the commission shall appoint an acting Public Defender, and the discharged Public Defender shall be in the status of suspension without pay. If the reviewing court reverses the commission and reinstates the Public Defender, the Public Defender shall be entitled to full compensation from the time of his being placed in status of suspension.

CHAPTER 29.5

The Colorado Rules for County Court Traffic Violations Bureaus

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Adopted by the

SUPREME COURT OF COLORADO

December 15, 1977,

Effective January 10, 1978

ANALYSIS BY RULE

CHAPTER 29.5

COLORADO RULES FOR COUNTY COURT TRAFFIC VIOLATIONS BUREAUS

Rule 1. Establishment of Traffic Violations Bureaus

There is hereby established in every county court in this state a traffic violations bureau for the processing of cases as hereinafter provided.

Rule 2. Purpose and Construction

These rules are intended to provide for the just and speedy disposition of minor traffic cases without appearance before a judge. They shall be construed to secure simplicity and uniformity in procedure and to minimize expense and delay while preserving the rights of defendants.

Rule 3. Definitions

Unless otherwise provided, the following definitions shall apply throughout these rules:

(a) ''Process'' means to dispose of cases in a traffic violations bureau without appearance before a judge or referee.

(b) ''Clerk'' means the clerk or deputy clerk of a county court.

Rule 4. Cases Processed by Traffic Violations Bureaus

(a) A county court traffic violations bureau may process any case involving violations contained in articles 2, 3, and 4 of title 42, C.R.S., as amended, except the following:

(1) Cases commenced by the issuance of a penalty assessment notice under section 42-4-1701 (5) (a), C.R.S., as amended;

(2) Cases involving any violation designated as a class 1 or class 2 traffic offense under article 4 of title 42, C.R.S., as amended;

(3) Cases involving charges of driving without a valid driver's license or while the driver's license is suspended, denied, or revoked, or while the driver's license has been expired for more than one year;

(4) Cases involving false, altered, or fraudulent drivers' licenses or false, altered, or fraudulent safety inspection stickers;

(5) Cases in which the summons indicates that a traffic accident or collision was involved;

(6) Cases in which the offense charged is a felony;

(7) Cases involving violations contained in sections 42-2-101 (3), 42-2-106, 42-2-132, 42-2-136, 42-2-139, 42-3-133 (1) (b) to (1) (h), 42-3-142, 42-4-222, 42-4-233, 42-4-606, 42-4-1904, 42-4-712, and 42-4-1208, C.R.S., as amended; and

(8) Cases involving multiple charges, one or more of which is not eligible for processing in a traffic violations bureau, or to one or more of which a defendant desires to enter a plea of not guilty.

(b) In traffic cases not eligible for processing in the traffic violations bureau, and except for penalty assessment notices paid properly and timely to the motor vehicle division of the department of revenue, an appearance before a judge or referee shall be required.

Source: (a)(1) and (a)(7) corrected and effective November 12, 1999.

Rule 5. Venue

A traffic violations bureau may process only those summonses issued for return in the county court in which the traffic violations bureau is situated.

Rule 6. Plea Agreements Prohibited

No charge shall be reduced, dismissed, or amended, and no new charge shall be added to any summons or complaint processed by any traffic violations bureau. A traffic violations bureau shall accept only a plea of guilty to each offense stated or charged in the notice or summons and complaint.

Rule 7. Acknowledgment and Waiver of Rights

(a) Before processing any case in a traffic violations bureau, the clerk shall ascertain that the defendant has been advised in writing of each of the following:
(1) The right to appear before a judge or a referee;
(2) The right to plead not guilty, and to have a trial by a judge, a referee, or a jury;
(3) The right to be represented by an attorney, and, if the defendant is indigent, to request the appointment of an attorney;
(4) The right to remain silent, and that any statement made by the defendant can and may be used against him;
(5) That any plea entered must be voluntary and not the result of undue influence or coercion on the part of anyone;
(6) The amount of fines and costs to be imposed, and that penalty points may be assessed against the driving privilege; and
(7) That if a plea of guilty is entered, the defendant waives the foregoing rights as well as any right of appeal.
(b) A document shall be delivered to the defendant providing a place for the defendant to execute a written acknowledgment and waiver of the rights set forth above, and to enter a plea of guilty to the offense or offenses charged.
(c) Such advisement, waiver, and plea may be incorporated in either of the following documents:
(1) The summons or notice served upon the defendant; or
(2) A separate document delivered to the defendant by the peace officer serving the summons or notice, or by the clerk at the traffic violations bureau when the defendant appears in person.

Rule 8. Procedure in Traffic Violations Bureaus

(a) Every traffic case shall be filed and indexed in the county court in the same manner, whether eligible or ineligible for processing in the traffic violations bureau.
(b) A traffic violations bureau shall accept guilty pleas and no others.
(c) A traffic violations bureau shall accept pleas of guilty only to the offense or offenses charged in the notice or summons and complaint and to no other offense. Such pleas may be entered in person, by counsel, or by mail.
(d) Every plea entered at a traffic violations bureau shall be in writing. The clerk shall not accept such plea or payment of fines and costs unless and until the defendant, or defendant's counsel, has executed an acknowledgment and waiver of rights as provided in Rule 7.
(e) Every county court shall post in a conspicuous place in the clerk's office a schedule of the fines and costs and the penalty points as provided by law for the offenses eligible for processing in the traffic violations bureau.
(f) After accepting a plea of guilty, the clerk shall assess and collect the appropriate fines as provided in Rule 9, together with costs as provided in Rule 10, and shall enter the plea and the amount of the fines and costs on the register of actions. After completing the foregoing, the clerk shall sign the register of actions. The completed entries and collections as set forth above shall constitute a judgment of conviction.

(g) The clerk shall provide a written receipt to each defendant, or defendant's attorney, who pays any fine or costs in person, or who provides a stamped, self-addressed envelope for such purpose when making payment by mail.

(h) The clerk shall account for moneys received in the traffic violations bureau in the same manner as in other traffic cases.

(i) The clerk shall report each conviction in the traffic violations bureau to the motor vehicle division of the department of revenue pursuant to section 42-2-124, C.R.S., as amended.

Source: (i) corrected and effective November 12, 1999.

Rule 9. Amounts of Fines

The amounts of fines which shall be assessed in a traffic violations bureau for those violations set forth in the schedule contained in section 42-4-1701 (4) (a), C.R.S., as amended, shall be the amounts specified in that schedule.

Source: Entire rule corrected and effective November 12, 1999.

Rule 10. Costs

Each defendant entering a plea of guilty and paying a fine shall be charged the docket fee provided for traffic violations bureaus by section 13-32-105, C.R.S., as amended, in addition to such fine.

Rule 11. Application

These rules shall be uniform in all county courts in this state and shall apply to all traffic cases except as limited by Rule 4 herein.

Rule 12. Effective Date

These rules take effect January 10, 1978, and shall apply to violations alleged to have been committed on or after that date.

Rule 13. Citation

These rules shall be known and cited as the Colorado Rules for County Court Traffic Violations Bureaus, or R.T.V.B.

INDEX TO
COLORADO RULES FOR
COUNTY COURT TRAFFIC VIOLATIONS BUREAUS

CHAPTER 29.7

The Colorado Rules for Traffic Infractions

Adopted by the

SUPREME COURT OF COLORADO

December 9, 1982,

Effective January 1, 1983

ANALYSIS BY RULE

CHAPTER 29.7

COLORADO RULES FOR TRAFFIC INFRACTIONS

Rule 1. Scope and Purpose

These rules are promulgated pursuant to section 13-6-501 (9), C.R.S., and govern practice and procedures for the handling of noncriminal traffic infractions, which are defined as civil offenses in section 42-4-1701 (1), C.R.S. The purpose of these rules is to provide for the orderly, expeditious, and fair disposition of this class of traffic offenses. For this purpose, the rules apply concepts of both civil and criminal law, as deemed appropriate, to establish informal hearing procedures in the county courts.

Source: Entire rule corrected and effective November 12, 1999.

Rule 2. Application

These rules apply to actions in which only the commission of statutory traffic infractions are charged. In any action in which the commission of a traffic infraction and a criminal offense are alleged in one complaint, all charges shall be returnable and judgment shall be entered pursuant to section 42-4-1708 (1), C.R.S., and the action shall be treated as one proceeding governed by the rules and statutes applicable to the alleged criminal offense.

Source: Entire rule corrected and effective November 12, 1999.

Rule 3. Definitions

The following definitions shall apply in these rules:

(a) ''Charging document'' means the document commencing or initiating the traffic infraction matter, whether denoted as a complaint, summons and complaint, citation, penalty assessment notice, or other document charging the person with the commission of a traffic infraction or infractions.

(b) ''Defendant'' means any person charged with the commission of a traffic infraction, including but not limited to the following terms used in the implementing legislation: ''cited person,'' ''cited party,'' ''individual,'' ''person charged with a traffic violation,'' ''violator,'' or ''accused.''

(c) ''Docket fee'' means a fee assessed according to the provisions of section 42-4-1710 (2), (3), or (4), C.R.S., or a fee in the same amount as provided in these rules.

(d) ''Judgment'' means the admission of guilt or liability for any traffic infraction, the entry of judgment of guilt or liability, or the entry of default judgment as used in section 42-4-1709 (7), C.R.S., against any person for the commission of a traffic infraction.

(e) ''Officer'' means a law enforcement agent who tenders or serves a charging document under these rules.

(f) ''Penalty'' means a fine pursuant to sections 42-4-1701 (4) (a) and 42-4-1710, C.R.S., if the charging document is a penalty assessment notice; or a fine pursuant to sections 42-4-1701 (3) (a) (I) and 42-4-1701 (5) (c) (II), C.R.S., if the charging document is any document other than a penalty assessment notice.

(g) ''Referee'' means any person appointed as a referee under section 13-6-501, C.R.S., and any judge acting as a referee to hear traffic infractions.

Source: (c), (d), and (f) corrected and effective November 12, 1999; (f) corrected and effective November 30, 1999.

Rule 4. Commencement of Action

An action under these rules is commenced by the tender or service of a charging document upon a defendant and by the filing of a charging document with the court.

Editor's note: Letter designation "(a)" removed on revision (2018).

Rule 5. Prohibition of Plea Agreements

Repealed June 16, 1988, effective January 1, 1989.

Rule 6. Payment Before Appearance

(a) The clerk of court shall accept payment of a penalty assessment notice by a defendant without an appearance before the referee, if payment is made before the time scheduled for the first appearance.

(b) At the time of payment, the defendant shall sign a waiver of rights and acknowledgment of guilt or liability, as set forth in Form A in the appendix to these rules, pay a docket fee, and agree to complete any additional court ordered sanction.

(c) This procedure shall constitute an entry and satisfaction of judgment.

Source: (b) amended and effective September 7, 2006; (a) amended and effective June 16, 2011.

Rule 7. First Hearing

(a) If the defendant has not previously acknowledged guilt or liability and satisfied the judgment, he shall appear before the referee at the time scheduled for first hearing.

(b) The defendant may appear in person or by counsel, who shall enter appearance in the case, providing, however, if an admission of guilt or liability is entered, the referee may require the presence of the defendant for the assessment of the penalty.

(c) If the defendant appears in person, the referee shall advise him in open court of the following:

(1) The nature of the infractions alleged in the charging document;

(2) The penalty and docket fee that may be assessed and the penalty points that may be assessed against the driving privilege;

(3) The consequences of the failure to appear at any subsequent hearing including entry of judgment against the defendant and reporting the judgment to the state motor vehicle division, which may assess points against the driving privilege and may deny an application for a driver's license;

(4) The right to be represented by an attorney at the defendant's expense;

(5) The right to deny the allegations and to have a hearing before the referee;

(6) The right to remain silent, because any statement made by the defendant may be used against him;

(7) Guilt or liability must be proven beyond a reasonable doubt;

(8) The right to testify, subpoena witnesses, present evidence, and cross-examine any witnesses for the state;

(9) Any answer must be voluntary and not the result of undue influence or coercion on the part of anyone; and

(10) An admission of guilt or liability constitutes a waiver of the foregoing rights and any right to appeal.

(d) The defendant personally or by counsel shall answer the allegations in the charging document either by admitting guilt or liability or by denying the allegations.

(e) If the defendant admits guilt or liability, the referee shall enter judgment and assess the appropriate penalty and the docket fee, after determining that the defendant understood the matters set forth in Rule 7(c) and has made a voluntary, knowing, and intelligent waiver of rights.

(f) If the defendant denies the allegations, the matter shall be set for final hearing, and the defendant and officer shall be notified.

Rule 8. Discovery

(a) Discovery shall not be available prior to final hearing.

(b) At the time of final hearing, the defendant is entitled to inspect all documents prepared by the officer which the officer intends to use in the presentation of evidence.

Rule 9. Subpoena

(a) A subpoena shall be issued only for the attendance of a witness or for the production of documentary evidence at final hearing.

(b) A subpoena shall be issued to any county within the state either by the clerk of court at the request of the officer or the defendant, or by counsel who has entered an appearance in the case.

(c) The service of a subpoena shall be by first class mail, if the person to whom it is directed waives personal service, as provided in Form B in the appendix to these rules. No fees or mileage need be tendered with service by mail.

(d) If the person to whom a subpoena is directed does not waive personal service, the issuance and service of a subpoena shall be as provided in Rule 345, C.R.C.P., except as otherwise provided in this rule.

Rule 10. Dismissal Before Final Hearing

(a) Except as provided in Rule 15, the charges shall be dismissed with prejudice if the officer fails to appear at the final hearing.

(b) The charges shall be dismissed if the final hearing is not held within six months from the defendant's answer, pursuant to the provisions of section 42-4-1710 (3), C.R.S.

Source: (b) corrected and effective November 12, 1999.

Rule 11. Final Hearing

(a) The hearing of all cases shall be informal, the object being to dispense justice promptly and economically. The referee shall ensure that evidence shall be offered and questioning shall be conducted in an orderly and expeditious manner and according to basic notions of fairness. The referee may call and question any witness consistent with the referee's obligation to be an impartial fact finder favoring neither the state nor the defense.

(b) The order of proceedings at the hearing shall be as follows:

(1) Before commencement of the hearing, the referee shall briefly describe and explain the purposes and procedures of the hearing.

(2) The officer shall offer sworn testimony and evidence to the facts concerning the alleged infraction. After such testimony, the referee and the defendant or counsel may examine the officer.

(3) Thereafter, the defendant may offer sworn testimony and evidence and shall answer questions, if such testimony is offered, as may be asked by the referee.

(4) If the testimony of additional witnesses is offered, the order of testimony and the extent of questioning shall be within the discretion of the referee.

(5) Upon the conclusion of such testimony and examination, the referee may further examine or allow examination and rebuttal testimony and evidence as deemed appropriate.

(6) At the conclusion of all testimony and examination, the defendant or counsel shall be permitted to make a closing statement.

(c) The Colorado Rules of Evidence do not apply to hearings under these rules.

Rule 12. Judgment After Final Hearing

(a) If all elements of a traffic infraction are proven beyond a reasonable doubt, the referee shall find the defendant guilty or liable and enter appropriate judgment.

(b) If any element of a traffic infraction is not proven beyond a reasonable doubt, the referee shall dismiss the charge and enter appropriate judgment, provided, however, that the referee may find the defendant guilty of or liable for a lesser included traffic infraction, if based on the evidence offered, and enter appropriate judgment.

(c) If the defendant is found guilty or liable, the referee shall assess the appropriate penalty and the docket fee, and any additional costs authorized by section 13-16-122 (1), C.R.S, and order the completion of any additional court ordered sanctions.

(d) The judgment shall be satisfied upon payment to the clerk of the total amount assessed as set forth above and performance of additional sanctions.

(e) If the defendant fails to satisfy the judgment in the time allowed, such failure shall be treated as a default under section 42-4-1710 (3) or (4), C.R.S. The provisions of Rule 16(d) and (e) shall apply to a default under this rule.

Source: (e) corrected and effective November 12, 1999; (c) and (d) amended and effective September 7, 2006.

Rule 13. Posthearing Motions and Appeal

(a) There shall be no posthearing motions except for a motion to set aside a default judgment as provided in Rule 16.

(b) Appeal procedure shall be according to section 13-6-504, C.R.S., and Rule 37, Crim. P.

Rule 14. Venue

Venue shall be as provided by statute.

Rule 15. Continuances

Continuances may be granted on a showing of good cause by the officer, his supervisor, or the defendant.

Rule 16. Default

(a) If the defendant fails to appear for any hearing, the referee shall enter judgment against the defendant.

(b) The amount of the judgment shall be the appropriate penalty assessed after a finding of guilt or liability, the docket fee, and any additional costs assessable under these rules.

(c) The referee may set aside a judgment entered under this rule on a showing of good cause or excusable neglect by the defendant. A motion to set aside the judgment shall be made to the court not more than seven calendar days after entry of judgment.

(d) The defendant may satisfy a judgment entered under this rule by paying the clerk and providing proof of compliance with any additional court orders.

(e) No warrant shall issue for the arrest of a defendant who fails to appear at a hearing or fails to satisfy a judgment.

Source: (d) amended and effective September 7, 2006.

Rule 17. Effective Date

These rules take effect January 1, 1983, and shall apply to traffic infractions alleged to have been committed on or after that date.

Rule 18. Title

These rules shall be known and cited as the Colorado Rules for Traffic Infractions, or C.R.T.I.

APPENDIX TO CHAPTER 29.7

The Colorado Rules for Traffic Infractions

APPENDIX TO CHAPTER 29.7

FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

Forms of captions are consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

(Forms are available on the Colorado judicial branch website at
https://www.courts.state.co.us.)

SPECIAL FORM INDEX

Form A

WAIVER OF RIGHTS AND ADMISSION OF GUILT OR LIABILITY
UNDER THE COLORADO RULES FOR TRAFFIC INFRACTIONS
(Rule 6, C.R.T.I.)

You have been accused of violating the traffic infraction laws of the State of Colorado. A simplified procedure is available for the payment of any fines if you voluntarily admit your guilt or liability after being advised of the following rights.

You have the right to:

1. Be represented by an attorney at your own expense;
2. Remain silent because any statement you make may be used against you;
3. Deny the allegations against you and have a hearing, at which the allegations must be proven beyond a reasonable doubt;
4. Testify at your own choosing, subpoena witnesses, present evidence, and cross-examine witnesses for the state;
5. Appeal a judgment against you.

Any answer you make must be voluntary and not the result of undue influence, and you must understand that points may be assessed against your driving records if you admit guilt or liability.

Admission of Guilt or Liability

I have read or been advised of the rights described above. I hereby waive these rights and voluntarily admit my guilt or liability.

Date _____ Signature _____

Please Note Carefully

Your failure EITHER to sign the above and pay the clerk the fine and costs OR to appear as directed in your notice will result in a judgment against you. The judgment will be reported to the state Motor Vehicle Division, which may assess points against your driving record and delay your application for a driver's license until you have paid the court the full amount of the judgment against you.

Form B

SUBPOENA BY FIRST-CLASS MAIL
(Rule 9, C.R.T.I.)

Instructions:

In order to obtain a subpoena in a traffic infraction matter, please follow the steps below:

1. Fill out the information required on the subpoena and post card waiver form, including your address for returning the post card waiver.

2. Place a stamp in the proper amount on the post card waiver form.

3. Ask the clerk of court to issue the subpoena by signing it and affixing the court seal.

4. Mail the subpoena with the post card, first-class mail, to the person subpoenaed.

5. If the person subpoenaed refuses to waive personal service, as provided by the post card, you may request the clerk of court to issue a subpoena for personal service.

☐ County Court _____County, Colorado Traffic Infraction Matter Court Address:	
TO:	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
SUBPOENA or SUBPOENA DUCES TECUM	

You are ordered to attend and give testimony in Division _____ of _____ County Court at _____(location) on _____(date and time), between the PEOPLE OF THE STATE OF COLORADO and _____, defendant, and also to produce at this time and place, if applicable,

_____

_____

now in your control. Please sign and return immediately the enclosed post card waiving personal service.

_____ _____

Date Clerk or Deputy Clerk

Post card waiver:

PLEASE SIGN AND MAIL IMMEDIATELY

_____

Division _____

_____ County Court

I waive personal service and accept service of the attached subpoena and order in the above case. I will appear as ordered.

Home Phone: _____

Work Phone: _____

_____

Signature of Witness

INDEX TO
COLORADO RULES FOR TRAFFIC INFRACTIONS

CHAPTER 30

The Colorado Municipal Court Rules of Procedure

Amended and Adopted by the

SUPREME COURT OF COLORADO

June 30, 1988,

Effective January 1, 1989

ANALYSIS BY RULE

CHAPTER 30

COLORADO MUNICIPAL COURT RULES OF PROCEDURE

Cross references: For municipal courts generally, see article 10 of title 13, C.R.S.

Law reviews: For article, ''Municipal Courts in Colorado: Practice and Procedure'', see 38 Colo. Law. 39 (Dec. 2009).

Rule 201. Scope

These rules shall govern the procedure in all municipal charter and ordinance violation cases.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Municipal court rules of procedure are applicable to home-rule municipal courts. Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972).

Nature of case determines which rules apply. It is the nature of the case, and not the court in which the case is being tried, that determines whether the municipal court rules or the rules of criminal procedure apply. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules apply in trial de novo for violation of ordinance. The municipal court rules, and not the rules of criminal procedure, apply in a trial de novo in the county court for violation of a municipal ordinance. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Absent rules, power exercised in court's discretion. The absence of procedural rules as to exercise of power to permit the consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made, does not destroy the power, but merely indicates that the manner of its exercise rests in the sound discretion of the court. Paukovich v. County Court, 44 Colo. App. 208, 615 P.2d 54 (1980).

Rule 202. Purpose and Construction

These rules are intended to provide for the just determination of all municipal charter and ordinance violations. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Applied in Patterson v. Cronin, 650 P.2d 531 (Colo. 1982).

Rule 203. Definitions

As used in these rules, the following terms shall have the following meanings:

(a) ''Complaint'' means a written statement of the essential facts constituting a violation;

(b) ''Law'' includes municipal charters and ordinances, statutes, and judicial decisions;

(c) ''Oath'' includes affirmations;

(d) ''Peace officer'' means a duly appointed law enforcement officer of the state of

Colorado or any political subdivision thereof, authorized by the constitution, statutes, charter, or ordinances to enforce municipal charter and ordinance violations;

(e) ''Prosecution'' means the prosecutor, if present, or the complaining witness, if the prosecutor is not present;

(f) ''Prosecutor'' means an attorney representing the municipality in a municipal court;

(g) ''Summons'' means a notice to appear before the court;

(h) ''Summons and complaint'' means a single document containing all the requisites of both a summons and a complaint.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 204. Simplified Procedure for Trial of Municipal Charter and Ordinance Violations

The following simplified procedure shall apply:

(a) Initiation of Prosecution.

(1) Prosecution of a violation under simplified procedure shall be commenced by:

(I) The issuance of a summons and complaint;

(II) The issuance of a summons following the filing of a complaint;

(III) The filing of a complaint following an arrest; or

(IV) The filing of a summons and complaint following arrest.

(b) Summons, Summons and Complaint — By Whom Issued; How Served; Failure to Appear; Contents; Amendment.

(1) **Summons.** Summons is issued by the clerk of the court following the filing of a sworn complaint when it appears from the complaint that there is probable cause to believe that a violation has been committed and that the defendant committed it. The summons need only contain the name of the defendant, the date, time, and place of appearance of the defendant. A copy of the complaint shall be served therewith, and a copy of the summons and the complaint shall be supplied to the prosecutor.

(2) **Warrant.** In lieu of a summons a warrant may be issued at the discretion of the court following the filing of a sworn complaint.

(3) **Summons and Complaint.** A summons and complaint may be issued by a peace officer for an offense constituting a violation which was committed in the peace officer's presence or, if not committed in the peace officer's presence, when the peace officer has reasonable grounds for believing that the offense was committed in fact and that the offense was committed by the person charged. A copy of the summons and complaint so issued shall be filed immediately with the court before which appearance is required. A second copy shall be supplied to the prosecutor if so requested.

(4) **Contents of Complaint or Summons and Complaint.** The complaint shall contain the name of the defendant; the date and approximate location of the offense; identification of the offense charged, citing the charter or ordinance section alleged to have been violated; and a brief statement or description of the offense charged, which statement or description shall be sufficient if it states the type of offense to which the charter or ordinance relates. The summons and complaint shall contain all the foregoing information and shall also direct the defendant to appear before a specified court at a stated date, time, and place, or in the office of the court clerk or violations bureau as provided in subsection (5) below.

(5) The summons or summons and complaint shall direct the defendant to appear before a specified court at a stated date, time, and place, or to appear or to respond at the office of the court clerk or violations bureau of a specified court at a stated date and time or within a stated period of time after service of said summons or summons and complaint.

(6) Amendment of complaint or summons and complaint. The court may permit a complaint or summons and complaint to be amended as to form or substance at any time prior to trial; the court may permit it to be amended as to form at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(c) Procedure After Initiation of Prosecution by Issuance of Summons or Summons and Complaint Without Arrest. Arraignment shall be conducted at the time of the defendant's first appearance in court in response to the direction to appear contained in the summons or summons and complaint, unless arraignment is continued as provided in Rule 210.

(d) Procedure After Initiation of Prosecution by Issuance of Complaint or Summons and Complaint Following Arrest.

(1) Any person arrested under a warrant issued upon a complaint, unless admitted to bail, shall be taken without unnecessary delay before a judge of the court which issued the warrant and shall be given a copy of the complaint and warrant. The defendant shall at such time be arraigned in accordance with the provisions of Rule 210, unless arraignment is continued as provided therein.

(2) A person arrested without a warrant for an offense constituting a municipal charter or ordinance violation shall either (i) be served with a summons and complaint and admitted to bail or released upon personal recognizance, or (ii) be taken without unnecessary delay before the judge, whereupon a complaint or summons and complaint shall be filed forthwith with the court and a copy served upon the accused person, unless earlier filed and served. The accused person shall at such time be arraigned in accordance with the provisions of Rule 210, unless arraignment is continued as provided therein.

(e) Service of Summons and Complaint. A copy of a summons or summons and complaint issued pursuant to these rules shall be served personally upon the defendant. In lieu of personal service, service may be made by leaving a copy of the summons or summons and complaint at the defendant's usual place of abode with some person over the age of eighteen years residing therein or by mailing a copy to the defendant's last known address by certified mail, return receipt requested, not less than 7 days prior to the time the defendant is required to appear.

(f) Failure to Appear. If a person upon whom a summons or summons and complaint has been served pursuant to this Rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for the person's arrest.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Personal service of parking summons not required. Fundamental principles of due process do not require personal service of parking summonses. Patterson v. Cronin, 650 P.2d 531 (Colo. 1982).

As affixing to windshield suffices. The practice of affixing a summons and complaint to the windshield of an unattended motor vehicle is sufficient for the limited purpose of notifying the owner of the motor vehicle of a parking violation. Patterson v. Cronin, 650 P.2d 531 (Colo. 1982).

Purpose of section (6)(4) requirement that ''identification of the offense charged, citing the charter or ordinance section alleged to have been violated'' is to provide for simplicity in procedure and fairness in administration. Alessi v. Municipal Court, 38 Colo. App. 153, 556 P.2d 87 (1976).

Adequate notice of offense. Where the city and municipal court name is printed on the face of a ticket, the section number together with a reference to the ''local ordinance'' provides adequate notice to the defendant of the offense allegedly violated. Alessi v. Municipal Court, 38 Colo. App. 153, 556 P.2d 87 (1976).

As to a "uniform traffic ticket and complaint" containing sufficient information as required for a summons and complaint under this rule, see Alessi v. Municipal Court, 38 Colo. App. 153, 556 P.2d 87 (1976).

Applied in Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Rules 205 to 207. No Colorado Rules

Rule 208. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. If several offenses are known to the prosecutor at the time of commencing the prosecution, all such offenses which are subject to the jurisdiction of the municipal court, upon which the prosecutor elects to proceed, must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode. Any such offense not thus joined by separate count cannot thereafter be the basis of a subsequent prosecution.

(b) Joinder of Defendants. Two or more defendants may be charged in the same complaint or summons and complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged on one or more counts together or separately, and all the defendants need not be charged on each count.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 209. No Colorado Rule

Rule 210. Arraignment

(a) In Court.

(1) Arraignment shall be held upon defendant's first appearance in court, unless defendant is granted a continuance to seek assistance of counsel, to determine which plea to enter, or for other good and sufficient reasons. The court shall advise each defendant of the right to have the arraignment continued upon request for good cause shown, and if no such request is made, the court may proceed with the arraignment.

(2) Arraignment shall be conducted in open court, and the defendant may appear in person or by counsel. If a plea of guilty or nolo contendere is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(3) Upon arraignment, the defendant or counsel shall be furnished with a copy of the complaint or summons and complaint if one has not been previously served.

(4) A defendant appearing without counsel at arraignment shall be advised by the court of the nature of the charges contained in the complaint and of the maximum penalty which the court may impose in the event of a conviction; in addition, the court shall inform the defendant of the following rights:

(I) To bail;

(II) To make no statement, and that any statement made can and may be used against the defendant;

(III) To be represented by counsel, and, if indigent, the right to appointed counsel as applicable;

(IV) To have process issued by the court, without expense to the defendant, to compel the attendance of witnesses in defendant's behalf;

(V) To testify or not to testify in defendant's own behalf;

(VI) To a trial by jury where such right is granted by statute or ordinance, together with the requirement that the defendant, if desiring a jury trial, demand such trial by jury in writing within 21 days after arraignment or entry of a plea; also the number of jurors allowed by law, and of the requirement that the defendant, if desiring a jury trial, tender to the court within 21 days after arraignment or entry of a plea a jury fee of $25 unless the fee be waived by the judge because of the indigence of the defendant.

(VII) To appeal.

(b) At Office of Court Clerk or Violations Bureau.

(1) Except where arraignment and immediate trial are available, the court, in order to eliminate unnecessary court appearances, may provide that a defendant desiring to enter a plea of not guilty may enter an appearance and such a plea at the clerk's office or violations

bureau, in person or by counsel, and have the case assigned for trial at a future date. The clerk shall furnish notice of such entry of plea to the prosecutor without delay.

(2) Before a plea of guilty is received, the defendant shall be arraigned in court as provided in section (a) above, unless the offense is included in a uniform schedule of fines imposed by the court in accordance with the provisions of subsection (5) below, and the defendant elects such procedure.

(3) Under the conditions specified in subsection (4) herein, a court where authorized may establish a procedure for the payment to the court clerk or violations bureau according to a schedule of fines. In such matters the violations bureau shall act under the direction and control of the court.

(4) Any court subject to these rules may by order, which may from time to time be amended, supplemented, or repealed, designate the violations, the penalties for which may be paid at the office of the court clerk or violations bureau. In no event shall the order of reference, or any amendment or supplement thereto, designate for processing any of the following traffic violations:

(I) Offenses resulting in an accident causing personal injury, death, or appreciable damage to the property of another;

(II) Reckless driving;

(III) Exceeding the speed limit by more than twenty-four miles per hour;

(IV) Exhibition of speed or speed contest.

(5) **Schedule of Fines.** The court, in addition to any other notice, by published order to be prominently posted in a place where fines are to be paid, shall specify by suitable schedules the amount of fines to be imposed for violations, designating each violation specifically in the schedules. Such fines shall be within the limits declared by ordinance. Fines and costs shall be paid to, receipted by, and accounted for by the violations clerk or court clerk in accordance with these rules.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a)(4)(VI) amended and adopted December 14, 2011, effective July 1, 2012; (b)(4)(III) amended and effective September 5, 2013.

Rule 211. Pleas

(a) Generally. A defendant, in person or by counsel, may plead guilty, not guilty, or, with the consent of the court, nolo contendere.

(b) Pleas of Guilty and Nolo Contendere. The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all rights set forth in Rule 210 (a)(4) and also determining:

(1) That the defendant understands the nature of the charge and the effect of the plea;

(2) That the plea is voluntary and is not the result of undue influence or coercion on the part of anyone;

(3) That the defendant understands the right to trial by court, or by jury, if applicable, and that the plea waives the right to trial on all issues;

(4) That the defendant understands the possible penalty or penalties.

(c) Absence of the Defendant. The court may accept, in the absence of the defendant, any plea entered in writing by the defendant or counsel or orally made by counsel.

(d) Failure or Refusal to Plead. If a defendant refuses to plead or if the court refuses to accept a plea of guilty, or a plea of nolo contendere, or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason the arraignment here provided for has not been had, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Although the defendant was advised of several rights and the possible penalties, he was not advised of his constitutional right to be represented by counsel, and the trial court prop-

erly ruled that the municipal court's advisement of the defendant was illegal since it did not meet the mandatory requirements set forth in this rule. Mulkey v. Sullivan, 753 P.2d 1226 (Colo. 1988).

Where the defendant has entered a plea of guilty and later wishes to withdraw such plea, the burden is on the defendant to present a prima facie case that the plea was not knowingly and understandingly made. City of Colo. Springs v. Forance, 776 P.2d 1107 (Colo. 1989).

Rule 212. Pleadings and Motions Before Trial

(a) Pleadings and Motions. Pleadings shall consist of the complaint or summons and complaint and pleas of guilty, not guilty, or nolo contendere. All other pleas, demurrers, and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, or as provided in these rules.

(b) Oral or Written Motions. All motions shall be oral unless otherwise ordered by the court.

(c) Defenses and Objections Which May be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(d) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the complaint or summons and complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion. The motion shall include all such defenses and objections then available to the defendant. Failure thus to present any such defense or objection constitutes a waiver of it, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the complaint or summons and complaint to charge an offense shall be noticed by the court at any time during the proceeding.

(e) Time for Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(f) Hearing on Motion. A motion before trial raising defenses or objections under section (c) or (d) shall be determined before the day of trial unless the court orders that it be deferred for determination at or after the trial of the general issue.

(g) Effect of Determination. If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if no plea has previously been made. A plea previously entered shall stand.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 213. Trial Together of Complaints or Summons and Complaints

Subject to the provisions of Rule 214, the court may order two or more complaints or summons and complaints to be tried together if the offenses, and the defendants if there are more than one, could have been joined in a single complaint or summons and complaint. The procedure shall be the same as if the prosecution were under such single complaint or summons and complaint.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 214. Relief From Prejudicial Joinder

If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in a complaint or summons and complaint or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. Upon motion any defendant shall be granted a separate trial as of right if the court finds that the prosecution probably will present against a joint defendant evidence, other than reputation or character testimony, which would not be admissible in a separate trial of the moving defendant, and that such evidence would be prejudicial to those against whom it is not admissible. In ruling on

a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 215. No Colorado Rule

Rule 216. Discovery and Inspection

(a) By Defendant. Upon the motion of a defendant or upon the court's own motion at any time after the filing of the complaint or summons and complaint the court may order the prosecution to permit the defendant to inspect and copy or photograph any books, papers, documents, photographs, or tangible objects that are within the prosecution's possession and control, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(b) Witness's Statements. At any time after the filing of the complaint or summons and complaint, upon the request of a defendant or upon the order of court, the prosecution shall disclose to the defendant the names and addresses of persons whom the prosecution intends to call as witnesses at the hearing or trial, together with any witness statements.

(c) Irrelevant Matters. If the prosecution claims that any material or statement ordered to be produced under this rule contains matter which does not relate to the subject matter of the witness's testimony, the court shall order it to deliver the statement for the court's inspection in chambers. Upon such delivery the court shall excise the portions of the statement which do not relate to the subject matter of the witness's testimony, then the court shall direct delivery of the statement to the defendant.

(d) Statement Defined. The term ''statement'' as used in sections (b) and (c) of this Rule in relation to any witness who may be called by the prosecution means:

(1) A written statement made by such witness and signed or otherwise adopted or approved by the witness;

(2) A mechanical, electrical, or other recording, or a transcription thereof, which is a recital of an oral statement made by such witness; or

(3) Stenographic or written statements or notes which are in substance recitals of an oral statement made by such witness and which were reduced to writing contemporaneously with the making of such oral statement.

(e) Additional Rules. Municipal courts may make such additional rules for discretionary or mandatory discovery by the defense or by the prosecution as are consistent with these rules and with any applicable law.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Request for production of documents held unreasonable and oppressive. Clary v. County Court, 651 P.2d 908 (Colo. App. 1982).

A municipal court has the discretion to order pretrial discovery of the statements of prosecution witnesses to the extent necessary to promote judicial economy and fundamental fairness, even though no such power is granted expressly in the rules. City of Englewood v. Municipal Court, 687 P.2d 521 (Colo. App. 1984).

Rule 217. Subpoena

(a) For Attendance of Witnesses — Form — Issuance. A subpoena shall be issued either by the court or by the clerk of the court or by counsel whose appearance has been entered in the particular case in which the subpoena is sought. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The court or

clerk shall issue a subpoena signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.

(b) For Production of Documentary Evidence and of Objects. Upon order of the court which may be issued ex parte, a subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(c) Service. Unless service is admitted or waived, a subpoena may be served by any peace officer or any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena may be made by delivering a copy thereof to the person named. Service is also valid if the person named has signed a written admission or waiver of personal service.

(d) Contempt. Failure by any person without adequate excuse to obey a subpoena may be deemed a contempt of the court from which the subpoena issued.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rules 218 to 222. No Colorado Rules

Rule 223. Trial by Jury or by the Court

(a) Trial by Jury. Trial shall be to the court, unless the defendant is entitled to a jury trial under the constitution, ordinance, charter, or general laws of the state, in which case the defendant shall have a jury, if, within 21 days after arraignment or entry of a plea, the defendant files with the court a written jury demand and at the same time tenders to that court a jury fee of $25, unless the fee is waived by the judge because of the indigence of the defendant. If the action is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded. A defendant who fails to file with the court the written jury demand as provided above waives the right to a jury trial.

(b) Numbers of Jurors. When a jury trial is granted pursuant to section (a) of this Rule, the jury shall consist of three jurors unless a greater number, not to exceed six, is requested by the defendant in the jury demand.

(c) Trial Without a Jury. In a case tried without a jury, the court shall make a general finding and in addition on request shall make oral findings of fact and conclusions of law.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a) amended and effective October 12, 2009; (a) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Right to jury trial not abridged by trial forum. The statutory right to a jury trial cannot be abridged on account of the forum in which the petty offense is tried. City of Aurora ex rel. People v. Erwin, 706 F.2d 295 (10th Cir. 1983).

Statutory provision on jury trial governs. Inasmuch as the right to a jury trial in petty offenses is a substantive right granted to all citizens of this state, § 16-10-109(2), governs over section (a) of this rule. Lininger v. City of Sheridan, 648 P.2d 1097 (Colo. App. 1982).

Prerequisites of a written demand and twenty-five dollar fee for a jury trial do not violate defendant's right to a jury trial or deprive him of equal protection of the laws under the federal constitution. Christie v. People, 837 P.2d 1237 (Colo. 1992).

By failing to file a written jury demand and

proceeding to a bench trial with counsel, plaintiff knowingly and intelligently waived his right to a jury trial for purposes of federal firearms law. Ward v. Tomsick, 30 P.3d 824 (Colo. App. 2001).

Rule 224. Trial Jurors

(a) Summoning and Selecting Prospective Jurors.

(1) Each municipality shall establish a procedure for summoning and selecting prospective jurors, which procedure shall be calculated to provide the defendant with a fair opportunity for obtaining on the jury a representative cross section of the population of the area served by the court.

(2) For the purposes of this rule, the term ''area served by the court'' means the entire territorial boundaries of the municipality, even if the boundaries encompass portions of more than one county or other political subdivision.

(b) Challenge to the Array. No array or panel of any trial jury shall be quashed, nor shall any verdict in any case be set aside or averted, by reason of the fact that the court or jury commissioner has returned such jury or any of them in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return of such jury. All issues of fact arising on any challenge to the array shall be tried by the court.

(c) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner or court employee in charge of summoning prospective jurors is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case using applicable instructions if available or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements;

(V) General legal principles applicable to the case including presumption of innocence, burden of proof, definition of reasonable doubt, elements of charged offenses and other matters that jurors will be required to consider and apply in deciding issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The court may, in its discretion, allow the parties or their counsel to supplement the court's interrogation by asking additional questions of prospective jurors. In the discretion of the judge, juror questionnaires, poster boards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business, in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during presentation of the case.

(d) Challenges for Cause.

(1) Challenges for cause may be taken on one or more of the following grounds:

(I) Absence of any qualification prescribed by statute to render a person competent as a juror except that, for the purpose of this rule, any requirement that a prospective juror be a resident of a the county shall be deemed satisfied if the prospective juror is a resident of the area served by the court as defined in section (a)(2) of this rule;

(II) Relationship within the third degree, by blood, adoption, or marriage, to a defendant or to any attorney of record or attorney engaged in the trial of the case;

(III) Standing in the relation of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent to, or being a member of the household of, or associated in business with, or surety on any bond or obligation for, any defendant;

(IV) The juror is or has been a party adverse to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

(V) The juror has served on any investigatory body which inquired into the facts of the offense charged;

(VI) The juror was a juror at a former trial arising out of the same factual situation or involving the same defendant;

(VII) The juror was a juror in a civil action against the defendant arising out of the act charged as a crime;

(VIII) The juror was a witness to any matter related to the crime or its prosecution;

(IX) The juror occupies a fiduciary relationship to the defendant or a person alleged to have been injured by the crime or the person on whose complaint the prosecution was instituted;

(X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution, or the acknowledgment of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court;

(XI) Repealed.

(XII) The juror is an employee of a public law enforcement agency or public defender's office.

(2) If either party desires to introduce evidence, other than the sworn responses of the prospective juror, for the purpose of establishing grounds to disqualify or challenge the juror for cause, such evidence shall be heard and all issues related thereto shall be determined by the court out of the presence of the other prospective jurors. All matters pertaining to the qualifications and competency of the prospective jurors shall be deemed waived by the parties if not raised prior to the swearing in of the jury to try the case, except that the court for good cause shown or upon a motion for mistrial or other relief may hear such evidence during the trial out of the presence of the jury and enter such orders as are appropriate.

(e) Peremptory Challenges and Manner of Exercise. Unless otherwise ordered by the court, the jury shall be impaneled as follows: The box shall be filled with prospective jurors exceeding by six the number of jurors requested by the defendant pursuant to Rule 223 (b) above. Prospective jurors shall be sworn, voir dire examination conducted, and challenges for cause taken and determined. Jurors excused by virtue of successful challenge for cause shall be replaced and replacements sworn, examined, and subjected to challenge for cause. When there are no remaining jurors subject to challenges for cause, the prosecution and defendant each shall be entitled to three peremptory challenges, all of which must be exercised either orally or by striking names from a list prepared by the court, and to be exercised alternatively by the parties commencing with the prosecution. In any case where there are multiple defendants, each side shall have an additional peremptory challenge for each defendant after the first, but not to exceed ten. The number of jurors called to the box in cases involving multiple defendants shall be consistent with the number of peremptory challenges permitted to be exercised.

(f) Alternate jurors. The court may, on its own motion or on the motion of either the prosecution or defense, direct that not more than one alternate juror be impaneled. Such

juror shall have the same qualifications, shall be subject to the same examination and challenges, and shall have the same functions, powers, facilities and privileges as the regular jurors.

(g) Custody of Jury.

(1) The court should only sequester jurors in extraordinary cases. Otherwise, jurors should be permitted to separate during all trial recesses, both before and after the case has been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be given to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff or other person designated by the court whenever that are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.

(h) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (c) repealed and readopted with amendments, (d)(1)(XI) repealed, and (g)(1) amended and adopted June 10, 1999, effective July 1, 1999; (h) added and adopted April 3, 2003, effective July 1, 2004.

Rule 225. Disability of Judge

If by reason of absence, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties. But if the substitute judge is satisfied that those duties cannot be performed because the judge did not preside at the trial, or for any other reason, a new trial may be granted.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 226. No Colorado Rule

Rule 227. Proof of Official Record

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Cross references: For proof of official records in civil actions, see C.R.C.P. 44.

Rule 228. No Colorado Rule

Rule 229. Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court, on motion of a defendant or on its own motion, shall order the entry of judgment of acquittal of one or more offenses charged in the complaint or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the prosecution's evidence is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the prosecution's case.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after Verdict or Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment or acquittal may be made or renewed within 14 days after the jury is discharged or within such further time as the court may fix during the 14-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that such a similar motion has been made prior to the submission of the case to the jury.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (c) amended and adopted December 14, 2011, effective July 1, 2012.

Rule 230. Instructions

The court shall disclose to the parties the instructions which it intends to give to the jury. At the same time, parties may tender instructions in duplicate, one copy of which shall be submitted to the opposite party, who shall make objection thereto if so desired. All instructions to the jury shall be given orally by the judge before argument. If the court is a court of record, a record shall be made of all objections to the proposed instructions of the court, and all instructions tendered by the parties and refused by the court shall be filed with the clerk with the endorsement of the action of the court.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 231. Verdict

(a) Submission and Finding.

(1) **Form of Verdict.** Before the jury retires the court shall submit to it written forms of verdict for its consideration.

(2) **Retirement of Jury.** When the jury retires to consider its verdict, the bailiff or other person designated by the court shall be sworn or affirmed to conduct the jury to some private and convenient place, and to the best of that person's ability to keep the jurors together until they have agreed upon a verdict. The bailiff or other person designated by the court shall not speak to any juror about the case except to ask if a verdict has been reached, nor shall that person allow others to speak to the jurors. When they have agreed upon a verdict, which shall be unanimous and signed by the foreman, the bailiff or other person designated by the court shall return the jury into court. In any case in which the jury agrees upon a verdict during a recess or adjournment of court for the day, it shall seal its verdict, which shall be retained by the foreman to be delivered to the judge at the opening of the court, and thereupon the jury may separate to meet in the jury box at the opening of the court. Such a sealed verdict shall be received by the court as the lawful verdict of the jury.

(b) Several Defendants. If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Poll of Jury. When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 232. Sentence and Judgment

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or may continue or alter the bail. Before

imposing sentence the court may direct a pre- sentence investigation by a probation officer and a report filed thereby. The court shall, before imposing sentence, afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment. The prosecution shall be given an opportunity to be heard on any matter material to the imposition of sentence.

(b) Judgment. A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, and costs if any are awarded against the defendant. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(c) Costs. When a judgment for costs is entered in the docket provided for in Rule 255, execution may be had thereon as in civil actions.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed.

(e) Probation. After conviction of an offense, the defendant may be placed on probation as provided by law.

(f) Compliance with the Compact for the Supervision of Adult Offenders. Any sentence imposed shall comply with the Compact for the Supervision of Adult Offenders, found at sections 24-60-2801 et seq., C.R.S., as may be amended in the future.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (f) added and adopted September 5, 2013, effective October 1, 2013.

ANNOTATION

Grant of allocution mandatory. This rule, granting defendant the right of allocution before imposition of sentence, is mandatory and should be granted in every case. Erickson v. City & County of Denver, 179 Colo. 412, 500 P.2d 1183 (1972).

Rules 233 and 234. No Colorado Rules

Rule 235. Correction or Vacation of Sentence

(a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 91 days (13 weeks) after the sentence is imposed, or (2) within 91 days (13 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 91 days (13 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) Other Remedies. A person convicted of a municipal ordinance violation may move the court for post-conviction review on the grounds that said conviction was obtained or sentenced imposed in violation of the constitution or laws of the United States, or of the constitution or laws of this state, or of the municipality's charter or ordinance. Said motion shall be made within six months after the date of conviction unless the applicant can show good cause for the delay.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

A sentence imposed after the municipal court's acceptance of a constitutionally infirm guilty plea is an illegal sentence and the court had authority under this rule to permit the defendant to withdraw his guilty plea even though sentencing had already taken place. Mulkey v. Sullivan, 753 P.2d 1226 (Colo. 1988).

Rule 236. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 237. Appeals

(a) Appeals From Courts Not of Record. Appeals from courts not of record shall be in accordance with sections 13-10-116 to 13-10-125, C.R.S. Rulings on motions in such courts are not appealable.

(b) Appeals From Courts of Record. Appeals from courts of record shall be in accordance with Rule 37 of the Colorado Rules of Criminal Procedure.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Because appellant's conviction originated in a municipal court of record, appellant had 30 days following the judgment of conviction to file the notice of appeal pursuant to § 13-10-116, this rule, and Crim. P. 37. Normandin v. Town of Parachute, 91 P.3d 383 (Colo. 2004).

Transcript of all relevant evidence must be included in record on appeal. Where an appellant challenges a ruling that was based, either in whole or in part, on evidence presented to the lower court, a transcript of all evidence pertaining to the decision must be included in the record; however, the appellant is not required to include a transcript of evidence that is not relevant to the issues raised on appeal. Holcomb v. City & County of Denver, 199 Colo. 251, 606 P.2d 858 (1980).

Applied in Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

Rules 238 to 240. No Colorado Rules

Rule 241. Search and Seizure

(a) Authority to Issue Warrant. A judge of any court shall have power to issue a search warrant under this Rule only when:

(1) It relates to a charter or ordinance violation involving a serious threat to public safety or order; and

(2) The violation is not also a violation prohibited by state statute for which a search warrant could be issued by a district or county court.

(b) Grounds for Issuance.

(1) A search warrant may be issued to search for and seize property which is located within the municipality and which:

(I) Is designated or intended for use in committing a charter or ordinance violation;

(II) Has been used as a means of committing a charter or ordinance violation; or

(III) The possession of which is prohibited by charter or ordinance.

(2) A search warrant may be issued for the inspection of private premises by an authorized public inspector upon showing that:

(I) The premises are located within the municipality;

(II) The inspection is required or authorized by charter or ordinance in the interest of public safety; and

(III) The owner or occupant of such private premises has refused entry to the public inspector, or the premises are locked and the public inspector has been unable to obtain permission of the owner or occupant to enter. This rule shall not be construed to require the issuance of a warrant for emergency inspections, or in any other case where warrants are not presently required by law.

(c) Issuance and Contents. A search warrant shall issue only on affidavit sworn to or affirmed before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, the judge shall issue a search warrant identifying the property and naming or describing the person or place to be searched. The search warrant shall be directed to any officer authorized by law to execute it in the municipality wherein the property is located. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for any property specified. The search warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the judge to whom it shall be returned.

(d) Execution and Return With Inventory. The search warrant may be executed and returned only within 14 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and receipt for any property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant for the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by unlawful search and seizure may move the municipal court for the municipality where property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant;

(2) The warrant is insufficient on its face;

(3) The property seized is not that described in the warrant;

(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued;

(5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention, and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Scope and Definition. This Rule does not modify any statute inconsistent with it regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (d) amended and adopted December 14, 2011, effective July 1, 2012.

Rules 242 and 243. No Colorado Rules

Rule 244. Assignment of Counsel

(a) If the defendant appears in court without counsel, the court shall advise the defendant of the right to retain counsel. In an appropriate case, if, upon the defendant's

affidavit or sworn testimony and other investigation, the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent the defendant at every stage of the trial court proceedings. In any case in which counsel must be appointed, the court may appoint law students who shall act under the provisions of C.R.C.P. 226. No lawyer need be appointed for a defendant who, after being advised, with full knowledge of the right to counsel, elects to proceed without counsel.

(b) Whenever two or more defendants have been jointly charged pursuant to Rule 208(b) or have been joined for trial pursuant to Rule 213, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 245. Time

(a) Computation. In computing any period of time, prescribed or allowed by these rules, the day of the event from which the designated period of time begins to run is not to be included. Thereafter, every day shall be counted including holidays, Saturdays, and Sundays. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. As used in these Rules, ''legal holiday'' includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement. When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion:

(1) Upon motion, with or without notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order; or

(2) Upon motion permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect.

(c) Repealed.

(d) For Motions — Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereon, shall be served not later than 7 days before the time specified for the hearing, unless a different period is fixed by rule or order of court. For cause shown, such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing, unless otherwise ordered by the court.

(e) Repealed.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (a) and (d) amended and (c) and (e) repealed and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Law reviews. For article, ''Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines'', see 41 Colo. Law. 33 (Jan. 2012).

Rule 246. Bail

(a) Right to Bail. All persons shall be bailable by sufficient sureties as provided in the constitution of the state of Colorado, in this Rule, and in local rules not inconsistent therewith.

(1) **Before Conviction.** If a judge is not immediately available for purposes of admission to bail of persons arrested and brought to the court or jail on charges of committing a municipal charter or ordinance violation, such persons may be admitted to bail, pursuant to court rule, by the clerk or other responsible and appropriate officer designated by the court. The court shall provide by rule for the conditions and circumstances under which such admission to bail will be granted pending appearance before the judge. The primary condition of the bail bond, and the only condition for a breach of which a surety or security on the bond may be subjected to forfeiture, is that the released person appear to answer the charged at a place and upon a date certain and at any place or upon any date to which the proceeding may be transferred or continued. In addition to the primary condition, the court may impose reasonable additional conditions upon the conduct of the defendant. Bail so required may be, at the election of the accused, in the form of cash, security, real property, tangible or intangible personal property, an acceptable corporate surety bond, or adequate or acceptable private sureties. In cases when so permitted under the Rules promulgated pursuant to this section (a), bail may be upon personal recognizance without security or surety.

(2) **After Conviction.** Bail may be allowed in arrest of judgment or during any stay of execution or pending appeal or review by a higher court, unless it appears the review is sought on frivolous grounds or is taken for delay. Pending appeal or review by the Supreme Court, bail may be allowed by the municipal court, the appellate judge, or by the Supreme Court or a justice thereof. Any court or any judge or justice granting bail may at any time alter or revoke the order admitting the defendant to bail.

(b) Amount. A defendant shall be admitted to bail in an amount which in the judgment of the court, judge, or justice will insure the defendant's presence. If fine and costs have been imposed, a deposit in the amount thereof or the posting of a bond for the payment thereof may be required by the trial court.

(c) Form and Place of Deposit. A person permitted to give bail shall execute a bond to appear in court on a designated day, or on the first day of the next term of court, and from day to day thereafter, as the court may deem appropriate. One or more sureties may be required or the defendant may furnish cash security or, in the discretion of the court, no security or surety need be required. If bond is made in a place other than the clerk's office, the bond shall be transferred to and deposited in the clerk's office.

(d) Forfeiture.

(1) **Declaration.** If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail.

(2) **Setting Aside.** The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) **Enforcement When Forfeiture Not Set Aside.** By entering into a bond each obligor, whether the principal or a surety, submits to the jurisdiction of the court. Liability under the bond may be enforced, without the necessity of an independent action, as follows: The court shall order the issuance of a citation directed to the obligor to show cause, if any there be, why judgment should not be entered forthwith and execution issue thereon. Said citation shall issue promptly may be served personally or by first class mail upon the obligor directed to the addresses given in the bond. Hearing on the citation shall be held not less than 21 days after service. The defendant and the prosecution shall be

given notice of the hearing. At the conclusion of the hearing, the court may enter a judgment against the obligor, and execution shall issue thereon as on other judgments.

(4) **Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this section (d). If a bond forfeiture has been paid into the general fund of the municipality, the appropriate city or town official shall be notified of the order for remission.

(5) **Meaning of "Court".** Wherever used in section (d) the word ''court'' means a court in which a principal has undertaken by bond to appear.

(e) Exoneration. The obligor shall be exonerated as follows:

(1) When the condition of the bond has been satisfied;

(2) When the amount of the forfeiture has been paid; or

(3) Upon surrender of the defendant into custody before judgment upon an order to show cause and upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to a peace officer within the municipality wherein the bond shall be taken, and it is the duty of such peace officer, on such surrender and delivery of a certified copy of the bond by which the surety is bound, to take such person into custody, and to acknowledge such surrender in writing.

(f) Continuation of Bonds. In the discretion of the court and with the consent of the surety or sureties, the same bond may be continued until the final disposition of the case in the court or pending disposition of the case on appeal or review.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (d)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 247. No Colorado Rule

Rule 248. Dismissal

(a) By the Prosecution. No case pending in any court shall be dismissed or a nolle prosequi therein entered by the prosecution, unless upon a motion in open court and with the court's consent and approval. Such a motion shall be supported by a statement concisely stating the reasons for the action. Such a dismissal may not be entered during the trial without the defendant's consent.

(b) By the Court. If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 91 days (13 weeks) after the arraignment of the defendant, or unless the delay is occasioned by the action or request of the defendant, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except that if on the day of a trial set within the last 7 days of the above time limit a necessity for a continuance arises which the court in the exercise of sound judicial discretion determines would warrant an additional delay, then one continuance, not exceeding 28 days, may be allowed, after which the dismissal shall be entered as above provided if trial is not held within the additional time allowed.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Mandatory limit to initiate prosecution. ''Unnecessary delay'' in section (b) does not merely codify the defendant's basic constitutional right to a speedy trial, since the reference to 90 days, rather than being a guideline for the court's discretion, is a mandatory limit. Bachicha v. Municipal Court, 41 Colo. App. 198, 581 P.2d 746 (1978).

Delay caused by defendant. The defendant may not whipsaw the court between its obligation to protect his right of confrontation and his right to a speedy trial. When, as a result of defendant's actions, the court cannot determine whether he has waived his right to be present at trial, it is clear that defendant has delayed proceedings within the meaning of this rule.

Crandall v. Municipal Court ex rel. City of Sterling, 650 P.2d 1324 (Colo. App. 1982).

Where defendant requested a pretrial conference for the purpose of achieving a disposition of his case without going to trial, and agreed to the terms of the disposition, defendant could not complain of the delay occasioned by his unsuccessful efforts to meet the conditions for disposition. Alley v. Kal, 44 Colo. App. 561, 616 P.2d 191 (1980).

Right to speedy trial under this rule violated where defendant is not brought to trial in county court within 90 days of filing of appeal requesting a trial de novo. Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979).

The computation of the speedy trial period begins from the entry of the last not-guilty plea. People of City of Aurora v. Allen, 885 P.2d 207 (Colo. 1994).

If the charges brought against the defendant are dismissed without prejudice, they become a nullity. Dismissal of all the charges is a final judgment on the case. If and when the defendant is arraigned under a subsequent information, the speedy trial period begins anew, even if the charges are identical. People of City of Aurora v. Allen, 885 P.2d 207 (Colo. 1994).

Speedy trial is tolled while an appeal is pending. People of City of Aurora v. Allen, 885 P.2d 207 (Colo. 1994).

When a trial court continues a case due to docket congestion, but makes a reasonable effort to reschedule within the speedy trial period, and defense counsel's scheduling conflict does not permit a new date within the speedy trial deadline, the resulting delay is attributable to defendant. The period of delay is excludable from time calculations for purposes of the applicable speedy trial provision. Hills v. Westminster Mun. Court, 245 P.3d 947 (Colo. 2011).

Rule 249. Service and Filing of Papers

(a) Service — When Required. Written motions other than those which are heard ex parte, written notices, and similar papers shall be served upon the adverse parties.

(b) Service — How Made. Whenever under these rules, or by court order, service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for civil actions unless otherwise ordered by the court.

(c) Notice of Orders. Immediately upon entry of any order made out of the presence of the parties and after the complaint or summons and complaint is filed, the clerk shall mail to each party affected a notice of the order and shall note the mailing in the docket.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Cross references: For manner of service in civil actions, see C.R.C.P. 5.

Rule 250. No Colorado Rule

Rule 251. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary. For all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the court ruling or order is made or sought, makes known to the court the court action sought or the objection to the court's action and the grounds therefor. But if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 252. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 253. Regulation of Conduct in Courtroom

Conduct in the courtroom pertaining to the publication of judicial proceedings shall conform to Canon 3 of the Code of Judicial Conduct, as adopted by the supreme court of Colorado.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 254. No Colorado Rule

Rule 255. Records

(a) Docket. The court or clerk thereof shall keep a record known as the court docket and shall enter thereon each action to which these rules are applicable. Said docket shall be appropriately indexed so that all entries may be readily located.

(b) Transcript. A transcript of record in each traffic case wherein the defendant was convicted, as the word ''convicted'' is used in all statutes and ordinances applicable to the municipal court, shall, upon conclusion of the case, be promptly forwarded to the motor vehicle division of the state department of revenue.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 256. Terms of Court

The presiding judge shall designated, by rule or order, regular times when the court shall be open for the transaction of court matters, for the purpose of filing any proper papers, of issuing and returning process, and of making of motions and orders.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

Rule 257. Rules of Court

All municipal court local rules, including local municipal procedures and standing orders having the effect of municipal court local rules, enacted before February 1, 1992, are hereby repealed. Each municipal court, by a majority of its judges, may from time to time propose municipal court local rules and amendments of municipal court local rules. Proposed rules and amendments shall not be inconsistent with the Colorado Rules of Municipal Court Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in municipal courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of municipal court local rules is required. Numbering and format of any municipal court local rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. The Supreme Court's approval of a municipal court local rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of a municipal court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of Municipal Court Procedure.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989; entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Effect of failure to submit proposed rules to supreme court. The fact that a municipal court had not submitted a proposed rule dealing with amendments to a ''summons and complaint'' to the Colorado supreme court pursuant to section (a) did not mean that the municipal

court was without authority to permit amendments. Paukovich v. County Court, 44 Colo. App. 208, 615 P.2d 54 (1980).

Absent rules, power to be exercised in court's discretion. The absence of procedural rules as to the exercise of power to permit the consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made, does not destroy the power, but merely indicates that the manner of its exercise rests in the sound discretion of the court. Paukovich v. County Court, 44 Colo. App. 208, 615 P.2d 54 (1980).

The power to permit the consolidation of charges, to permit amendments thereto, or to permit the charging party to withdraw any one or more of the charges made need not be expressly granted as each is inherently a part of the power to receive and hear such charges. Paukovich v. County Court, 44 Colo. App. 208, 615 P.2d 54 (1980).

Rule 258. No Colorado Rule

Rule 259. Effective Date

These Rules take effect on January 1, 1989. Amendments take effect on the date indicated. They govern all proceedings in municipal charter and ordinance violations brought after they take effect and also in all further proceedings in actions then pending.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

ANNOTATION

Applied in Municipal Court v. Brown, 175 Colo. 433, 488 P.2d 61 (1971).

Rule 260. Citation

These Rules for procedure in municipal courts are additions to Colorado Rules of Criminal Procedure, and shall be known and cited as ''Colorado Municipal Court Rules'' or ''C.M.C.R.''.

Source: Entire chapter amended June 30, 1988, effective January 1, 1989.

INDEX TO
COLORADO MUNICIPAL COURT RULES OF PROCEDURE

CHAPTER 31

The Colorado Rules of Jury Selection and Service

Repealed by the

SUPREME COURT OF COLORADO

Effective November 16, 1995

CHAPTER 32

The Colorado Appellate Rules

Adopted by the

SUPREME COURT OF COLORADO

Effective April 1, 1970,

and as Amended

ANALYSIS BY RULE

GENERAL PROVISIONS

JURISDICTION ON WRIT OF CERTIORARI

CHAPTER 32

COLORADO APPELLATE RULES

Cross references: For the supreme court, see article 2 of title 13, C.R.S.; for the court of appeals, see article 4 of title 13, C.R.S.

APPLICABILITY OF RULES

1. These rules of appellate procedure are intended to embrace appeals of both criminal and civil matters. The appeal replaces the writ of error.

2. Rules 1 through 48, except where specifically noted otherwise, apply to appeals to either the supreme court or to the court of appeals. Whenever ''appellate court'' is used it refers to either court. Whenever in these rules the supreme court or court of appeals is referred to specifically the rule shall apply to procedure in that court and no other, e.g., C.A.R. 4.1.

3. As near as practicable these rules are patterned on the Federal Rules of Appellate Procedure for the United States Courts of Appeal as of July 1, 1968. However, several of the rules peculiarly apply to procedure in the state practice.

4. Procedure for invoking original jurisdiction of and for remedial writs in the supreme court are embraced in Rule 21 and 21.1. Certiorari proceedings to the supreme court from the court of appeals or from the district court when applicable are embraced in Rules 49 through 57.

ANNOTATION

Law reviews. For article, ''Colorado Appellate Rule Changes: A Commentary'', see 12 Colo. Law. 1927 (1983).

Colorado appellate rules are patterned directly on the federal rules of appellate procedure. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Rule-making authority of supreme court. The supreme court has authority to adopt rules for the regulation of the business of the courts and the procedure to be followed by litigants in doing that business. Nonetheless, absent constitutional authority, the supreme court cannot adopt a rule which changes jurisdiction of a court contrary to a provision of a statute. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Appellate rules do not apply when appealing a county court judgment to a district court. While the case may be an appeal from the county court, the district court is not an appellate court. Mercantile Adjustment Bureau v. Flood, 2012 CO 38, 278 P.3d 348.

Rule 1. Scope of Rules

(a) Matters Reviewable. An appeal to the appellate court may be taken from:

(1) A final judgment of any district, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

(2) A judgment and decree, or any portion thereof, in a proceeding concerning water rights; and an order refusing, granting, modifying, cancelling, affirming or continuing in whole or in part a conditional water right, or a determination that reasonable diligence or progress has or has not been shown in an enterprise granted a conditional water right;

(3) An order granting or denying a temporary injunction;

(4) An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver.

(b) Limitation on Taking Appeals. The taking of appeals shall be in accordance with these rules except for special proceedings in which a different time period is set by statute for the taking of an appeal.

(c) Appeal Substitute for Writs of Error. Matters designated by statute to be reviewable by writ of error shall be reviewed on appeal as herein provided.

(d) Ground for Reversal, etc. Briefs filed pursuant to C.A.R. 28(a) shall state clearly and briefly the grounds upon which the party relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders, or rulings of the trial court. The party will be limited to the grounds so stated although the court may in its discretion notice any error appearing of record. When an appeal has been taken, it shall not be dismissed upon motion of an appellant without notice to all interested parties whose appearances have been entered in the appellate court, and order of the court permitting such dismissal; if dismissal is objected to by any such interested party, the party may, in the court's discretion, seek reversal, modification, or correction of the judgment.

(e) Review of Water Matters. The notice of appeal (see C.A.R. 4) for review of the whole or any part of a judgment and decree or order as defined in subsection (a)(2) of this Rule shall designate as appellant the party or parties filing the notice of appeal and as appellee all other parties whose rights may be affected by the appeal and who in the trial court entered an appearance, by application, protest, or in any other authorized manner. If not an appellant, the division engineer shall be an appellee; provided that upon application, a dismissal may be entered as to the division engineer in the absence of objection made by any party to the appeal within 14 days from the mailing to such party of such application. The notice of appeal shall describe the water rights with sufficient particularity to apprise each appellee of the issues sought to be reviewed. The notice of appeal shall otherwise comply with the requirements of C.A.R. 3(d).

Source: Entire rule amended and effective June 23, 2014.

Cross references: As to time limit for filing of notice of appeal and extension of such time, see C.A.R. 4; for time period for transmission of record, see C.A.R. 10; for requirements and contents of briefs, see C.A.R. 28; for enlargement of time limits in general, see C.R.C.P. 6(b); for provision that party claiming error must move for new trial, see C.R.C.P. 59; for provision exempting special proceedings from the rules of civil procedure, see C.R.C.P. 81; for statutory provisions for review of judgments in criminal cases, see §§ 16-12-101 through 16-12-103, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Necessity for Writs of Error and Motions for New Trial for a Review in Colorado'', see 2 Rocky Mt. L. Rev. 99 (1930). For article, ''The Grounds for Reversal of Criminal Cases in Colorado, 1864 to 1948'', see 22 Rocky Mtn. L. Rev. 117 (1950). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev 551 (1968). For article, ''Preserving Issues for Appeal'', discussing the requirement of an offer of proof, see 20 Colo. Law. 879 (1991). For article, ''Perfecting Appeals to the Colorado Court of Appeals'', see 21 Colo. Law. 2385 (1992). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

Appeal is a matter of right. Monti v. Bishop, 3 Colo. 605 (1877); Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P.2d 791 (1935); Wheeler Kelly Hagny Trust Co. v. Williamson, 111 Colo. 515, 143 P.2d 685 (1943).

Appeal is adequate remedy to judgment of trial court. If, by any judgment entered by a trial court, the parties feel aggrieved, their remedy by appeal is speedy and altogether adequate for the protection of their rights, and there is no occasion for invoking the original jurisdiction of the supreme court. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Original proceeding may not be substituted for appeal. C.A.R. 21 concerning original proceedings may not be utilized to avoid the requirements of finality of judgments and orders set forth in this rule. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Original proceedings in the supreme court may not be used as a substitute for appeal. Douglas v. Municipal Court, 151 Colo. 358, 377 P.2d 738 (1963); DeLong v. District Court, 151 Colo. 364, 377 P.2d 737 (1963).

Nor may writ of habeas corpus. Habeas corpus will not lie where an appeal is adequate and may not be used as a substitute for appeal.

Nickle v. Reeder, 144 Colo. 593, 357 P.2d 921 (1960); Medberry v. Patterson, 142 Colo. 180, 350 P.2d 571 (1960), cert. denied, 368 U.S. 839, 82 S. Ct. 59, 7 L. Ed. 2d 39 (1961).

A party seeking only to affirm a lower court so that its holding may be used as precedent in other cases has not presented adequate grounds for an appeal, because the party is not seeking the reversal, modification, or correction of the holding as required under section (d). Broomfield v. Farmers Reservoir & Irrigation Co., 235 P.3d 296 (Colo. 2010).

Appellant must be party or aggrieved by lower court's decision. One of two tests must be met before a party may prosecute an appeal to the supreme court. He must either be a party to the action or he must be a person substantially aggrieved by the disposition of the case in the lower court. Tower v. Tower, 147 Colo. 480, 364 P.2d 565 (1961).

Only parties aggrieved may appeal. The word aggrieved refers to a substantial grievance, the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation. Miller v. Reeder, 157 Colo. 134, 401 P.2d 604 (1965).

Guarantors of a surety company on a criminal recognizance, who are permitted to intervene in the trial court, and who are the only persons who would suffer loss from a forfeiture, are parties to the record and entitled to seek a review in the supreme court by appeal. Allison v. People, 132 Colo. 156, 286 P.2d 1102 (1955).

The attorney is properly before the supreme court on a motion for fees because he is a party substantially aggrieved by the disposition in the trial court. Equity demands that he be treated as an intervenor and he was so considered by the trial court and the parties because his motion for fees was on behalf of himself and not for the wife. Tower v. Tower, 147 Colo. 480, 364 P.2d 565 (1961).

Else appellant lacks standing. Where appellants are not proper parties in an action, they have no standing in the court of appeals to question the validity of a judgment. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972).

Standing, for purposes of an appeal, means that a party must have alleged an injury in fact and that injury must be to a legally protected or cognizable interest. The right to appeal of a matter of law follows the property interest. City of Aspen v. Artes-Roy, 855 P.2d 22 (Colo. App. 1993).

Due process not denied by limitation on filing appeals. Prejudicial irregularity in a trial court proceeding must be asserted by an appeal, and where a party sues out an appeal to review a judgment, and thereafter dismisses the same and because of the lapse of time may not again apply for an appeal, due process of law is not denied. Davidson Chevrolet, Inc. v. City & County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Time limitations are procedural. Limitations of time within which an appeal may be brought is procedural and may be fixed by the supreme court. Sitler v. Brians, 126 Colo. 370, 251 P.2d 319 (1952).

Motion for a new trial is a prerequisite to review on appeal in cases involving questions of law only as well as in cases involving questions of fact. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

It is mandatory upon the party claiming error to move the trial court for a new trial, unless an order dispensing with same is entered. Security Bldg. Co. v. Lewis, 127 Colo. 139, 255 P.2d 405 (1953).

This applies to temporary injunctions. Sections (b) and (f) of C.R.C.P. 59, requiring a motion for a new trial or an order dispensing therewith, apply to appeals brought to determine validity of orders granting or denying temporary injunctions under this rule. Minshall v. Pettit, 151 Colo. 501, 379 P.2d 394 (1963); CF&I Steel, L.P. v. United Steel Workers of Am., 990 P.2d 1124 (Colo. App. 1999), aff'd on other grounds, 23 P.3d 1197 (Colo. 2001).

Failure to move for new trial requires dismissal of appeal. Where no motion for new trial was filed, and no order dispensing with such filing was entered, the requirements of this rule were not complied with, and the appeal is accordingly dismissed. People ex rel. Dunbar v. South Platt Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959).

In an action on a promissory note where judgment notwithstanding the verdict was entered for plaintiff, and defendant failed to file a motion for a new trial, and the necessity for such a motion was not dispensed with pursuant to C.R.C.P. 59(f), an appeal to review such judgment will be dismissed. Boyd v. Adjustment Bureau, Inc., 148 Colo. 233, 365 P.2d 813 (1961).

As does insufficient motion for new trial. This rule presupposes that a motion for a new trial be filed with the trial court, and an appeal was dismissed where the motion which was filed was couched in such broad and general language that it informed the court that appellants were dissatisfied with the judgment, as if no motion for new trial was ever filed. Martin v. Opdyke Agency, Inc., 156 Colo. 316, 398 P.2d 971 (1965).

Substantial noncompliance with procedure requires dismissal. Where the rules relating to procedure on appeal in the supreme court are ignored or disregarded in substantial particulars, an appeal will be dismissed. Farrell v. Bashor, 140 Colo. 408, 344 P.2d 692 (1959).

But strict compliance not necessary where status of children at stake. While a motion may fail to comply strictly with the requirements of C.R.C.P. 59, when the status of minor children is at stake, a court of appeals will notice error in the trial court proceedings, and remand for findings. In re Brown, 626 P.2d 755 (Colo. App. 1981).

Supreme court may dismiss an appeal on its own motion where there is no jurisdiction to review the case. Unzicker v. Unzicker, 74 Colo. 211, 220 P. 495 (1923); Diebold v. Diebold, 74 Colo. 557, 223 P. 46 (1924).

Jurisdiction of district court while appeal pending. Once a case is in the supreme court on appeal, a trial court is without jurisdiction to vacate its judgment or enter another or different judgment. Davidson Chevrolet, Inc. v. City & County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Appellate court must not, upon review, sit as thirteenth juror and set aside a verdict because it might have drawn different conclusion from all evidence. People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

If sentences imposed are within statutory bounds, and if they do not shock the conscience of the court, they will not be disturbed on the grounds that they constitute cruel and unusual punishment. Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

Transfer to court of appeals does not violate rule. Section 13-4-110(2), providing that cases within the jurisdiction of the court of appeals may be transferred from the supreme court, is not void and the statutory procedure is not contrary to this rule. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

There is a recognized distinction between "proceedings" and "special proceedings". Hewitt v. Landis, 75 Colo. 277, 225 P. 842 (1924); Silter v. Brians, 126 Colo. 370, 251 P.2d 319 (1952).

Applied in Graham v. Swift, 123 Colo. 309, 228 P.2d 969 (1951); Hart v. Herzig, 131 Colo. 458, 283 P.2d 177 (1955); Cline v. McDowell, 132 Colo. 37, 284 P.2d 1056 (1955); Addressograph-Multigraph Corp. v. Kelly, 146 Colo. 550, 362 P.2d 184 (1961); Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968); Reed v. Reed, 29 Colo. App. 199, 481 P.2d 125 (1971); People v. Morris, 190 Colo. 215, 545 P.2d 151 (1976); In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976); Sanderson v. District Court, 190 Colo. 431, 548 P.2d 921 (1976); Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978); In re Estate of Dandrea, 40 Colo. App. 547, 577 P.2d 1112 (1978); People v. Rael, 198 Colo. 225, 597 P.2d 584 (1979); Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980); Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980); Ward v. Indus. Comm'n, 44 Colo. App. 301, 612 P.2d 1164 (1980); People in Interest of G.L., 631 P.2d 1118 (Colo. 1981); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); Schuster v. Zwicker, 659 P.2d 687 (Colo. 1983); M.E.G. v. R.B.D., 676 P.2d 1250 (Colo. App. 1983).

II. MATTERS REVIEWABLE.

A. In General.

Practice under the former code of civil procedure is analogous to the practice under this rule. Burks v. Maudlin, 109 Colo. 281, 124 P.2d 601 (1942).

Appeals are not allowed for mere purpose of delay, or to present purely abstract legal questions, however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation. Miller v. Reeder, 157 Colo. 134, 401 P.2d 604 (1965).

Jurisdiction cannot be conferred by act of parties. Jurisdiction of an appeal which otherwise does not exist cannot be conferred by act of the parties. Sons of Am. Bldg. & Inv. Ass'n v. City of Denver, 15 Colo. 592, 25 P. 1091 (1890); Bd. of Comm'rs v. McIntire, 23 Colo. 137, 46 P. 638 (1896).

An appellate court will consider only those questions properly raised by the appealing parties. Denver United States Nat'l Bank v. People ex rel. Dunbar, 29 Colo. App. 93, 480 P.2d 849 (1970).

And issues between parties to appeal. Appellate review is limited to a consideration of issues between the parties to an appeal. Mills v. Saunders, 30 Colo. App. 462, 494 P.2d 1309 (1972).

Constitutional challenges to sales and use tax provisions of municipal code made to an administrative agency but were not made in declaratory judgment action in district court are not properly preserved for appellate review. Arapahoe Roofing & Sheet Metal v. Denver, 831 P.2d 451 (Colo. 1992).

Colorado rules and decisions discourage the review of a cause piecemeal. Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Only section (a) orders are appealable. One seeking review of a judgment or order must bring his case within one of the categories under section (a); otherwise, it is not an appealable order. Freshpict Foods, Inc. v. Campos, 30 Colo. App. 354, 492 P.2d 867 (1971).

A denial of a summary judgment motion is not generally considered a final decision that

is immediately appealable under this rule. City of Lakewood v. Brace, 919 P.2d 231 (Colo. 1996).

The denial of a motion for summary judgment is not an appealable ruling. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Interlocutory appeal proper on denial of county department of social services employees' motion for summary judgment based on qualified immunity where denial was based on trial court's finding that plaintiff children pleaded facts sufficient to establish a violation by county employees of a clearly established constitutional right. Interlocutory review is proper but limited to the trial court's legal conclusions, taking plaintiff children's factual allegations as true. Shirk v. Forsmark, 2012 COA 3, 272 P.3d 1118.

Temporary restraining order is not appealable. Under this rule an ex parte temporary restraining order entered by the trial court is not an order granting a ''temporary injunction'' which is subject to review on appeal. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

A temporary restraining order issued under C.R.C.P. 65(b), is not an appealable order under section (a) of this rule. Freshpict Foods, Inc. v. Campos, 30 Colo. App. 354, 492 P.2d 867 (1971); O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

But order granting preliminary injunction is reviewable. An order granting a preliminary injunction restraining the board of optometric examiners from enforcing its regulation is reviewable by appeal. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

Order appointing or overruling motion to discharge a receiver is reviewable on appeal before final judgment. Boyd v. Brown, 79 Colo. 568, 247 P. 181 (1926).

This rule provides opportunity to seek a receiver's discharge and have review if the trial court should refuse the request. Thompson v. Beck, 92 Colo. 441, 21 P.2d 712 (1933).

An order entered on a motion to discharge a receiver, although intermediate in a sense, is expressly made reviewable on appeal before final judgment. Melville v. Weybrew, 108 Colo. 520, 120 P.2d 189 (1941), cert. denied, 315 U.S. 811, 62 S. Ct. 795, 86 L. Ed. 1210, reh'g denied, 315 U.S. 830, 62 S. Ct. 913, 86 L. Ed. 1224 (1942).

But appeal from interlocutory order not mandatory. Although an order granting or denying the appointment of a receiver is appealable as of right, pursuant to this rule, it is not mandatory that an appeal be taken from such an interlocutory order. Jouflas v. Wyatt, 646 P.2d 946 (Colo. App. 1982).

If an interlocutory appeal is not taken from an order appointing a receiver, a party may still appeal the subject matter of the interlocutory order upon the entry of a final judgment. Application of Northwestern Mut. Life Ins. Co., 703 P.2d 1314 (Colo. App. 1985).

And matters not disposed of by trial court not considered on review. Where a petition in intervention is filed in an action involving the appointment of a receiver, questions raised by the petition which have not been disposed of by the trial court will not be considered on review of the order appointing the receiver. Woods v. Capitol Hill State Bank, 70 Colo. 221, 199 P. 964 (1921).

Prosecutor's appeal pursuant to § 16-12-102 subject to the final judgment requirement of this rule. People v. Guatney, 214 P.3d 1049 (Colo. 2009).

An order declining to revoke probation is not a final judgment within meaning of this rule, thus the court of appeals lacked jurisdiction to entertain the appeal. People v. Guatney, 214 P.3d 1049 (Colo. 2009).

Probation revocation order reviewable. Nothing in § 16-12-101, prohibits a direct appeal of a probation revocation order under this rule. People v. Carr, 185 Colo. 293, 524 P.2d 301 (1974).

Appellate review of a county court's decision is available by direct appeal to the Colorado supreme court. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Appeal may not be taken from order denying application to compel arbitration on an employment contract entered into before July 14, 1975. Monatt v. Pioneer Astro Indus., Inc., 42 Colo. App. 265, 592 P.2d 1352 (1979).

Chartering decisions of banking board not within rule. Proceedings in the court of appeals to review chartering decisions of the banking board do not fall within the rules applicable to appeals generally. Columbine State Bank v. Banking Bd., 34 Colo. App. 11, 523 P.2d 474 (1974).

B. Final Judgment.

Appeal may be taken from final judgment only. Doane v. Glenn, 1 Colo. 417 (1872); Hadley v. Fish, 3 Colo. 51 (1876); Alvord v. McGaushey, 5 Colo. 244 (1880); Wehle v. Kerbs, 6 Colo. 167 (1882); Meyer v. Brophy, 15 Colo. 572, 25 P. 1090 (1890); Tatarsky v. Smith, 78 Colo. 491, 242 P. 971 (1926); Colo. State Bank v. Bird, 79 Colo. 625, 247 P. 802 (1926); People ex rel. Ernst v. Eldred, 86 Colo. 174, 279 P. 41 (1929); Martin v. Way, 86 Colo. 232, 280 P. 488 (1929); Commercial Credit Co. v. Higbee, 88 Colo. 300, 295 P. 792 (1931); Marysville & Colo. Land Co. v. Heyde, 93 Colo. 523, 27 P.2d 498 (1933); Crews-Beggs Dry Goods Co. v. Bayle, 96 Colo. 19, 40 P.2d 233 (1934); Julius Hyman & Co. v. Velsicol Corp., 119 Colo. 121, 201 P.2d 380 (1948);

North Sterling Irrigation Dist. v. Knifton, 132 Colo. 212, 286 P.2d 612 (1955); People v. Hernandez, 155 Colo. 519, 395 P.2d 733 (1964) (decided prior to adoption of C.A.R. 4.1 providing for interlocutory appeals in criminal cases).

Entry of final judgment is a prerequisite to the right to prosecute an appeal. Stonebraker v. Konugres, 117 Colo. 429, 188 P.2d 894 (1948).

An order entered by a trial court which is a final judgment is subject to review on appeal, and on such appeal an adequate remedy is available. DeLong v. District Court, 151 Colo. 364, 377 P.2d 737 (1963).

Other than to orders of the kinds specifically enumerated, an appeal may be taken only from a final judgment, and questions with respect to other interlocutory orders may be presented only on review of the final judgment. State v. Harrah, 118 Colo. 468, 196 P.2d 256 (1948); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954).

The supreme court cannot determine the propriety of the order of the district court dismissing the action as against the bank where the order or judgment, which the appellant has brought up for review is not a final judgment, but interlocutory, to which an appeal does not lie unless some statute expressly authorizes it. Boxwell v. Greenley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931).

Or from order mentioned in sections (a)(2), (3), or (4). Save in the exceptional instances mentioned in sections (a)(2), (3), and (4), an appeal may be taken from a final judgment only. Burks v. Maudlin, 109 Colo. 281, 124 P.2d 601 (1942); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954).

But not interlocutory order. An appeal may not be taken to review an interlocutory order unless expressly authorized by rule or statute. Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

An appeal to review an interlocutory order of a district court may not be taken. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

Appeal dismissed if no final judgment. If it appears on review that there is no final judgment, the appeal will be dismissed. People ex rel. Ernst v. Eldred, 86 Colo. 174, 279 P. 41 (1929); Martin v. Way, 86 Colo. 232, 280 P. 488 (1929); Stuchlik v. Talpers, 90 Colo. 277, 8 P.2d 762 (1932); Marysville & Colo. Land Co. v. Heyde, 93 Colo. 523, 27 P.2d 498 (1933); Morron v. McDaniel, 127 Colo. 180, 254 P.2d 862 (1953); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Schoenwald v. Schoen, 132 Colo. 142, 286 P.2d 341 (1955); Cutting v. DeAndrea, 135 Colo. 501, 313 P.2d 315 (1957); Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959); Ortega v. Bd. of County Comm'rs, 657 P.2d 989 (Colo. App. 1982).

Where record discloses only the sustaining of a motion to dismiss the action without the entry of any order of dismissal, no "matter reviewable" being presented, the appeal will be dismissed. Slifka v. Viettie, 110 Colo. 138, 131 P.2d 417 (1942).

Where there was no final judgment for money against appellants, only an injunction to desist from manufacturing and selling their products, and an accounting was still to be had, an appeal may not be taken and must be dismissed. Julius Hyman & Co. v. Velsicol Corp., 119 Colo. 121, 201 P.2d 380 (1948).

Because case improperly before appellate court. Where the so-called judgment and orders of the court from which an appeal is taken do not constitute a final judgment, a case is therefore improperly before an appellate court on appeal. People v. People in Interest of G.L.T., 177 Colo. 196, 493 P.2d 20 (1972).

Judicial notice of absence of final judgment. Although the absence of a final judgment was not raised by any of the parties, the court is required to take notice thereof. Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977).

"Final judgment" is one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971); People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977); Moore v. Gardner, 40 Colo. App. 194, 571 P.2d 318 (1977); People in Interest of E.A., 638 P.2d 278 (Colo. 1981); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); People in Interest of P.L.B., 743 P.2d 980 (Colo. App. 1987); Foothills Meadow v. Myers, 832 P.2d 1097 (Colo. App. 1992); Things Remembered v. Fireman's Ins. Co., 924 P.2d 1089 (Colo. App. 1996).

The supreme court has consistently defined a final judgment as one which concludes a case to the extent that no further action is required in order to completely determine the rights of the parties involved. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Until a final judgment has been rendered and entered, no substantial rights of the parties have been determined or effected. North Sterling Irrigation Dist. v. Knifton, 132 Colo. 212, 286 P.2d 612 (1955).

Otherwise, it is interlocutory. If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final, for, to be final, it must end the particular suit in which it is entered. Dusing v. Nelson, 7 Colo. 184, 2 P. 922

(1883); Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910); District Court v. Eagle Rock Gold Mining & Reduction Co., 50 Colo. 365, 115 P. 706 (1911); Goodknight v. Harper, 70 Colo. 41, 197 P. 237 (1921); Peters v. Peters, 82 Colo. 503, 261 P. 874 (1927); Boxwell v. Greeley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931); Julius Hyman & Co. v. Velsicol Corp., 119 Colo. 121, 201 P.2d 380 (1948); Morron v. McDaniel, 127 Colo. 180, 254 P.2d 862 (1953); Vandy's, Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956); Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959); Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Andrews v. Hayward, 149 Colo. 585, 369 P.2d 980 (1962); Stillings v. Davis, 158 Colo. 308, 406 P.2d 337 (1965).

Final judgment must terminate the litigation between the parties. Boxwell v. Greeley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931); Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Jones v. Balbasini, 134 Colo. 64, 299 P.2d 503 (1956).

A judgment or decree is not final which determines the action as to less than all of the defendants. Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960).

Until such time as the issue raised by the plea of not guilty by reason of insanity be resolved, there can be no final judgment from which an appeal could be taken, as the litigation has not yet been terminated on its merits. Rupert v. People, 156 Colo. 277, 398 P.2d 434 (1965).

Final judgment must leave nothing to be done except ministerial act of execution. Boxwell v. Greeley Union Nat'l Bank, 89 Colo. 574, 5 P.2d 868, 80 A.L.R. 1179 (1931).

Where there was no order dismissing or otherwise disposing of the claim against the appellee nor was there any order entered in accordance with C.R.C.P. 54(b), there was no final judgment to support an appeal. Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977).

Certification of order does not constitute final adjudication. If an order does not constitute final adjudication of a claim, certification of it as such does not operate to make it so. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

No particular form of words necessary. A judgment must adjudicate the issues and be complete in itself. Apart from statute, no particular form of words is necessary to constitute a judgment. Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956).

The court should regard the substance and effect of an order, rather than its form, to determine whether it is subject to review. Cent. Locomotive & Car Works v. Smith, 27 Colo. App. 449, 150 P. 241 (1915).

The character of an instrument, whether a judgment or an order, is to be determined by its contents and substance, and not by its title. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955).

Counsel, by the simple step of relabeling the procedure by which review is sought, generally may not make a judicial order that is interlocutory in nature reviewable before a final judgment is entered in a case. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

In dissolution proceeding, where trial court incorporated partial separation agreement as well as oral supplemental agreement into the decree of dissolution, there was a final, appealable order notwithstanding the fact that wife's counsel failed to prepare and file a written form of the supplemental agreement. The decree was dated and signed by the trial court and, by expressly incorporating both the partial separation agreement and the supplemental agreement, it left nothing further for the court to do in order to completely determine the rights of the parties. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Relief granted may be equitable or legal. A final determination of a cause is a judgment whether the relief granted is equitable or legal. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955).

Multiple claims or parties. Final adjudication of a particular claim in a case involving multiple claims or multiple parties may be certified as a final judgment. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

In a multi-count information, dismissal of some charges is a final order appealable under this rule. People v. Jefferson, 748 P.2d 1223 (Colo. 1988).

Decision to remand is final judgment where based on denial of procedural due process. The trial court's decision to remand is a final judgment where the remand is premised solely on the conclusion that the party seeking review has been denied procedural due process. Soon Yee Scott v. City of Englewood, 672 P.2d 225 (Colo. App. 1983).

District court's dismissal without prejudice was not final and appealable order. Court's dismissal, without prejudice, of plaintiff's claims under 42 U.S.C. §§ 1983 and 1988 on the basis that claims were not properly joined with claim for judicial review under § 42-2-122, was not a final and appealable order, and dismissal of appeal was therefore proper. Norby v. Charnes, 764 P.2d 407 (Colo. App. 1988).

The denial of a motion for judgment on the pleadings is not a final judgment subject to review on appeal. It is an interlocutory order.

Central Locomotive & Car Works v. Smith, 27 Colo. App. 449, 150 P. 241 (1915); North Sterling Irrigation Dist. v. Knifton, 132 Colo. 212, 286 P.2d 612 (1955).

When denial of summary judgment is not appealable. Denial of a motion for summary judgment is not an appealable order when it does not otherwise put an end to the litigation. Glennon Heights, Inc. v. Cent. Bank & Trust, 658 P.2d 872 (Colo. 1983).

Pretrial ruling that statute is unconstitutional does not constitute a "final judgment" for purposes of appeal. People v. Young, 814 P.2d 834 (Colo. 1991).

A default is not a final judgment. Moore v. Gardner, 40 Colo. App. 194, 571 P.2d 318 (1977).

Neither is an order quashing service of summons. An order quashing service of summons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court. Brockway v. W. & T. Smith Co., 17 Colo. App. 96, 66 P. 1073 (1902).

Nor order striking bench warrants. An order of the trial court striking all bench warrants issued in aid of an execution and discharging defendant from custody is not a final judgment from which an appeal may be taken. Latimer Constr. Co. v. Cram, 152 Colo. 533, 383 P.2d 315 (1963).

Nor an order for costs. An order of the district court requiring defendants to pay for the additions to the record requested by them was not such a final judgment as would form basis for an allegation of error. Hays v. City & County of Denver, 127 Colo. 154, 254 P.2d 860 (1953).

An order of a trial court rendering judgment for costs alone, but not adjudicating the case proper is not such a final judgment as would be subject to review on appeal. Free v. Chandler, 155 Colo. 128, 393 P.2d 9 (1964).

Nor an order for sales under powers. Proceedings under C.R.C.P. 120, providing for orders for sales under powers are not an adversary proceeding in which the court determines issues and enters a final judgment, and no appeal may be taken to review the same. Hastings v. Sec. Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

Nor an order on motion to vacate a judgment. An order overruling a motion to vacate a judgment is not final in the sense that it may be reviewed on appeal. Polk v. Butterfield, 9 Colo. 325, 12 P. 216 (1886); Hughes v. Felton, 11 Colo. 489, 19 P. 444 (1888); Miller v. Buyer, 77 Colo. 329, 236 P. 990 (1925); Van Dyke v. Fishman, 77 Colo. 333, 236 P. 990 (1925).

An order of a trial court in setting aside its former judgment is not a final judgment; therefore, an appeal is premature. Schtul v. Christ, 132 Colo. 293, 287 P.2d 661 (1955).

An appeal may not be taken from an order of the trial court vacating a judgment since that order is not a final judgment within the scope and meaning of this rule. Westerkamp v. Westerkamp, 155 Colo. 534, 395 P.2d 737 (1964).

Order setting aside default. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by appeal after final judgment. Gen. Aluminum Corp. v. Arapahoe County Dist. Court, 165 Colo. 445, 439 P.2d 340 (1968).

Additur to verdict. An order of the trial court granting additur to verdict of jury, or, if either party elected not to accept such additur, granting a new trial is not a final judgment from which an appeal may be taken until, following an election to stand upon the record, the action proceeds to judgment. Herzog v. Murad, 147 Colo. 345, 363 P.2d 645 (1961).

Orders for intervention. The nature of orders for intervention is interlocutory. An order granting intervention does no more than add a new party plaintiff. Such an order is not final, and no appeal from it lies until after entry of final judgment in an action. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Denial of motion to join third parties. An order denying defendant's motion to make another a third-party plaintiff, being interlocutory and not a final judgment, could be presented only on review of the final judgment as an appeal cannot be taken to review such order. Burks v. Maudlin, 109 Colo. 281, 124 P.2d 601 (1942).

Denial of a motion to make a party or parties third-party defendants is not a final judgment subject to review on appeal. Weaver v. Bankers Life & Cas. Co., 146 Colo. 157, 360 P.2d 807 (1961).

Order for temporary possession. In an eminent domain proceeding an appeal may not be taken to review an interlocutory order granting immediate temporary possession. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Remand of license application without affirmance or reversal. Where a trial court remands a license application case without affirming or reversing, but with instructions for further proceedings, the order is not final and appealable. Safeway Stores, Inc. v. City of Trinidad, 31 Colo. App. 75, 497 P.2d 1277 (1972).

Appeal while motion for new trial is pending is premature. Plaintiff's appeal is premature, inasmuch as the trial court has not yet entered any final judgment resolving once and for all the controversy at the trial court level, because plaintiff's motion for new trial is still pending. Commercial Credit Corp. v. Frederick, 164 Colo. 5, 431 P.2d 1016 (1967).

A judgment under § 10-3-1116 (1) is not final until a determination of attorney fees and costs is made because attorney fees and costs are components of damages under the statute. Hall v. Am. Standard Ins. Co. of Wis., 2012 COA 201, 292 P.3d 1196.

Order granting or denying a motion for a new trial is not appealable. Gonzales v. Trujillo, 133 Colo. 64, 291 P.2d 1063 (1956).

Where a motion for new trial is granted the issues stand undisposed of; hence an appeal taken from the granting of such motion will be dismissed. Gonzales v. Trujillo, 133 Colo. 64, 291 P.2d 1063 (1956); Andrews v. Hayward, 149 Colo. 585, 369 P.2d 980 (1962).

Where a court has ordered that the defendant be tried again on the same charge, such a ruling is not appealable, for the judgment is not final. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971).

The granting of "a motion for new trial" is not a motion from which the state can appeal an adverse ruling, for an order granting a motion for new trial does not constitute a final judgment. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971).

Child custody order reviewable. An order determining custody of children, like an order determining alimony, is reviewable in the supreme court. Miller v. Miller, 129 Colo. 462, 271 P.2d 411 (1954); People in Interest of K.L. and A.L., 681 P.2d 535 (Colo. App. 1984).

Even though child custody order states that it is "temporary", the order is permanent and appealable if it is a permanent adjudication of custody. In re Murphy, 834 P.2d 1287 (Colo. App. 1992).

Delinquency proceedings subject to finality requirements. Delinquency proceedings are no less subject to the finality requirements of section (a)(1) than any other type of proceeding. People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977).

Dependency and neglect proceedings are subject to the finality requirements of section (a)(1). People in Interest of P.L.B., 743 P.2d 980 (Colo. App. 1987); People in Interest of C.L.S., 934 P.2d 851 (Colo. App. 1996).

Following an adjudication of dependency and neglect, the initial disposition order adopting a treatment plan constitutes a "decree of disposition" and renders the adjudication and the initial dispositional order final for purposes of appeal. People in Interest of C.L.S., 934 P.2d 851 (Colo. App. 1996).

Modification of an order for out-of-home placement of a child is interlocutory and not appealable as such modification does not affect the legal custody of the child. People in Interest of P.L.B., 743 P.2d 980 (Colo. App. 1987).

Permanency order in juvenile proceedings held interlocutory in nature. People in Interest of H.R., 883 P.2d 619 (Colo. App. 1994).

Adjudication of a child as dependent or neglected, with the dispositional hearing continued to a future date, does not become a final judgment until a decree of disposition is entered. People in Interest of E.A., 638 P.2d 278 (Colo. 1981).

Order of juvenile division of district court waiving jurisdiction. It is evident from the provisions of §§ 19-3-108 (4), 19-3-106, and 19-3-109, that an order of the juvenile division of the district court waiving jurisdiction is not a final disposition of the action. People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977).

Whether a probate court order is final and appealable must be determined on a case-by-case basis. The test for finality is whether the order disposes of and is conclusive of the controverted claim for which the proceeding was brought. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

An order which completely determines the issues of the trustee's indebtedness to and compensation from the estate is a final judgment on those issues. Retainer of jurisdiction by the probate court to later modify the trustee's rate of compensation does not change the order into an interlocutory order. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

C.R.C.P. 54(b) governs the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Where probate court's order of partial summary judgment adjudicated fewer than all of the parties' claims, it was not a final judgment, and party could not appeal the order without C.R.C.P. 54(b) certification. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Order granting a stay in action pending resolution of case involving similar issues in another state was not a final appealable order where the issues and parties were not identical in the two proceedings and the order did not preclude plaintiff from seeking to lift the stay based upon a showing of prejudice. Things Remembered v. Fireman's Ins. Co., 924 P.2d 1089 (Colo. App. 1996).

Granting a motion to dismiss a complaint is not in and of itself a final and reviewable order of judgment from which an appeal may be taken. District 50 Metro. Rec. Dist. v. Burnside, 157 Colo. 183, 401 P.2d 833 (1965).

But entry of judgment on dismissal is final. A written ruling by a trial court ordering a complaint to be dismissed and the entry of judgment of dismissal by the clerk pursuant thereto, constitutes a final judgment. Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956).

An order of a trial court dismissing an action for failure to prosecute is a final judgment. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955).

An appeal could be taken from a judgment of dismissal entered on the motion of the district attorney. People v. Hernandez, 155 Colo. 519, 395 P.2d 733 (1964).

A plaintiff who voluntarily accepted an award through stipulation is estopped by his conduct from claiming any further right to relief by appeal. Farmers Elevator Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972), aff'd, 181 Colo. 231, 508 P.2d 1261 (1973).

Where parties stipulate that judgment be satisfied, and the stipulation is approved by the court, an appeal becomes moot. Farmers Elevator Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972), aff'd, 181 Colo. 231, 508 P.2d 1261 (1973).

Unless there is no inconsistency between enforcement and appeal. A party who accepts an award or legal advantage under any order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted, unless the decree is such or the circumstances such that there is no inconsistency between such enforcement and the appeal. Farmers Elevator Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972), aff'd, 181 Colo. 231, 508 P.2d 1261 (1973).

Dimissal of class action aspects of case held to constitute final judgment. Levine v. Empire Sav. & Loan Ass'n, 192 Colo. 188, 557 P.2d 386 (1976).

Judgment of district court on appeal from assessment reviewable. Under section (a)(1), the supreme court may review the judgment of the district court rendered in a statutory proceeding relating to appeals from assessments made by the county assessor. In re Hover Motors, Inc., 120 Colo. 511, 212 P.2d 99 (1949).

Revocation of deferred sentence appealable. A defendant may either appeal an order revoking a deferred sentence pursuant to this rule, or file a motion for postconviction review, pursuant to Crim. P. 35(c). People v. Boykin, 631 P.2d 1149 (Colo. App. 1981).

A postjudgment collection order is final if the order ends the particular part of the action in which it is entered, leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that part of the proceeding, and is more than a ministerial or administrative determination. Luster v. Brinkman, 250 P.3d 664 (Colo. App. 2010).

State cannot appeal delinquency case. An appeal on behalf of the state to review decisions of trial courts on questions of law arising in criminal cases cannot lie for a proceeding in delinquency case, for such is not a criminal case. People in Interest of P.L.V., 176 Colo. 342, 490 P.2d 685 (1971).

Rather, the state's right to appeal exists only where the trial court's decision terminates a prosecution. People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971).

When final judgment entered. For purposes of appeal, the final judgment was entered when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal taken more than 30 days after sentencing was proper. People v. Fisher, 539 P.2d 1253 (1975).

Since the trial court reserved ruling on defendant's request to withdraw his guilty plea, there is no final appealable order, so appellate review is not available. People v. Durapau, 12 COA 67, 280 P.3d 42.

C. Review of Water Matters.

The supreme court has jurisdiction to review a general adjudication decree settling the priorities of the reservoirs upon a particular stream, and this necessarily involves the power to determine whether a reservoir to which a priority has been awarded is entitled to any priority whatsoever. Greeley & Loveland Irrigation Co. v. Huppe, 60 Colo. 535, 155 P. 386 (1916).

And may make and direct the entry of a proper amended decree. On appeal to review an adjudication decree, when any part of the decree is reversed, and where practicable, the supreme court shall make and direct the entry of a proper amended decree. Greeley & Loveland Irrigation Co. v. Handy Ditch Co., 77 Colo. 487, 240 P. 270 (1925).

The supreme court has jurisdiction over an appeal from a water court judgment that is a full, final, and complete determination of claims presented. The only claim at issue was a city's application for a refill right, and the mere presence of a signature line for the federal court, per the parties' stipulation, did not affect the validity of the water court's decree nor did it transfer authority to the federal court. City of Grand Junction v. Denver, 960 P.2d 675 (Colo. 1998).

All water users are proper parties. Where a proceeding is conducted pursuant to statutory direction, all users of water affected by said proceeding are, in effect, parties and have full right to protect their rights had they so desired. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

But appellants must be aggrieved by judgment to prosecute appeal. Where the only parties designated as appellees and served with notice of appeal for supreme court review were the plaintiffs in the trial court whose claims therein were dismissed and judgment entered therein in favor of the appellants, the appellants being in no wise aggrieved by the judgment, the appeal will be dismissed. Camenisch v. Nuccitelli, 150 Colo. 141, 372 P.2d 85 (1962).

Incomplete judgment on claims reversed. Where a statutory water adjudication proceeding is brought up for review, and it appears that there was an incomplete determination of some of the claims before the trial court, the judgment is reversed on that ground only, the supreme court declining to pass upon the case piecemeal. Northern Colo. Irrigation Co. v. City & County of Denver, 86 Colo. 54, 278 P. 592 (1929).

In a proceeding to adjudicate priority of rights to the use of water, a general water adjudication was held not final, where it failed to determine all claims presented. Northern Colo. Irrigation Co. v. City & County of Denver, 86 Colo. 54, 278 P. 592 (1929).

III. GROUNDS FOR REVERSAL.

No judicial obligation is more imperative than the accomplishment of justice in any particular case where the trial record does not reflect as an absolute that every evidentiary requirement for sustaining a guilty verdict was fulfilled. People v. Emeson, 179 Colo. 308, 500 P.2d 368 (1972).

Specification of points no longer required. The rules of civil procedure, apparently having been confusing to the bar as to the distinction between the ''specification of points'' and the ''statement of each point intended to be urged'' formerly required, were amended to eliminate specification of points. Mauldin v. Lowery, 127 Colo. 234, 255 P.2d 976 (1953); Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955).

Incorrect instruction may be error. Where the instruction affects substantial rights of the plaintiffs, the supreme court may elect to address the correctness of the instruction in order to prevent injustice. Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984).

General statement of error insufficient. A statement of grounds for reversal so general that it covers any possible question involved in the record is not sufficient to authorize its consideration on review. Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955).

A general specification of points is insufficient and will not be considered upon review. Farrell v. Bashor, 140 Colo. 408, 344 P.2d 692 (1959).

An assertion that the findings and orders of a trial court are contrary to the evidence and contrary to the law is not sufficient to authorize its consideration upon review. Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955); Phipps v. Hurd, 133 Colo. 547, 297 P.2d 1048 (1956).

Generally stating that evidence was insufficient to support trial court's determinations, and failing to make specific arguments, identify supporting facts, or set forth specific authorities to support contention of error was insufficient to authorize consideration upon review. People ex rel. D.B-J., 89 P.3d 530 (Colo. App. 2004).

Court may decline to notice errors where statement is deficient. Where a proper statement of grounds for reversal is lacking, or where it fails to direct attention to the alleged error, the supreme court may decline to notice alleged errors presented in the argument. Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955).

Brief must direct attention of court to alleged error. A statement of grounds required under section (d) that fails to direct attention to any alleged error is meaningless and does not comply with this rule. Allison v. Heller, 132 Colo. 415, 289 P.2d 160 (1955).

Even though matter alleged to be error is mentioned in the defendant's motion for new trial, it was not mentioned in his brief to the supreme court, and therefore, it was waived. People v. Pleasant, 182 Colo. 144, 511 P.2d 488 (1973).

Contemporaneous objection required. An appellate court need not review errors where counsel fails to make a contemporaneous objection. City & County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348 (1972); People v. Chavez, 179 Colo. 316, 500 P.2d 365 (1972); People v. Routa, 180 Colo. 386, 505 P.2d 1298 (1973).

Where defendant fails to object during trial to statements made by prosecutor, he waives further objection as matter of right on appeal. People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972).

Absent defect affecting substantial right. The failure to timely object will preclude an appellate from reversing on the ground that there is an absence of a showing of defects affecting the substantial rights. Crespin v. People, 175 Colo. 509, 488 P.2d 877 (1971).

Lack of contemporaneous objection at trial constitutes waiver of objections to admission of evidence, and issues may not be raised on appeal; if they are, they will not be considered unless errors are so fundamental as to seriously prejudice basic rights of defendant. People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

Or where contemporaneous objection impossible. Where purported impropriety of comments in prosecutor's opening statement cannot be alleged until prosecutor fails to support statements during presentation of case, and strict contemporaneous objection by defense counsel

following opening statement is therefore impossible, the failure to object immediately to prosecutor's statements does not constitute waiver of right to object as matter of right on appeal. People v. Jacobs, 179 Colo. 182, 499 P.2d 615 (1972).

This rule modifies C.R.C.P. 51. C.R.C.P. 51, providing that only grounds specified in objections to instructions will be considered on appeal is modified by this rule permitting the supreme court at its discretion to notice any error of record, and such discretion will be exercised when necessary to do justice. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956).

Court may notice error of record on its own motion. Although counsel are confined to the points properly specified, the supreme court, under special circumstances, frequently notices error appearing of record and takes appropriate action to protect the right of a litigant to have his cause determined under well-established principles of law. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984); People v. Herrera, 734 P.2d 136 (Colo. App. 1986).

The discretionary power of the supreme court to notice any error appearing of record is granted by this rule even where the plaintiff in the lower court failed to make appropriate objections and exceptions thereto. Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

Under the provisions of this rule the supreme court may notice error appearing on the face of the record when in the interest of justice to a litigant it is appropriate to do so. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

The right and duty of an appellate court to notice error on appeal and to reverse under section (d) has generally been applied to those situations where the error could be characterized as ''fundamental'' or where it is the cause of a ''miscarriage of justice''. Polster v. Griff's of Am., Inc., 184 Colo. 418, 520 P.2d 745 (1974).

Such as error in amount of verdict. An error in the amount of a verdict not properly before the supreme court, as for excessive damages, is one which is of enough importance to consider on the supreme court's own motion when such a course is considered necessary to do complete justice. Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

Where counsel failed to tender suitable instructions on the measure of damages in a personal injury action, it was the duty of the court to so instruct on its own motion. In such circumstances, the supreme court exercised its discretion in noticing error appearing on the face of the record even though not raised by the parties. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

Error noticed on record was not prejudicial. Clark v. Bunnell, 172 Colo. 32, 470 P.2d 42 (1970).

Ground waived in motion for new trial unavailable on appeal. In an action to foreclose a deed of trust, where defendants' motion for a new trial waived the defense of tender before the trial court, it cannot be reasserted in the supreme court on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

When defendant claims that evidence is insufficient to convict, an appellate court should view evidence in light most favorable to prosecution. People v. Vigil, 180 Colo. 104, 502 P.2d 418 (1972).

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, the appellate court may, except as otherwise provided in C.A.R. 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

ANNOTATION

The supreme court may retain and review an appeal of a declaratory order of the state personnel board that should have been filed with the court of appeals. The court's authority rests in its power under C.A.R. 50(b) to review cases pending in the court of appeals prior to judgment and under this rule to suspend the rules of appellate procedure. Colorado Ass'n of Pub. Emp. v. DOH, 809 P.2d 988 (Colo. 1991).

This rule permits an appellate court to expedite decisions and order proceedings in accordance with its direction even though C.A.R. 3.4 does not extend to permanent custody orders entered in dependency or neglect proceedings. People ex rel. K.A., 155 P.3d 558 (Colo. App. 2006).

Applied in Rivera v. Civil Serv. Comm'n, 34 Colo. App. 152, 529 P.2d 1347 (1974); Converse v. Zinke, 635 P.2d 1228 (Colo. App. 1979); People v. Williams, 736 P.2d 1229 (Colo. App. 1986).

APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS AND AGENCIES

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal in Appeals from Trial Courts. An appeal permitted by law from a trial court to the appellate court must be taken by filing a notice of appeal with the clerk of the appellate court within the time allowed by C.A.R. 4. Upon the filing of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal and all procedures concerning the appeal unless otherwise specified by these rules. An advisory copy of the notice of appeal must be served on the clerk of the trial court within the time for its filing in the appellate court. Failure of an appellant to take any step other than the timely filing of a notice of appeal in the appellate court does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal is not jurisdictional.

(b) Filing the Notice of Appeal or Petition for Review in Appeals from State Agencies. An appeal permitted by statute from a state agency directly to the court of appeals or appellate review from a district court must be in the manner and within the time prescribed by the particular statute.

(c) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(d) Contents of the Notice of Appeal in Civil Cases (Other Than District Court Review of Agency Actions and Appeals From State Agencies). The notice of appeal must set forth:

(1) A caption that complies in form with C.A.R. 32;

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the controversy (not to exceed one page);

(B) The judgment, order or parts being appealed and a statement indicating the basis for the appellate court's jurisdiction;

(C) Whether the judgment or order resolved all issues pending before the trial court including attorneys' fees and costs;

(D) Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b);

(E) The date the judgment or order was entered (if there is a question of the date, set forth the details) and the date of mailing to counsel;

(F) Whether there were any extensions granted to file any motion(s) for post-trial relief, and, if so, the date of the request, whether the request was granted, and the date to which filing was extended;

(G) The date any motion for post-trial relief was filed;

(H) The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j); and

(I) Whether there were any extensions granted to file any notice(s) of appeal, and, if so, the date of the request, whether the request was granted, and the date to which filing was extended;

(3) An advisory listing of the issues to be raised on appeal;

(4) Whether the transcript of any evidence taken before the trial court or any administrative agency is necessary to resolve the issues raised on appeal;

(5) Whether the order on review was issued by a magistrate where consent was necessary. If the order on review was issued by a magistrate where consent was not necessary, whether a petition for review of the order was filed in the trial court and ruled on by a trial court judge pursuant to the Colorado Rules for Magistrates;

(6) The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers;

(7) An appendix containing a copy of the judgment or order being appealed, the findings of the court, if any, the motion for new trial, if any, and a copy of the trial court's order granting or denying leave to proceed in forma pauperis if appellant is filing without docket fee pursuant to C.A.R. 12(b); and

(8) A certificate of service, in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the trial court and all other parties to the action in the trial court.

(e) Contents of Notice of Appeal from State Agencies (Other Than the Industrial Claim Appeals Office) Directly to the Court of Appeals. The notice of appeal must set forth:

(1) A caption that complies in form with C.A.R. 32;

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the controversy (not to exceed one page);

(B) The order being appealed and a statement indicating the basis for the appellate court's jurisdiction;

(C) Whether the order resolved all issues pending before the agency;

(D) Whether the order is final for purposes of appeal; and

(E) The date of service of the final order entered in the action by the agency. The date of service of an order is the date on which a copy of the order is delivered in person, or, if service is by mail, the date of mailing;

(3) An advisory listing of the issues to be raised on appeal;

(4) Whether the transcript of any evidence taken before the administrative agency is necessary to resolve the issues raised on appeal;

(5) The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers;

(6) An appendix containing a copy of the order being appealed and the findings of the agency, if any; and

(7) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the state agency and all other persons who have appeared as parties to the action before the agency, or as required by section 24-4-106(4), C.R.S. concerning rule-making appeals.

(f) Contents of Notice of Appeal from District Court Review of Agency Actions. The notice of appeal must set forth:

(1) A caption that complies in form with C.A.R. 32;

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the controversy (not to exceed one page);

(B) The decision or order being appealed and a statement indicating the basis for the appellate court's jurisdiction;

(C) Whether the decision or order resolved all issues pending before the agency;

(D) Whether the decision or order is final for purposes of appeal;

(E) The date the decision or order was entered (if there is a question of the date, set forth the details) and the date of mailing to counsel;

(F) Whether there were any extensions granted to file any motion(s) for post-trial relief, and, if so, the date of the request, whether the request was granted, and the date to which filing was extended;

(G) The date any motion for post-trial relief was filed;

(H) The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j);

(I) The date the notice of intent to seek appellate review was filed with the district court pursuant to C.R.S. 24-4-106(9), C.R.S.; and

(J) Whether there were any extensions granted to file any notice(s) of appeal, and, if so, the date of the request, whether the request was granted, and the date to which filing was extended;

(3) An advisory listing of the issues to be raised on appeal;

(4) Whether the transcript of any evidence taken before the administrative agency is necessary to resolve the issues raised on appeal;

(5) The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers;

(6) An appendix containing a copy of the decision or order being appealed, the agency order and the findings of the agency, if any; and

(7) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the reviewing court, the agency and all other persons who have appeared as parties to the district court proceedings.

(g) Contents of the Notice of Appeal in Criminal Cases. The notice of appeal must set forth:

(1) A caption that complies in form with C.A.R. 32;

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the case;

(B) The charges upon which defendant was tried;

(C) The charges for which defendant was convicted;

(D) The date judgment of conviction or the order granting or denying a motion for postconviction relief was entered;

(E) The date the sentence was imposed;

(F) The sentence; and

(G) A statement indicating the basis for the appellate court's jurisdiction;

(3) Whether an appeal bond was granted and, if so, the amount of the bond;

(4) An advisory listing of the issues to be raised on appeal;

(5) Whether any transcript of evidence taken at trial is necessary to resolve the issues on appeal;

(6) The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers;

(7) An appendix containing a copy of the judgment or order being appealed, the mittimus, the findings of the court, if any, the motion for new trial, if any, and a copy of the trial court's order granting or denying leave to proceed in forma pauperis if appellant is filing without docket fee pursuant to C.A.R. 12(b); and

(8) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the trial court and all other parties to the action in the trial court.

Comment: In most criminal cases, the State of Colorado is represented by the Office of the Attorney General. See §24-31-101(1)(a), C.R.S.

(h) Contents of any Notice of Cross-Appeal. A notice of cross-appeal must set forth the same information required for a notice of appeal and must set forth the party initiating the cross-appeal and designate all cross-appellees.

COMMENT

Rule 3 combines the notice of appeal, designation of parties, and preliminary statement into one document, and requests certain jurisdictional information. The rule also requires the attachment of a copy of the order being appealed to the notice of appeal. It also requires a notice of appeal in criminal cases and should include information about counsel for the parties as is now required in the notices for all other types of appeal.

Source: IP(d) added and (d)(1), (d)(2), IP(f), (f)(1), and (f)(2) amended August 23, 1984, effective January 1, 1985; (d)(2)(B), (e)(2)(B), (f)(2)(B), (g)(2)(E), and (g)(2)(F) amended and (g)(2)(G) and (i) added August 30, 1985, effective January 1, 1986; (d)(7) and (g)(7) amended May 15, 1986, effective November 1, 1986; and IP(e) and (e)(7) amended June 4, 1987, effective January 1, 1988; (h) amended March 17, 1994, effective July 1, 1994; (h) amended June 7, 1994, effective July 1, 1994; IP(d)(1), IP(e)(1), IP(f)(1), and IP(g)(1) amended June 1, 2000, effective July 1, 2000; (a) amended and (a) comment

deleted, (b) and (d) amended and (d) comment deleted, (e) to (g) amended and (g) comment amended, and (h) amended, and (i) repealed and comment added and effective October 17, 2014.

Cross references: For time within which notice of appeal must be filed, see C.A.R. 4.

ANNOTATION

Law reviews. For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953).

Purpose of the notice of appeal is simply to put the other party on notice that an appeal will be taken and to identify the action of the trial court from which the appeal is to be taken. Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980).

The particular function of the notice of appeal is to require the clerk of the court, in which the judgment complained of is entered, to certify the record for review. Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P.2d 791 (1935); Wheeler Kelly Hagny Trust Co. v. Williamson, 111 Colo. 515, 143 P.2d 685 (1943); People v. Bost, 770 P.2d 1209 (Colo. 1989).

Purpose of requiring notice where less than the entire record is designated on appeal is to permit the appellee an opportunity to add to the designated portions. People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975).

Timely filing of notice of appeal is mandatory and jurisdictional. Chapman v. Miller, 29 Colo. App. 8, 476 P.2d 763 (1970); Cline v. Farmers Ins. Exchange, 792 P.2d 305 (Colo. App. 1990).

Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits. Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980).

The filing of a notice of appeal is mandatory and a jurisdictional prerequisite for appellate review of a lower court decision to deny a Rule 35(a), Crim. P. motion. People v. Silvola, 198 Colo. 228, 597 P.2d 583 (1979).

Notice of appeal not timely filed. Earlier notice of appeal, which related to probate of will, did not provide notice of appeal of order vacating notices of lis pendens to estate property, and since no timely appeal was filed, court lacked jurisdiction over appeal. Matter of Estate of Anderson, 727 P.2d 867 (Colo. App. 1986)(decided under former rule).

Untimely service of notice of appeal to appellee does not affect court's jurisdiction to hear appeal. B.A. Leasing Corp. v. State Bd. of Equal., 745 P.2d 254 (Colo. App. 1987), aff'd sub nom. Gates Rubber Co. v. Bd. of Equalization, 770 P.2d 1189 (Colo. 1989).

Notice of appeal is not "pleading" within strict definition of term, and therefore failure to serve copies of notice as directed by trial court did not warrant court of appeals decision to dismiss appeal. Matter of Estate of Jones, 704 P.2d 845 (Colo. 1985) (decided under former rule).

Dismissal of appeal for failure to serve notice of designation of record is made discretionary by section (a). People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975).

Substantial compliance with section (c) is all that is required. Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980); See People v. Bost, 770 P.2d 1209 (Colo. 1989).

Lack of designation in the caption that the document is a notice of appeal will not defeat substantial compliance. Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980).

Where defendant objected to venue by filing a proper motion prior to answering complaint, issue was preserved for appeal regardless of lack of specific reference to venue in notice of appeal. Resolution Trust Corp. v. Parker, 824 P.2d 102 (Colo. App. 1991).

Defect in the notice of appeal was harmless where appellant failed to list all of the parties to the appeal, but complied with all other provisions of the rule. Turkey Creek, LLC v. Rosania, 953 P.2d 1306 (Colo. App. 1998).

When sanctions are imposed against a litigant's attorney, the attorney is a real party in interest and must appeal in his or her own name. Because plaintiffs' attorney did not file a separate notice of appeal and the plaintiffs' notice of appeal did not name the attorney as an appellant, the court is jurisdictionally barred from deciding whether the trial court abused its discretion in imposing sanctions against the attorney. Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992), impliedly overruled in Cruz v. Benine, 984 P.2d 1173 (Colo. 1999).

To have standing to appeal an award of attorney fees only against a party's attorney, the attorney must file a separate appeal or be added as an appellant to the party's appeal. Anglum v. USAA Cas. Ins. Co., 166 P.3d 191 (Colo. App. 2007).

Abuse of discretion. In light of the significance of the issues on appeal (i.e., the state's obligation to maintain state prisoners in state correctional facilities and to reimburse counties for confining state prisoners) and the fact that both petitioner and respondent sought appellate review, the court of appeals abused its discretion in dismissing case for failure to timely

transmit the record. Dept. of Corr. v. Pena, 788 P.2d 143 (Colo. 1990).

Substantiality of issues. When determining whether dismissal is an appropriate sanction for failure to timely transmit the record, an appellate court should consider the substantiality of the issues on appeal and the full range of possible sanctions and should select the sanction most appropriate under the circumstances. Dept. of Corr. v. Pena, 788 P.2d 143 (Colo. 1990).

Court elected to suspend strict requirements of this rule. Serv. Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); Converse v. Zinke, 635 P.2d 1228 (Colo. App. 1979), aff'd in part, and rev'd on other grounds, 635 P.2d 882 (Colo. 1981).

Supersedeas not required. The appeal and the supersedeas are two separate things, and the appeal can be sustained without a supersedeas. Monks v. Hemphill, 119 Colo. 378, 203 P.2d 503 (1949).

Rule inapplicable to industrial commission orders. This rule has no application to the review of orders of the industrial commission. Trujillo v. Indus. Comm'n, 31 Colo. App. 297, 501 P.2d 1344 (1972).

Applied in Beadles v. Metayka, 135 Colo. 366, 311 P.2d 711 (1957); In re Peterson, 40 Colo. App. 115, 572 P.2d 849 (1977); Catron v. Catron, 40 Colo. App. 476, 577 P.2d 322 (1978); Gillespie v. Dir. of Dept. of Rev., 41 Colo. App. 561, 592 P.2d 418 (1978); Dayhoff v. State, Motor Vehicle Div., 42 Colo. App. 91, 595 P.2d 1051 (1979); People v. Moore, 674 P.2d 354 (Colo. 1984).

Rule 3.1. Appeals from Industrial Claim Appeals Office

(a) How Taken. Appeals from orders and awards of the Industrial Claim Appeals Office shall be in the manner and within the time prescribed by statute. On appeal from orders and awards entered upon review of cases determined by the Industrial Claim Appeals Office, the record of the proceedings shall be arranged in chronological order, with all duplicates omitted. The record shall be properly paginated and fully indexed and bound by the agency.

(b) 14 days after return of the record, the appellant shall file an opening brief. Within 14 days after service of the opening brief, the appellee shall file an answer brief. Within 7 days after service of the answer brief, the appellant may file a reply brief. Briefs may be printed, typewritten, mimeographed, or otherwise reproduced in conformity with the provisions of C.A.R. 28.

(c) Priority of Industrial Claim Appeals Office Cases. All appeals from the Industrial Claim Appeals Office shall have precedence over any civil cause of a different nature pending in said court, and the Court of Appeals shall always be deemed open for the determination thereof, and shall be determined by the Court of Appeals in the manner as provided for other appeals.

(d) Contents of Notice of Appeal from the Industrial Claim Appeals Office Directly to the Court of Appeals. The notice of appeal shall set forth:

(1) A caption that complies in form with C.A.R. 32. In the caption:

(A) The case title in compliance with C.A.R. 12(a);

(B) The party or parties initiating the appeal;

(C) All others who have appeared as parties to the action before the agency; and

(D) The agency case number.

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the controversy (not to exceed one page);

(B) The order being appealed and a statement indicating the basis for the appellate court's jurisdiction;

(C) Whether the order resolved all issues pending before the agency;

(D) Whether the order is final for purposes of appeal; and

(E) The date of the certificate of mailing of the final order.

(3) An advisory listing of the issues to be raised on appeal;

(4) The names of counsel for the parties, their addresses, telephone numbers, and registration numbers;

(5) An appendix containing a copy of the order being appealed and the findings of the agency, if any; and

(6) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the Industrial Claim Appeals Office panel in

workmen's compensation cases, and on the Division of Employment and Training in unemployment insurance cases, and on all other persons who have appeared as parties to the action before the agency.

Source: Entire rule amended June 4, 1987, effective January 1, 1988; IP(d)(1) amended June 1, 2000, effective July 1, 2000; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For statutory provision relating to appellate review of workers' compensation decisions, see part 3 of article 43 of title 8, C.R.S.

ANNOTATION

Procedural requirements mandatory and jurisdictional. The procedural requirements for obtaining administrative or appellate review of the commission's orders are mandatory and jurisdictional. Hildreth v. Dir. of Div. of Labor, 30 Colo. App. 415, 497 P.2d 350 (1972).

One seeking to exercise a statutory right of review or appeal must follow and comply with the procedures prescribed, and failure to do so deprives the court of jurisdiction. Trujillo v. Indus. Comm'n, 31 Colo. App. 297, 501 P.2d 1344 (1972).

There is no authority for the filing of notice of appeal in proceedings in the appellate court for review of final orders of the industrial commission; therefore, such notice is inoperative for any purpose and, being a nullity, does not extend the time prescribed for commencing the review. Trujillo v. Indus. Comm'n, 31 Colo. App. 297, 501 P.2d 1344 (1972).

With respect to the service of process requirement of § 8-53-119 (3), (now § 8-43-307) service upon the attorney general constitutes service upon industrial commission (now industrial claim appeals office). Butkovich v. Indus. Comm'n, 723 P.2d 1306 (Colo. 1985).

No damages may be awarded under this section as a sanction for a frivolous review petition. Haynes v. Interior Investments, 725 P.2d 100 (Colo. App. 1986).

Notice of appeal sufficient to satisfy requirements of § 8-53-119 (now § 8-43-307) and to invoke the jurisdiction of the Court of Appeals where the document complied with the requirements of this rule and of that section but merely failed to bear the caption ''Petition for Review''. Hawkins v. State Comp. Ins. Authority, 790 P.2d 893 (Colo. App. 1990).

Rule 3.2. Appeals from the Denial of a Petition for Waiver of Parental Notification Requirements

Appeals from orders denying a petition for waiver of the parental notification requirements of Section 12-37.5-104, C.R.S., shall be in the manner and within the time prescribed in Rule 3 of Chapter 23.5 of the Colorado Rules of Civil Procedure.

Source: Entire rule added and adopted September 18, 2003; entire rule corrected effective June 16, 2004; entire rule amended and effective June 23, 2014.

Editor's note: This rule was originally adopted as rule 3.2 of chapter 1, C.R.C.P., on September 18, 2003, but was relocated pursuant to corrective order on June 16, 2004.

Rule 3.3. Appeals of Grant or Denial of Class Certification

An appeal from an order granting or denying class certification under C.R.C.P. 23(f) may be allowed pursuant to the procedures set forth in that rule and C.R.S. § 13-20-901.

Source: Entire rule added and effective September 9, 2004; entire rule amended and effective April 5, 2010.

Rule 3.4. Appeals from Proceedings in Dependency or Neglect

(a) How Taken. Appeals from judgments, decrees, or orders in dependency or neglect proceedings, as permitted by section 19-1-109 (2) (b) and (c), C.R.S., including an order

allocating parental responsibilities pursuant to section 19-1-104 (6), C.R.S., final orders entered pursuant to section 19-3-612, C.R.S., and final orders of permanent legal custody entered pursuant to section 19-3-702 and 19-3-605, C.R.S., must be in the manner and within the time prescribed by this rule.

(b) Time for Appeal.

(1) A Notice of Appeal and Designation of Transcripts (JDF 545) must be filed with the clerk of the court of appeals with an advisory copy served on the clerk of the trial court within 21 days after the entry of the judgment, decree, or order. The trial court continues to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59 (a) and determined within the time specified in C.R.C.P. 59 (j). An order is entered within the meaning of this rule when it is entered pursuant to C.R.C.P. 58. If notice of the entry of judgment, decree, or order is transmitted to the parties by mail or E-Service, the time for the filing of the notice of appeal commences from the date of mailing or E-Service of the notice.

(2) If a timely notice of appeal is filed by a party, any other party may file a Notice of Cross-Appeal and Designation of Transcripts (JDF 545) within 7 days of the date on which the notice of appeal was filed or within the 21 days for the filing of the notice of appeal, whichever period last expires.

(3) The time in which to file a notice of appeal or a notice of cross-appeal and the designation of transcripts will not be extended, except upon a showing of good cause pursuant to C.A.R. 2 and C.A.R. 26 (b).

(4) In appeals filed by respondent parents who were represented by counsel in the trial court, it is trial counsel's obligation to ensure a timely notice of appeal is filed. This obligation is met if different counsel for appeal timely files a notice of appeal. Self-represented parties are obligated to timely file a notice of appeal on their own behalf.

(c) Contents of the Notice of Appeal. A Notice of Appeal and Designation of Transcripts (JDF 545) must include:

(1) identification of the party or parties initiating the appeal;

(2) identification of the judgment, decree, or order from which the appeal is taken;

(3) the date the judgment, decree, or order from which the appeal is taken was signed by the trial court;

(4) a certificate of service in compliance with C.A.R. 25; and

(5) a copy of the judgment, decree, or order from which the appeal is taken.

(d) Composition of the Record on Appeal.

(1) The record on appeal must include the trial court file, including all exhibits. No designation of record is necessary for the trial court file and all exhibits. The record on appeal may also include any transcripts designated and ordered by the parties pursuant to this rule.

(2) It is the duty of the appellant and any cross-appellant to complete and properly serve the designation of transcripts portion of JDF 545 upon the trial court's managing court reporter at the time the notice of appeal is filed.

(3) The designation of transcripts portion of JDF 545 must set forth the dates of the proceedings for which transcripts are requested and the names of the court reporters, if applicable.

(4) Within 7 days after service of JDF 545, any appellee may complete and file a Supplemental Designation of Transcripts (JDF 547) with the clerk of the trial court and the clerk of the court of appeals and serve it on the trial court's managing court reporter.

(5) The designating party or public entity responsible for the cost of transcription must make arrangements for payment with the managing court reporter within 7 days after serving the designation. Within 14 days after service of JDF 545, the court reporter must file a statement with the clerk of the trial court and the clerk of the court of appeals indicating whether arrangements for payment have been made.

(e) Transmission of Record.

(1) Within 42 days after the filing of JDF 545, the record, composed as set forth in subsection (d), must be transmitted to the court of appeals in accordance with C.A.R. 10(c).

(2) The appellant may request an extension of time of no more than 14 days in which to file the record, which will be granted only upon a showing of good cause. If a request of more than 14 days is based on a court reporter's or transcriber's inability to complete the transcript, it must be supported by an affidavit of the reporter, transcriber, managing court reporter, or clerk of the trial court.

(f) Opening Brief on Appeal.

(1) Within 21 days after the record is filed, the appellant must file a brief. The appellant's brief must be entitled ''Opening Brief'' and must contain the following under appropriate headings in the order indicated:

(A) a caption in compliance with C.A.R. 32 (d);

(B) a certificate of compliance as required by C.A.R. 32 (h);

(C) a table of contents, with page references;

(D) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(E) a statement of compliance with the Indian Child Welfare Act (ICWA) with citation(s) to the location(s) in the designated record of:

(i) each date when the court made an inquiry to determine whether the child is or could be an Indian child, and a statement of any identified tribe(s) or potential tribe(s);

(ii) copies of ICWA notices (including for foster care placement and termination of parental rights proceedings, if applicable), and other communications intended to provide such notice, sent to the child's parents, the child's Indian custodian(s), the Bureau of Indian Affairs (BIA), or the child's tribe(s) or potential tribe(s) may be found;

(iii) the postal return receipts for Indian child welfare notices sent to the child's parents, the child's Indian custodian(s), the BIA, or the child's tribe(s) or potential tribe(s) may be found;

(iv) responses from the parent(s) or Indian custodian(s) of the child, the BIA, and child's tribe(s) or potential tribe(s) may be found;

(v) additional notices (including for a termination hearing) were sent to non-responding tribe(s), or the BIA; and

(vi) date(s) of any ruling as to whether the child is or is not an Indian child;

(F) a statement of the issues presented for review;

(G) a concise statement identifying the nature of the case, the relevant facts and procedural history, and the ruling, judgment, or order presented for review, with appropriate references to the record (see C.A.R. 28 (e));

(H) a summary of the arguments, which must:

(i) contain a succinct, clear, and accurate statement of the arguments made in the body of the brief;

(ii) articulate the major points of reasoning employed as to each issue presented for review; and

(iii) not merely repeat the argument headings or issues presented for review;

(I) the arguments, which must contain:

(i) under a separate heading placed before the discussion of each issue, statements of the applicable standard of review with citation to authority, whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled; and

(ii) appellant's contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies; and

(J) a short conclusion stating the precise relief sought.

(2) The appellant may request one extension of time of no more than 7 days in which to file the opening brief.

(3) The opening brief must contain no more than 7,500 words, excluding attachments and/or any addendum containing statutes, rules, regulations, etc. A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten opening brief of not more than 25 double-spaced and single-sided pages. Such a brief must otherwise comply with this rule and C.A.R. 32.

(g) Answer Brief on Appeal.

(1) Within 21 days after service of the appellant's opening brief, any appellee may file an answer brief that must be entitled ''Answer Brief,'' and any cross-appellant may file an opening/answer brief that must be entitled ''Cross-Appeal Opening/Answer Brief.''

(2) Under a separate heading following the table of authorities, the brief must contain a statement of whether the appellee agrees with the appellant's statements concerning compliance with the ICWA, and if not, why not.

(3) The brief must conform to the requirements of C.A.R. 3.4 (f) except that separate headings titled statement of the issues or of the case need not be included unless the appellee is dissatisfied with the appellant's statement. For each issue, the answer brief must, under a separate heading placed before the discussion of the issue, state whether the appellee agrees with the appellant's statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not.

(4) A party may request one extension of time of no more than 7 days to file an answer brief or cross-appeal opening/answer brief.

(5) The answer brief or cross-appeal opening/answer brief must contain no more than 7,500 words, excluding attachments and/or any addendum containing statutes, rules, regulations, etc. A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten brief of not more than 25 double-spaced and single-sided pages. Such a brief must otherwise comply with this rule and C.A.R. 32.

(6) In cases involving more than one appellant and in which the appellee chooses to file an answer brief, the appellee must file a combined answer brief addressing the legal issues raised by all appellants. The combined answer brief must be filed within 28 days of service of the last opening brief filed and must contain no more than 9,500 words.

(7) In cases involving more than one appellee, the court encourages coordination among appellees to avoid repetition within the answer briefs. A joint answer brief may, but is not required to, be filed by appellees.

(h) Reply Brief. Within 14 days after service of the appellee's answer brief, any appellant may file a reply brief, which must be entitled ''Reply Brief,'' in reply to the answer brief. A reply brief must comply with C.A.R. 3.4 (f)(1)(A)-(D) and must contain no more than 5,700 words. A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten reply brief of not more than 19 double-spaced and single-sided pages. Such a brief must otherwise comply with this rule and C.A.R. 32. No further briefs may be filed except with leave of court.

(i) Oral Argument. Oral argument will be allowed upon the written request of a party or upon the court's own motion, unless the court, in its discretion, dispenses with oral argument. A request for oral argument must be made in a separate, appropriately titled document filed no later than 7 days after briefs are closed. Unless otherwise ordered, argument may not exceed 15 minutes for the appellant and 15 minutes for the appellee.

(j) Advancement on the Docket. Appeals in dependency or neglect proceedings must be advanced on the calendar of the appellate courts pursuant to section 19-1-109 (1), C.R.S., and will be set for disposition at the earliest practical time.

(k) Petition for Rehearing. A petition for rehearing in the form prescribed by C.A.R. 40 (b) may be filed within 14 days after entry of judgment. The time in which to file the petition for rehearing will not be extended.

(l) Petition for Writ of Certiorari. Review of the judgment of the court of appeals may be sought by filing a petition for writ of certiorari in the supreme court in accordance with C.A.R. 51. The petition must be filed within 14 days after the expiration of the time for filing a petition for rehearing or the date of denial of a petition for rehearing by the court of appeals. The filing of the petition results in an automatic stay of proceedings in the court of appeals. Any cross-petition or opposition brief to a petition for writ of certiorari must be filed within 14 days after the filing of the petition. The petition for writ of certiorari, any cross-petition, and any opposition brief must be in the form prescribed by C.A.R. 53 (a)-(c) and filed and served in accordance with C.A.R. 53 (h).

(m) Issuance of Mandate. The mandate must be in the form prescribed by C.A.R. 41 (a) and must issue 29 days after entry of the judgment. The timely filing of a petition for

rehearing will stay the mandate until the court of appeals has ruled on the petition. If the petition is denied, the mandate must issue 14 days after entry of the order denying the petition. The mandate may also be stayed in accordance with C.A.R. 41.

(n) Filing and Service. All papers required or permitted by this rule must be filed and served in accordance with C.A.R. 25.

(o) Computation and Extension of Time. Computation and extension of any time period prescribed by this rule must be in accordance with C.A.R. 26.

Source: Entire rule added February 10, 2005, effective March 1, 2005; (a), (b)(3), (d), (g)(3)(E), (g)(3)(F), (h)(3)(C), and (h)(3)(D) amended and effective November 9, 2006; (b)(1), (b)(2), (e)(4), (e)(5), (f), (g)(1), (g)(2), (h)(1), (h)(2), (j)(2), (k), and (l) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and adopted May 23, 2016, effective July 1, 2016 for cases filed on or after July 1, 2016; (e)(1) amended and adopted October 26, 2017, effective January 1, 2018; (l) amended and effective September 11, 2018.

ANNOTATION

Law reviews. For article, ''Implementing C.A.R. 3.4 to Expedite Appeals in Dependency and Neglect Cases'', see 34 Colo. Law. 47 (June 2005). For article, ''Dependency and Neglect Appeals Under C.A.R. 3.4'', see 36 Colo. Law. 55 (Oct. 2007). For article, ''New ICWA Regulations Promote Tribal Sovereignty and Culture for Native American Children'', see 46 Colo. Law. 41 (Apr. 2017).

Court of appeals has jurisdiction to address the constitutionality of this rule as promulgated by the Colorado supreme court. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Expedited procedure under this rule does not violate procedural due process because it benefits parents by quickly correcting decisions in which their rights were terminated erroneously; benefits children, whose parents have had their rights terminated, by decreasing the time before they are either returned to their parents or permitted to be legally adopted; and furthers the state's interest in protecting children. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Expedited process does not violate procedural due process by placing court of appeals in the role of an advocate on legal issues because it does not alter the court's responsibility to thoroughly examine the record on factual issues. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

This rule sufficiently protects parents in dependency and neglect cases against the risk of an erroneous deprivation of their appellate rights by (1) allowing appellate counsel for the parents a reasonable opportunity to review an unedited transcript and to raise possible issues for appeal, and (2) allowing the assigned division of the court of appeals to review the complete record and order supplemental briefing when appropriate. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

This rule does not violate plaintiff's constitutional right to equal protection because parents whose rights are terminated under article 5 of the Colorado Children's Code are not similarly situated to parents whose rights are involuntarily terminated under article 3 of the code. This rule applies to parents subject to dependency and neglect proceedings under article 3 of the Colorado Children's Code. As such, the proceedings focus primarily on the protection and safety of the children, not on the custodial interests of the parent. Further, such a proceeding can be initiated only by the state. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

Fact finder's "no adjudication" finding with respect to one party is not a proper basis for a motion notwithstanding the verdict and is not a final appealable order under section (a) of this rule or § 19-1-109 (2)(c). Statute provides that an order decreeing a child neglected or dependent is a final and appealable order. Father's dismissal from the petition based on a jury verdict that the child was not dependent and neglected with respect to him is not subject to direct appeal under this rule. People in Interest of S.M-L, 2016 COA 173, __ P.3d __, aff'd sub nom. People in Interest of R.S., 2018 CO 31, 416 P.3d 905.

Constitutional right to effective assistance of counsel is not violated because of a lack of

a complete record because this rule provides access to an unedited transcript for preparation of the petition on appeal and an opportunity to identify the issues on appeal. People ex rel. T.D., 140 P.3d 205 (Colo. App.), cert. denied, 549 U.S. 1020, 127 S. Ct. 564, 166 L. Ed. 2d 411, and 549 U.S. 1024, 127 S. Ct. 565, 166 L. Ed. 2d 419 (2006).

C.A.R. 2 permits an appellate court to expedite decisions and order proceedings in accordance with its direction even though this rule does not extend to permanent custody orders entered in dependency or neglect proceedings. People ex rel. K.A., 155 P.3d 558 (Colo. App. 2006).

The plain language of section (a) shows that this rule does not apply to paternity actions. Because C.A.R. 4 does not list specific orders that are appealable, and in the absence of any limiting language, a judgment of paternity is subject to that rule. People in Interest of N.S., 2017 COA 8, 413 P.3d 172.

The Colorado rules of civil procedure apply and govern the appropriate methods of service in dependency and neglect cases because neither the Colorado Children's Code nor the Colorado rules of juvenile procedure address the method by which a trial court may serve orders on parties. People ex rel. S.M.A.M.A., 172 P.3d 958 (Colo. App. 2007).

Three days must be added to the deadline for filing a notice of appeal pursuant to subsection (b) when the order appealed is served on the parties by delivery to attorney's courthouse mailbox, which constitutes service by mail. People ex rel. S.M.A.M.A., 172 P.3d 958 (Colo. App. 2007).

Appellant mother's consent is a substantive condition precedent to a valid notice of appeal. Mother's counsel was not empowered to file a notice of appeal without mother's signature or specific authorization, and her defective notice did not invoke the court's jurisdiction even overlooking the untimeliness of the notice. People ex rel. R.D., 259 P.3d 562 (Colo. App. 2011).

An allocation of parental responsibilities order filed under § 19-1-104 (6) in the district court of the county where the child resides is final and appealable. Once a final and appealable order has been entered, a party who wishes to appeal must file a notice of appeal within twenty-one days under this rule. People In Interest of M.R.M., 2018 COA 10, __ P.3d __.

The language of subsection (b)(3) prohibiting extensions of time does not preclude enlarging or suspending the deadline for filing a notice of appeal for good cause. An appellate court remains empowered to extend or suspend deadlines based on a showing of good cause. People ex rel. A.J., 143 P.3d 1143 (Colo. App. 2006).

Based on the "unique circumstances exception", court of appeals has the authority to extend the deadline for filing the notice of appeal in a dependency and neglect case. The ''no extensions'' provision in section (b) does not preclude application of the unique circumstances exception, because it is an exception to procedural rules limiting a court's authority to grant exceptions. Here, the trial court must bear some responsibility for the late filing because of an ambiguous ruling and subsequent written orders. People ex rel. A.J.H, 134 P.3d 528 (Colo. App. 2006).

Substitution of both parents' counsel appropriate. Applying the criminal standard, there was good cause for the substitution of both parents' counsel in dependency and neglect proceedings when the motions judge ordered supplemental briefing on the issue in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, and the substitution of mother's counsel after the announcement of A.L.L. v. People, 226 P.3d 1054 (Colo. 2010). People ex rel. C.Z., 262 P.3d 895 (Colo. App. 2010).

The good cause standard is the same standard recognized in criminal cases, not the standard for civil cases set forth in C.R.C.P. 121 § 1-1(2)(b). People ex rel. C.Z., 262 P.3d 895 (Colo. App. 2010).

Matter is moot where guardian ad litem (GAL) failed to offer facts in supplemental brief demonstrating a current basis to terminate mother's parental rights. Although the GAL argued on appeal that the court improperly failed to terminate mother's rights, the child has been returned to the mother and all parties believed that the child should remain in the mother's custody. A matter is moot when the relief sought, if granted, would have no practical legal effect on the existing controversy. People ex rel. L.O.L., 197 P.3d 291 (Colo. App. 2008).

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases (Other than Appeals or Appellate Review Within C.A.R. 3.1, 3.2, 3.3 and 3.4). Except as provided in Rule 4(e), in a civil case in which an appeal is permitted by law as of right from a trial court to the appellate court, the notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within 49 days of the date of the entry of the judgment, decree, or order from which the party appeals. In appeals from district court review of agency actions, such notice of appeal shall be in addition to the statutory 45-day notice of

intent to seek appellate review filed with the district court required by C.R.S. 24-4-106(9). If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (a), whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the trial court by any party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (a) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) Granting or denying a motion under C.R.C.P. 59 for judgment notwithstanding verdict; (2) granting or denying a motion under C.R.C.P. 59, to amend findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under C.R.C.P. 59, to alter or amend the judgment; (4) denying a motion for a new trial under C.R.C.P. 59; (5) expiration of a court granted extension of time to file motion(s) for post-trial relief under C.R.C.P. 59, where no motion is filed. The trial court shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the appellate court shall be stayed. A judgment or order is entered within the meaning of this section (a) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of judgment, decree, or order is transmitted to the parties by mail or E-Service, the time for the filing of the notice of appeal shall commence from the date of the mailing or E-Service of the notice.

Upon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed 35 days from the expiration of the time otherwise prescribed by this section (a). Such an extension may be granted before or after the time otherwise prescribed by this section (a) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Comment: C.A.R. 4(a) provides for the notice of appeal to be filed with the appellate court and a copy to be served upon the trial court. Time for filing the notice of appeal is increased to 49 days.

(b) Appeals in Criminal Cases.

(1) Except as provided in Rule 4(e), in a criminal case the notice of appeal by a defendant shall be filed in the appellate court and an advisory copy served on the clerk of the trial court within 49 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed on the date of such entry. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 49 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made within 14 days after entry of the judgment. A judgment or order is entered within the meaning of this section (b) when it is entered in the criminal docket. Upon a showing of excusable neglect the appellate court may, before or at any time after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 35 days from the expiration of the time otherwise prescribed by this section (b).

Comment: C.A.R. 4(b) has been altered to make it conform more closely to C.A.R. 4(a).

(2) Unless otherwise provided by statute or Colorado appellate rule, when an appeal by the state or the people is authorized by statute, the notice of appeal shall be filed in the Court of Appeals within 49 days after the entry of judgment or order appealed from. The Court of Appeals, after consideration of said appeal, shall issue a written decision answering the issues in the case and shall not dismiss the appeal as without precedential value.

The final decision of the Court of Appeals is subject to petition for certiorari to the Supreme Court.

(3) **Prosecutorial Appeals in Criminal Cases.** An appeal by the state or the people from an order dismissing one or more but less than all counts of a charging document prior to trial, including a finding of no probable cause at a preliminary hearing, shall be filed in the court of appeals unless the order is based on a determination that a statute, municipal charter provision, or ordinance is unconstitutional, in which case the appeal shall be filed in the supreme court. Appeals of orders dismissing one or more but less than all counts of a charging document shall otherwise be conducted pursuant to the procedures set forth in Rule 4.1, except petitions for rehearing and certiorari shall be permitted, and mandates shall issue, as provided by these rules.

(c) Appellate Review of Felony Sentences.

(1) **Availability of Review.** Except in those cases provided for in subsection (e) of this Rule, a person upon whom sentence is imposed for conviction of a felony shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, the public interest, and the sufficiency and accuracy of the information on which the sentence was based.

(I) If the appeal review of conviction is sought in a case where there has been a trial and conviction on the merits, appellate review of the propriety of the sentence will be a part of and be treated in the same manner as the review of the conviction.

(II) If the appeal is to review a sentence following a plea of guilty or nolo contendere, or resentencing, where the imposition of sentence was the only issue before the court, then the following abbreviated procedure for appellate review of sentences will be utilized:

(A) The notice of appeal must be filed within 49 days from the date of the imposition of sentence. The notice shall be filed with the appellate court with an advisory copy served on the clerk of the trial court which imposed the sentence. The time for filing the notice of appeal may be extended by the appellate court.

(B) Except as provided by this Rule, the Colorado Appellate Rules governing criminal appeals shall apply to appellate review of sentences.

Comment: The change in the title and deletion of subsection (d) of this rule became necessary because of repeal of C.R.S. 18-1-409(2.1) and (2.2) and repeal of C.R.S. 18-1-409.5 effective July 1, 1981. In 1984 this rule was changed to make it conform more closely to C.A.R. 4(a) and (b).

(d) Appeals of Cases in Which a Sentence of Death Has Been Imposed.

(1) **Availability of Review.** Whenever a sentence of death is imposed, the Supreme Court shall review the propriety of the sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information upon which it was based.

If the Supreme Court determines that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, or that, as a matter of law, the sentence is not supported by the evidence, a sentence of death shall not thereafter be imposed.

(2) **Procedure.** The procedure for pursuing appeals in cases in which a sentence of death has been imposed is as set forth in Rule 32.2 of the Colorado Rules of Criminal Procedure.

(3) **Record on Appeal.** In appeals under subsection (e) of this Rule, the following items shall be included in the record on appeal:

(I) The indictment or information upon which the sentence is based; a verbatim transcript of the entire sentencing proceeding; the instructions given by the trial court and tendered by the parties in the sentencing proceeding; all exhibits admitted or offered during the trial and at the sentencing proceeding; all verdict forms submitted to the jury; and the judgment, sentence, and mittimus.

(II) Such other portions of the record as may be designated under C.A.R. 10(b) or as may be ordered by the Supreme Court.

(e) Appeal by an Inmate Confined in an Institution. If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of

appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (a) amended August 23, 1984, effective January 1, 1985; (b)(2) amended July 7, 1988, effective August 1, 1988; (a) amended and effective June 18, 1992; (a) and (d) amended March 17, 1994, effective July 1, 1994; (c)(1)(I) amended and effective April 7, 1994; (a) corrected and effective January 9, 1995; entire rule amended and adopted May 17, 2001, effective July 1, 2001; (b)(1) corrected June 12, 2001, effective July 1, 2001; (b)(3) added and adopted June 27, 2002, effective July 1, 2002; (a) amended and effective September 9, 2004; (a) amended and effective November 9, 2006; (a) amended and effective February 7, 2008; (d)(2) amended and effective May 10, 2010; (a), (b)(1), (b)(2), and (c)(1)(II)(A) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Defects in Ineffective Assistance Standards Used By State Courts'', see 50 U. Colo. L. Rev. 389 (1979). For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J. 1 (1980). For article, ''Colorado Felony Sentencing'', see 11 Colo. Law. 1478 (1982).

Compliance with the rules of court is prerequisite to appellate jurisdiction, and actions undertaken to avoid application of those rules, whether by the parties or by the trial court, cannot operate to confer jurisdiction. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982).

Although adherence to strict jurisdictional notions may sometimes create a needless waste of judicial resources. In re Ross, 670 P.2d 26 (Colo. App. 1983).

Rule is procedural requirement without jurisdictional significance. Trial court's preparation and transmission of findings with an order nunc pro tunc to date of original sentencing was valid because trial court did not lose jurisdiction by initial oversight. People v. Abeyta, 677 P.2d 393 (Colo. App. 1983).

New requirement that notice of appeal be filed with the appellate court with an advisory copy served on the clerk of the trial court is jurisdictional, and strict compliance with the rule is required. Therefore, a notice of appeal erroneously filed in the trial court was of no effect under the new rules, and the trial court was without authority to grant an extension of time to correctly file a notice of appeal. Collins v. Boulder Urban Renewal Auth., 684 P.2d 952 (Colo. App. 1984).

The timely filing of notice of appeal is a jurisdictional prerequisite to appellate review. Estep v. People, 753 P.2d 1241 (Colo. 1988); Hillen v. Colo. Comp. Ins. Auth., 883 P.2d 586 (Colo. App. 1994).

Reduction of charge. In reducing a charge, the court in effect dismisses the greater charge and substitutes a lesser one. Through such action, the court does not dismiss the case in its entirety; therefore, the appeal of the case is governed by the procedures set forth in section (b)(3) of this rule and in C.A.R. 4.1, not section (b)(2), and must be filed within 10 days of the date of the order. People v. Severin, 122 P.3d 1073 (Colo. App. 2005).

Court does not pass upon plaintiff's claim that stay order was improperly entered where he did not formally protest that order by filing either a notice of appeal under this rule or a motion under C.A.R. 8. DiMarco v. Dept. of Rev., MVD, 857 P.2d 1349 (Colo. App. 1993).

This rule is inapplicable to review of orders of the industrial appeals panel. Picken v. Indus. Claim Appeals Office, 874 P.2d 485 (Colo. App. 1994).

Trial court may not correct jurisdictional defects in the appeal. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975).

Rule on appellate review of criminal sentences controls over conflicting statute, § 18-1-409, which had not been amended after rule was changed. People v. Arevalo, 835 P. 2d 552 (Colo. App. 1992).

However, § 18-1-409 prevails over a conflicting supreme court rule in substantive matters. To the extent that section (c)(1) of this rule provides that every defendant may seek review of the propriety of his or her sentence, it conflicts with the substantive provisions of § 18-1-409 (1). People v. Prophet, 42 P.3d 61 (Colo. App. 2001).

A nunc pro tunc judgment may not be used to circumvent the time requirements of the rules of procedure. Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975).

Applied in Carr v. District Court, 157 Colo. 226, 402 P.2d 182 (1965); City & County of

Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972); People v. Samora, 188 Colo. 74, 532 P.2d 946 (1975); People v. Martinez, 190 Colo. 507, 549 P.2d 758 (1976); People v. Hinchman, 40 Colo. App. 9, 574 P.2d 866 (1977); Emerick v. Greene, 40 Colo. App. 246, 575 P.2d 441 (1977); Schenk v. Indus. Comm'n, 40 Colo. App. 350, 579 P.2d 1171 (1978); People v. McKnight, 41 Colo. App. 372, 588 P.2d 886 (1978); People v. Reyes, 42 Colo. App. 73, 589 P.2d 1385 (1979); People v. Mikkleson, 42 Colo. App. 77, 593 P.2d 975 (1979); People v. Malacara, 199 Colo. 243, 606 P.2d 1300 (1980); Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980); People v. Foster, 200 Colo. 283, 615 P.2d 652 (1980); People v. Martinez, 628 P.2d 608 (Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Hunt, 632 P.2d 572 (Colo. 1981); People v. Byerley, 635 P.2d 542 (Colo. 1981); People v. District Court, 638 P.2d 65 (Colo. 1981); People v. Boivin, 632 P.2d 1038 (Colo. App. 1981); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982); People v. Rafferty, 644 P.2d 102 (Colo. App. 1982); People v. Dennis, 649 P.2d 321 (Colo. 1982); People v. Cole, 648 P.2d 687 (Colo. App. 1982); People v. Peterson, 656 P.2d 1301 (Colo. 1983); Acme Delivery Serv., Inc. v. Samsonite Corp., 663 P.2d 621 (Colo. 1983); Church v. Am. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987); People v. Harmon, 3 P.3d 480 (Colo. App. 2000); People v. Banuelos-Landa, 109 P.3d 1039 (Colo. App. 2004); Harris v. Reg'l Transp. Dist., 155 P.3d 583 (Colo. App. 2006).

II. CIVIL CASES.

Timely filing of a notice of appeal is mandatory and jurisdictional. Chapman v. Miller, 29 Colo. App. 8, 476 P.2d 763 (1970); Concelman v. Ray, 36 Colo. App. 181, 538 P.2d 1343 (1975); In re Foster, 39 Colo. App. 130, 564 P.2d 429 (1977).

Compliance with section (a) is mandatory. Failure to comply deprives the appellate court of jurisdiction and precludes a review of the merits. Bosworth Data Servs., Inc. v. Gloss, 41 Colo. App. 530, 587 P.2d 1201 (1978).

Time limitation contained in section (a) is jurisdictional. Fed. Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

The filing of a notice of appeal is mandatory and a jurisdictional prerequisite for appellate review of a lower court decision. People v. Silvola, 198 Colo. 228, 597 P.2d 583 (1979).

Strict compliance with section (a) is essential. Laugesen v. Witkin Homes Inc., 29 Colo. App. 58, 479 P.2d 289 (1970).

A judgment of paternity is subject to this rule. This rule does not list specific orders that are appealable, and in the absence of any limiting language, a judgment of paternity is subject to it. People in Interest of N.S., 2017 COA 8, 413 P.3d 172.

Any appeal of the dismissal of a claim as barred by the Colorado Governmental Immunity Act, article 10 of title 24, C.R.S., must be sought immediately within the time limits specified in this rule, or it is barred. Buckles v. State, Div. of Wildlife, 952 P.2d 855 (Colo. App. 1998).

Jurisdictional defect created which warranted dismissal. Where trial court took no action with respect to appellant's posttrial motion within 60 days after that motion was filed, that motion was ''deemed denied'', pursuant to C.R.C.P. 59(j), so that appellant's failure to file notice of appeal within 45 days after the posttrial motion was ''deemed denied'' created a jurisdictional defect in the appeal which warranted dismissal under this rule. Baum v. State Bd. for Cmty. Colls., 715 P.2d 346 (Colo. App. 1986); Anderson v. Molitor, 738 P.2d 402 (Colo. App. 1987).

Lack of a proper order determining a C.R.C.P. 59 motion was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the rule 59 motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Temporary orders as to maintenance are reviewable as a final judgment even if there has not been a final judgment in the form of a decree of dissolution. In re Nussbeck, 899 P.2d 347 (Colo. App. 1995), rev'd on other grounds, 974 P.2d 493 (Colo. 1999).

Post-trial motions for attorney fees are subject to the provisions of C.R.C.P. 59 and the effect of such motions upon the time limitations of this rule are as specified in C.R.C.P. 59. Torrez v. Day, 725 P.2d 1184 (Colo. App. 1986).

Requirements of this rule must be met for appeals of judgments for attorney fees. The award of attorney fees in a case is sufficiently separate from an underlying judgment on the merits to require that a separate notice of appeal be filed within the time limits of this rule from the judgment awarding attorney fees independently of the judgment entered on the merits of the underlying case. If this is not done, the court of appeals is not vested with subject matter jurisdiction to determine issues related to the award of attorney fees. Dawes Agency v. Am. Prop. Mortg., 804 P.2d 255 (Colo. App. 1990).

Judgment awarding prejudgment interest is not final until the amount of such interest is reduced to a sum certain. Grand County Custom Homebuilding, LLC v. Bell, 148 P.3d 398 (Colo. App. 2006).

Timely filing of motion for reconsideration of a completed post-trial ruling on an attorney fees issue tolls the time for filing a notice of appeal under this rule until the court determines the motion or the motion is deemed de-

nied after 60 days pursuant to C.R.C.P. 59(j). Jensen v. Runta, 80 P.3d 906 (Colo. App. 2003).

The court of appeals is not usually precluded from reviewing an appeal merely because the notice of appeal was premature. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994).

Calculation of timeliness of notice of appeal. The timeliness of a notice of appeal is calculated from the date the judgment appealed from is entered on the register of actions. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

Construction given "announced" within context of section (a) for purposes of resolving timeliness of notices of appeal. Oral ruling on posttrial motions in presence of parties and their counsel did not constitute ''announcement'' of trial court's judgment. Judgment was not ''announced'' until signing of the order in its final form thereby deferring commencement of the running of the time to appeal until the parties were notified by mail of such action. City of Colo. Springs v. Timberland Assocs., 783 P.2d 287 (Colo. 1989).

For purposes of timeliness of notice of appeal, order of dismissal is final judgment and motion for reconsideration operated to suspend the running of time until the ruling thereon. Small v. Gen. Motors, 694 P.2d 374 (Colo. App. 1984).

Failure to file timely notice of appeal requires dismissal. An appeal must be dismissed when appellant has failed to file a timely notice of appeal under section (a). Fed. Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

Jurisdictionally defective notice insufficient. A notice of appeal which is jurisdictionally defective is not a ''timely notice of appeal'' as contemplated in section (a). Watered Down Farms v. Rowe, 39 Colo. App. 169, 566 P.2d 710 (1977), rev'd on other grounds, 195 Colo. 152, 576 P.2d 172 (1978).

Notice of appeal not timely filed. Earlier notice of appeal, which related to probate of will, did not provide notice of appeal of order vacating notices of lis pendens to estate property, and since no timely appeal was filed, court lacked jurisdiction over appeal. Matter of Estate of Anderson, 727 P.2d 867 (Colo. App. 1986).

Wife's creditor's claim was barred because she failed to timely file a notice of appeal for that specific claim. Although wife filed two claims on the same day addressing different elements of a singular probate case, each claim was distinctive, and the probate court ruled on each claim on separate dates. Because wife's creditor's claim was governed by a proceeding independent of the petition for spouse's elective share, the probate court's order barring wife's creditor's claim was a final order, and wife failed to timely appeal that particular claim pursuant to section (a). In re Estate of Gadash, 2017 COA 54, 413 P.3d 272.

Proponent's notice of appeal as to the probate court's November order denying a partial summary judgment was timely filed in March since the November court order adjudicated fewer than all of proponent's pending claims in the proceedings and, therefore, did not constitute a final judgment, but the court's intervening February order resolved the remaining issue pending between the parties. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Notice of appeal timely filed when filed within 45 days of amended order. In trial involving title to a road segment, original order expressly deferred determination of road segment's width to a later date, and the notice of appeal was timely filed after trial court amended the order to incorporate the road segment's width. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Defendant's notice of appeal from automatic denial of motion to alter and amend judgment pursuant to C.R.C.P. 59(j) was untimely and prevents prosecution of the appeal. Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

When second motion to alter or amend not prerequisite to filing of notice. Where an appellant seeks no greater or different relief on appeal than that asked of the trial court in the motion directed to the original judgment, where appellant is not urging any new alleged errors arising from the amended judgment, and where the amended judgment is not the result of a post-judgment hearing involving controverted issues of fact, the appellant need not file another motion to alter or amend or for a new trial after entry of the amended judgment as a prerequisite to the filing of his notice of appeal. In re Foster, 39 Colo. App. 130, 564 P.2d 429 (1977).

Effect of filing motion for new trial. The running of the time for filing a notice of appeal is terminated upon the timely filing of a motion for new trial, and the time begins to run anew when that motion is denied. A subsequent motion for new trial that raises issues that either were or could have been raised in the movant's prior motion does not affect the running of the time for filing the notice of appeal. Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Denial of motion for new trial starts filing period. Until such time as the motion, for new trial is denied, plaintiff's time within which it may file an appeal in the supreme court does not even start to run. Commercial Credit Corp. v. Frederick, 164 Colo. 5, 431 P.2d 1016 (1967).

Where final order appealed from is denial of a C.R.C.P. 60(b) motion for relief from

judgment, and C.R.C.P. 59 motion to reconsider such denial has been filed, time for filing notice of appeal runs from denial of C.R.C.P. 59 motion, not from the date of the underlying judgment. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Final entry of judgment for purposes of timely notice of appeal under this rule based on denial of new trial motion is date on which court filed written judgment in fixed amount on special verdict. Vallejo v. Eldridge, 764 P.2d 417 (Colo. App. 1988).

Rule 60(b) motion is appealable independently of an underlying judgment, and, where the notice of appeal was timely as to the trial court's order denying defendant's motion to set aside the judgment dismissing the action, the appellate court has jurisdiction to consider it. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

A notice of appeal must be filed within 45 days from the entry of an order granting or denying a motion filed pursuant to C.R.C.P. 59. Campbell v. McGill, 810 P.2d 199 (Colo. 1991).

When a party timely files a C.R.C.P. 59 motion, the running of the 45 days for the notice of appeal under section (a) of this rule is terminated and does not begin to run anew until either a ruling on the motion within 60 days or when the motion is deemed denied at the end of the 60-day period. Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

If a C.R.C.P. 59 motion is timely filed, the time for filing a notice of appeal commences when the trial court determines that motion or when the motion is deemed denied under the rule. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

One method by which to calculate the forty-nine-day period is from the date the court grants or denies a C.R.C.P. 59 motion. Semler v. Hellerstein, 2016 COA 143, 428 P.3d 555, rev'd on other grounds sub nom. Bewley v. Semler, 2018 CO 79, 432 P.3d 582.

Thus, the timely filing of a motion pursuant to C.R.C.P. 59 tolls the time for filing a notice of appeal. Goodwin v. Homeland Cent. Ins. Co., 172 P.3d 938 (Colo. App. 2007); Semler v. Hellerstein, 2016 COA 143, 428 P.3d 555, rev'd on other grounds sub nom. Bewley v. Semler, 2018 CO 79, 432 P.3d 582.

Filing notice gives extra time to all parties. The timely filing of a notice of appeal by any party affords an additional 14 days to all other parties, regardless of whether the party subsequently appealing was an appellee in the initial appeal. Kitto v. Gilbert, 39 Colo. App. 374, 570 P.2d 544 (1977).

Effect of filing motion to alter or amend judgment. The filing of a motion to alter or amend a judgment tolls the running of the time for filing notice of appeal. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Amendment of judgment does not extend filing period. Generally where an appellant procures an amendment of a judgment, the time period in which to file an appeal will not be extended. In re Everhart, 636 P.2d 1321 (Colo. App. 1981); Mosley v. Indus. Claim Appeals Office, 78 P.3d 1150 (Colo. App. 2003).

Neither does petition to show cause. The filing of a petition to show cause in the supreme court within a 10-day period following entry of final judgment, coupled with the filing of a motion in a trial court to suspend proceedings, does not stay the time to file a motion for a new trial under C.R.C.P. 59 or the time to proceed under C.A.R. 11 or this rule. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957).

Nor does pendency of motion for attorney fees and costs. The pendency of such a motion does not preclude a judgment on the merits from becoming final or toll the running of the 45-day period for filing a notice of appeal, at least where attorney fees are sought pursuant to a statutory fee-shifting provision rather than as damages. Goodwin v. Homeland Cent. Ins. Co., 172 P.3d 938 (Colo. App. 2007).

Parties may not waive requirement of timely filing. Parties may not by their independent action amend or waive the jurisdictional requirement of timely filing of a notice of appeal under section (a). Concelman v. Ray, 36 Colo. App. 181, 538 P.2d 1343 (1975).

Court may extend the time for filing a notice of appeal upon a showing of excusable neglect only in cases that are appealed from a trial court. Section (a) does not apply to appeals from rulings of an administrative agency. Martinez v. Colo. State Pers. Bd., 28 P.3d 978 (Colo. App. 2001).

Upon showing of excusable neglect, trial court may extend the time for filing the notice of appeal for a period not to exceed 30 days. Chapman v. Miller, 29 Colo. App. 8, 476 P.2d 763 (1970).

Finding of excusable neglect is supported by the record and binding upon review. F.W. Woolworth Co. v. State Dept. of Rev., 699 P.2d 1 (Colo. App. 1984).

Reason for late filing critical in determination of excusable neglect. Although the number of days that a filing is late may be one factor in determining whether neglect is excusable for purposes of extending time to file notice of appeal, the critical question is the reason for the late filing. Bosworth Data Servs., Inc. v. Gloss, 41 Colo. App. 530, 587 P.2d 1201 (1978).

Negligence of counsel generally is not considered "excusable neglect" which would justify the late filing of a notice of appeal under section (a). Trujillo v. Indus. Comm'n, 648 P.2d 1094 (Colo. App. 1982).

Nor attorney's press of work. The press of work or other activities of an attorney do not constitute excusable neglect. Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970); Laugesen v. Witkin Homes, Inc., 29 Colo. App. 58, 479 P.2d 289 (1970).

Miscounting days within which to file notice of appeal does not constitute excusable neglect. Bosworth Data Servs., Inc. v. Gloss, 41 Colo. App. 530, 587 P.2d 1201 (1978); Kronkow, Inc. v. Wood, 44 Colo. App. 462, 615 P.2d 71 (1980).

Reliance on post office's assurance of timely delivery of notice of appeal did not constitute excusable neglect. Ford v. Henderson, 691 P.2d 754 (Colo. 1984).

Reliance on office staff to make appropriate filings did not constitute excusable neglect. Hillen v. Colo. Comp. Ins. Auth., 883 P.2d 586 (Colo. App. 1994).

Doctrine of "unique circumstances" and finding of excusable neglect. When counsel erroneously filed motion for extension of time to file notice of appeal of an order terminating parental rights with trial court instead of appellate court within 45-day period and counsel relied on trial court's erroneous extension of deadline and filed notice of appeal after the 45-day period but within the 30-day extension period for excusable neglect, court of appeals had jurisdiction to consider a request for late filing under ''unique circumstances'' doctrine and failure to find excusable neglect to justify extension of time was abuse of discretion. P.H. v. People in Interest of S.H., 814 P.2d 909 (Colo. 1991).

Refusal of extension was not abuse of discretion. Where there is no showing of excusable neglect, there is no abuse of discretion on the part of the trial court in its refusal to extend the time for filing the notice of appeal. Long v. Ross, 30 Colo. App. 436, 494 P.2d 128 (1972).

Forty-five-day time limit for filing appeal with court of appeals in tax assessment cases, rather than statutory time period, is applicable when appeal has first been filed with state board of assessment appeals and not in district court. Denver v. Bd. of Assessment Appeals, 748 P.2d 1306 (Colo. App. 1987).

"Unique circumstances" doctrine may be applied to allow the filing of notice of appeal in a kinship adoption proceeding governed by C.A.R. 4(a) beyond the 75-day jurisdictional deadline. Court shall consider the totality of the circumstances in decision to apply doctrine. In re C.A.B.L., 221 P.3d 433 (Colo. App. 2009).

Doctrine of unique circumstances not applicable because case does not involve a fundamental liberty interest and the doctrine should be rarely invoked. Petition of Heostis v. Dept. of Educ., 2016 COA 6, 375 P.3d 1232.

III. CRIMINAL CASES.

Appellate court may, for good cause shown, enlarge the time for filing under section (b). People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973); People v. Baker, 104 P.3d 893 (Colo. 2005).

Where public defender was notified of appointment to represent petitioner on last day on which petitioner could file late notice of appeal, court of appeals should have either allowed notice of appeal or given petitioner additional time to gather more supporting information rather than denying motion for out of time filing. Weason v. Colo. Court of Appeals, 731 P.2d 736 (Colo. 1987).

A motion filed after entry of the order challenged on appeal does not extend the time for the prosecution to file its notice past the 45 days allowed by this rule. People v. Retallack, 804 P.2d 279 (Colo. App. 1990).

But trial court cannot extend time for filing past 75 days. A trial court has no authority or jurisdiction to extend the time for filing of notice of appeal from criminal conviction past 60 days (now 75 days) after the entry of the judgment. People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973).

The excusable neglect provision does not apply to appeals by the people. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

The civil cross-appeal rule that allows for sequential submissions does not apply in criminal cases. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

An order granting a new trial is a final order pursuant to § 16-12-102, therefore, prosecution must file its appeal within 45 days of the order. People v. Curren, 228 P.3d 253 (Colo. App. 2009).

Order granting motion for a new trial not final judgment for purposes of appeal, and therefore people's failure to file appeal within 45 days of such order did not render subsequent appeal untimely. People v. Campbell, 738 P.2d 1179 (Colo. 1987).

Alleged errors must be preserved by objection and motion. Proper procedure necessitates that alleged error, including errors of a constitutional nature, be preserved by raising same by objection during the trial and by motion for a new trial. People v. Sanchez, 180 Colo. 119, 503 P.2d 619 (1972).

Timely but defective notice was adequate to invoke appellate jurisdiction. People v. Bost, 770 P.2d 1209 (Colo. 1989).

Perfection of appeal divests trial court of jurisdiction. Unless otherwise specifically authorized by statute or rule, once an appeal has been perfected, the trial court has no jurisdiction to issue further orders in the case relative to the order or judgment appealed from. Consequently, should it be necessary for the trial court

to act, other than in aid of the appeal or pursuant to specific statutory authorization, the proper course would be for a party to obtain a limited remand from the appellate court. People v. Dillon, 655 P.2d 841 (Colo. 1982).

Sentence imposed after revocation of probation is final judgment. Where the trial court has initially imposed sentence on a defendant and has suspended execution of the sentence and granted probation, which is thereafter revoked, the resulting sentence imposed after revocation of probation is the final judgment. People v. Jenkins, 40 Colo. App. 140, 575 P.2d 13 (1977).

As is reversal of order imposing costs. The final judgment for purposes of appeal was entered when trial court reversed its previous order imposing costs on the defendant, and therefore state's appeal taken more than 30 days after sentencing was proper. People v. Fisher, 189 Colo. 297, 539 P.2d 1258 (1975).

When the court vacates a sentence, the time to file an appeal starts to run from the date when the court imposes the new sentence. People v. Hunsaker, 2013 COA 5, 411 P.3d 36, aff'd, 2015 CO 46, 351 P.3d 388.

Because § 16-12-102 (1) authorizes the people to appeal any decision of the trial court in a criminal case upon any question of law, section (b)(2) of this rule requires an appellate court to issue a written decision. People v. Wilburn, 2013 COA 135, 343 P.3d 998.

IV. REVIEW OF SENTENCES.

Misdemeanor sentence. There is no provision for appellate review of the propriety of a misdemeanor sentence. People v. Roberts, 668 P.2d 977 (Colo. App. 1983).

Sentencing by its very nature is a discretionary decision which requires the weighing of various factors and striking a fair accommodation between the defendant's need for rehabilitation or corrective treatment and society's interest in safety and deterrence. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

Wide latitude will be given the trial court's final decision since it is in the best position to balance the many factors which must be considered in tailoring an appropriate sentence in each individual case. People v. Valencia, 630 P.2d 85 (Colo. 1981).

But discretion not unrestricted. The discretion implicit in the sentencing decision is not an unrestricted discretion devoid of reason or principle. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

Sentencing decisions should reflect rational selection from various sentencing alternatives in a manner consistent with the dominant aims of the sentencing process. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

Record to include reasons for imposition of sentence. Hereafter in felony convictions involving the imposition of a sentence to a correctional facility, the sentencing judge must state on the record the basic reasons for the imposition of sentence. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

The statement of reasons that sentencing judge must state on record need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

Factors considered in sentencing. Some of the more common considerations significant to the sentencing process are: The gravity of the offense in terms of harm to person or property; the gravity of the offense in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released forthwith; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation, and the likelihood of depreciating the seriousness of the offense were a less drastic sentencing alternative chosen. People v. Watkins, 200 Colo. 163, 613 P.2d 633 (1980).

In reviewing the district court's imposition of sentence, the supreme court is to consider the following factors: The nature of the offense, the character of the offender, the public interest in safety and deterrence, and the sufficiency and accuracy of the information on which the sentence was based. People v. Mattas, 645 P.2d 254 (Colo. 1982).

An appellate court must consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence in reviewing a sentence claimed to be excessive. People v. Valencia, 630 P.2d 85 (Colo. 1981).

Review of propriety of sentence limited. Neither the court of appeals nor the supreme court of Colorado has jurisdiction to review the propriety of a sentence except on direct appeal from the initial sentence, and then only under the limitations established in this rule and in § 18-1-409. Mikkleson v. People, 199 Colo. 319, 618 P.2d 1101 (1980).

Record to justify extended term sentence. Where a sentence is imposed for an extended term, the record must clearly justify the decision of the sentencing judge. People v. Valencia, 630 P.2d 85 (Colo. 1981).

Sentence cannot be modified absent abuse of discretion. In reviewing the record in a proceeding under this rule, the sentence imposed cannot be modified unless it appears to the appellate court that the trial judge abused his discretion in imposing the sentence. People v. Walker, 189 Colo. 545, 542 P.2d 1283 (1975).

Trial court does not err in failing to hold hearing. When a defendant does not raise a question or move for a new trial, but raises the question for the first time on appeal of conviction, the trial court does not err in failing to hold a hearing "sua sponte" to determine such. People v. Sanchez, 180 Colo. 119, 503 P.2d 619 (1972).

Invoking fifth amendment at codefendant's trial. Where a defendant is appealing his sentence and fears that his testimony in the trial of his codefendant might be used at a subsequent hearing to enhance the sentence should it be vacated, he may invoke his fifth amendment right against self-incrimination. People v. Villa, 671 P.2d 971 (Colo. App. 1983).

The language of section (b)(2) is plain and unambiguous and dictates that if an appeal by the People is authorized by statute, the court of appeals must issue a written decision. People v. Jackson, 972 P.2d 698 (Colo. App. 1998).

Rule 4.1. Interlocutory Appeals in Criminal Cases

(a) Grounds. The state may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion under Crim. P. 41(e) and (g) and Crim. P. 41.1(i) made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion and to the Supreme Court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) Limitation on Time of Issuance. An interlocutory appeal must be filed within 14 days after the entry of the order complained of. It shall not be a condition for the filing of such interlocutory appeal that a motion for a new trial or rehearing shall have been filed and denied in the trial court.

(c) How Filed. To file an interlocutory appeal the state, within the time fixed by this Rule, shall file the notice of appeal with the clerk of the appellate court with an advisory copy served on the clerk of the trial court.

(d) Record. The record for an interlocutory appeal shall consist of the information or indictment, the plea of the defendant or the defendants, the motions filed by the defendant or defendants on the grounds stated in section (a) above, the reporter's transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the parties may designate (subject to the provisions in C.A.R. 10(c)(3) pertaining to exhibits of bulk), the order of court ruling on said motions together with the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. After the filing of the record, such other exhibits or reasonable copies, facsimiles, or photographs thereof shall be transmitted by the clerk of the trial court to the appellate court as the appellate court may order. The record shall be filed within 14 days of the date of filing the notice of appeal.

(e) Appearances. The state in these proceedings shall be represented by the district attorney, and briefs shall be prepared by the district attorney's office and responsive briefs or pleadings served upon that office.

(f) Briefs. Within 14 days after the record has been filed in the Supreme Court, the state shall file its brief, and within 14 days thereafter, the appellee shall file the answer brief, and the state shall have 7 days after service of the answer brief to file any reply brief.

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

(h) Time. The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

Source: (b), (d), and (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 23, 2014; (d) amended and adopted October 26, 2017, effective January 1, 2018.

ANNOTATION

Rule not violative of equal protection. The provisions of this rule permitting only the prosecution to enter an interlocutory appeal are not violative of equal protection, since the prosecution is precluded from placing the defendant in double jeopardy after the final verdict has been reached, and its only meaningful avenue of appeal must be found in a prejudgment proceeding. People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980).

This rule requires filing of an interlocutory appeal within ten days after entry of an appealable order. However, where there was no indication that entry of a motion to reconsider was an attempt to circumvent the appeals process or delay the proceedings, the prosecution complied with this rule by filing an appeal within ten days after the modified ruling. People v. Melton, 910 P.2d 672 (Colo. 1996).

In order to toll the time for filing an interlocutory appeal, a motion to reconsider a trial court order of suppression must be filed within ten days of the date of the order of suppression. People v. Powers, 47 P.3d 686 (Colo. 2002).

This rule provides an appeal for the prosecution rather than defendant, therefore, the court does not have jurisdiction to address any issues resolved by the trial court in favor of the prosecution. People v. Gothard, 185 P.3d 180 (Colo. 2008).

Issues raised by defendant are not normally included. An interlocutary appeal by the people under this rule does not normally include issues raised by the defendant. People v. Barton, 673 P.2d 1005 (Colo. 1984).

The supreme court has no jurisdiction to address a ruling adverse to the defendant in an interlocutory appeal under this rule. People v. Oates, 698 P.2d 811 (Colo. 1985); People v. Griffin, 727 P.2d 55 (Colo. 1986); People v. Weston, 869 P.2d 1293 (Colo. 1994).

This rule does not interfere with defendant's rights to appeal his conviction after a verdict has been reached. People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980).

This rule is designed as procedural device to facilitate review, and does not represent a constitutional right on the part of either the defendant or the state. People v. Renfrow, 172 Colo. 399, 473 P.2d 957 (1970).

Reduction of charge. In reducing a charge, the court in effect dismisses the greater charge and substitutes a lesser one. Through such action, the court does not dismiss the case in its entirety; therefore, the appeal of the case is governed by the procedures set forth in C.A.R. 4(b)(3) and in this rule, not C.A.R. 4(b)(2), and must be filed within 10 days of the date of the order. People v. Severin, 122 P.3d 1073 (Colo. App. 2005).

Interlocutory appeals may not be employed to obtained pretrial review of issues not covered by this rule. People v. Dailey, 639 P.2d 1068 (Colo. 1982); People v. Cummings, 706 P.2d 766 (Colo. 1985); People v. Weston, 869 P.2d 1293 (Colo. 1994).

Interlocutory appeal rule may not be employed to "piggyback" issues not embraced by that rule for pretrial review. People v. Morrison, 196 Colo. 319, 583 P.2d 924 (1978).

Where a suppression order is based on conclusions that statements were the product of an illegal arrest and of a custodial interrogation not preceded by Miranda warnings, a district court must make sufficient findings of fact and conclusions of law to identify each of the statements at issue and to permit appellate review of its rulings with regard to whether the statements must be suppressed. People v. Haurey, 859 P.2d 889 (Colo. 1993).

Appellate court has the responsibility of ascertaining whether the trial court's legal conclusions are supported by sufficient evidence and whether the trial court applied the correct legal standard. People v. Brazzel, 18 P.3d 1285 (Colo. 2001).

Trial court's findings of fact are entitled to deference by a reviewing court, but when the absence of factual findings regarding key contested issues hinders appellate review, or when unresolved evidentiary conflicts exist with regard to material facts, case must be remanded to the trial court for further fact-finding. People v. Brazzel, 18 P.3d 1285 (Colo. 2001).

Review of suppression hearings. This rule is designed to review rulings of the trial court made upon suppression hearings under Crim. P. 41(e) and Crim. P. 41(g). People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970); People v. Cobbin, 692 P.2d 1069 (Colo. 1984).

Interlocutory appeals are limited to motions to suppress, and it is contemplated that the motion be disposed of prior to trial. People v. Voss, 191 Colo. 338, 552 P.2d 1012 (1976).

And only from adverse rulings. Interlocutory appeals under this rule may only be appealed from adverse rulings on Crim. P. 41 motion. People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971). See People v. McNulty, 173 Colo. 491, 480 P.2d 560 (1971).

Unless an adverse trial court ruling is within the scope of Crim. P. 41(e) and Crim. P. 41(g), it is not within an appellate court's jurisdiction on interlocutory appeal under this rule. People v. Patterson, 175 Colo. 19, 485 P.2d 494 (1971). See People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970); People v. Braunthal, 31 P.3d 167 (Colo. 2001).

Only three circumstances for interlocutory appeal of a suppression order. Review is proper where evidence was suppressed due to:

(1) An unlawful search and seizure; (2) an involuntary confession or admission; or (3) an improperly ordered or insufficiently supported, nontestimonial identification. People v. Braunthal, 31 P.3d 167 (Colo. 2001).

Prosecution's brief and the record do not support certification that defendant's statements form a substantial part of the evidence where defendant's statements were made during transport as a part of a non-material, benign interchange meant to solace the defendant and where the officer did not immediately prepare any notes or reports documenting the statements. People v. MacCallum, 925 P.2d 758 (Colo. 1996).

Statements suppressed by trial court held to constitute substantial part of proof of charges pending against defendant; therefore, prosecution was entitled to bring interlocutory appeal. People v. Mendoza-Rodriguez, 790 P.2d 810 (Colo. 1990).

Suppression order based upon sanctions was not reviewable under this rule. However, the court could consider the issue on an interlocutory appeal under C.A.R. 21. People v. Casias, 59 P.3d 853 (Colo. 2002).

Supreme court will not expand jurisdiction. The supreme court will not stray beyond the scope of its interlocutory appeal jurisdiction set forth in this rule and will not consider rulings issued in a preliminary hearing held in conjunction with a motion to suppress. People v. Singleton, 174 Colo. 138, 482 P.2d 978 (1971).

If the evidence or statement suppressed is not a ''substantial part'' of the proof which may be offered against the defendant, the supreme court will not address the substantive issues raised by the interlocutory appeal. People v. Harding, 671 P.2d 975 (Colo. App. 1983).

Where review of the record provided on appeal convinced court that the defendant's statement, suppressed under Crim. P. 41(g) did not form a ''substantial part'' of the proof to be offered against the defendant, the court refused to address the substantive issues raised by the prosecution. People v. Valdez, 621 P.2d 332 (Colo. 1981).

An order granting a motion to sever a count for separate trial is not within scope of rule. People v. Wallace, 724 P.2d 670 (Colo. 1986).

Proceeding is interlocutory in nature if it intervenes between the commencement and the final decision of a case. People v. Medina, 40 Colo. App. 490, 583 P.2d 293 (1978).

An appeal could not be interlocutory where it was from a final order after trial. People v. Voss, 191 Colo. 338, 552 P.2d 1012 (1976).

Ruling granting a defendant's pretrial motion to suppress is subject to interlocutory appeal under this rule. People v. Nunez, 658 P.2d 879 (Colo. 1983).

Lineup identification is question for trial, and not interlocutory appeal. The question of whether eyewitness identification evidence was obtained from a lineup that was overly suggestive is a matter to be resolved at trial; it is not within the ambit of the interlocutory appeal rule since it is not a proper subject of a pretrial suppression hearing. People v. Thornburg, 173 Colo. 230, 477 P.2d 372 (1970).

Order suppressing statement which prosecution sought to use only for impeachment purposes if defendant elected to testify is not subject to interlocutory appeal because it was not a substantial part of the prosecution's proof. People v. Garner, 736 P.2d 413 (Colo. 1987).

But suppression order was properly the subject of an interlocutory appeal under this rule where the suppressed statements concerned a murder conspiracy, jointly fabricated alibi, and videotaped confession that constituted a substantial part of the proof of the pending charges. People v. Matheny, 46 P.3d 453 (Colo. 2002).

Court exercised its discretion to review district court's full pretrial order even though order did not ''neatly'' fall within the scope of this rule. People v. Luna-Solis, 2013 CO 21, 298 P.3d 927.

A ruling limiting the scope of cross-examination of a witness in a criminal case is not appealable under this rule. People v. Haurey, 859 P.2d 889 (Colo. 1993).

Record did not support the prosecution's certification that statements were a substantial part of the evidence. People v. Mounts, 801 P.2d 1199 (Colo. 1990).

Interlocutory appeal unavailable in delinquency proceedings. An interlocutory appeal is not available to either the state or the respondent in a delinquency proceeding under the Colorado children's code. People in Interest of P.L.V. v. P.L.V., 172 Colo. 269, 472 P.2d 127 (1970); People in Interest of G.D.K. v. G.D.K., 30 Colo. App. 54, 491 P.2d 81 (1971). See People in Interest of P.L.V., 176 Colo. 342, 490 P.2d 685 (1971).

Findings on second motion held sufficient to support ruling in earlier case. Where in one case the district judge, in denying the motion to suppress, did not make sufficient findings, but in another case the findings upon denial of the motion to suppress were amply sufficient, since the findings in the second case were by the same court, although by a different judge, since the rulings by both judges were the same, and since the parties and the search — and in substantial effect the testimony — are identical, the supreme court is justified in considering the findings in the second case as governing the first case. It would be useless to remand the first case for findings. People v. Ramey, 174 Colo. 250, 483 P.2d 374 (1971).

Applied in People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972); People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978); People v. Lott, 197 Colo. 78, 589 P.2d 945 (1979); People v. Hillyard, 197 Colo. 83, 589 P.2d 939 (1979); People in Interest of M.R.J., 633 P.2d 474 (Colo. 1981); People v. Ferguson, 653 P.2d 725 (Colo. 1982); People v. Lindsey, 660 P.2d 502 (Colo. 1983); People v. Cobbin, 692 P.2d 1069 (Colo. 1984); People v. Lingo, 806 P.2d 949 (Colo. 1991); People v. Washington, 865 P.2d 145 (Colo. 1994); People v. Reyes, 956 P.2d 1254 (Colo. 1998); People v. Legler, 969 P.2d 691 (Colo. 1998); People v. Holmes, 981 P.2d 168 (Colo. 1999); People v. Winpigler, 8 P.3d 439 (Colo. 1999); People v. Crippen, 223 P.3d 114 (Colo. 2010).

Rule 4.2. Interlocutory Appeals in Civil Cases

(a) Discretionary Interlocutory Appeals. Upon certification by the trial court, or stipulation of all parties, the court of appeals may, in its discretion, allow an interlocutory appeal of an order in a civil action. This rule applies only to cases governed by C.R.S. 13-4-102.1.

(b) Grounds for Granting Interlocutory Appeal. Grounds for certifying and allowing an interlocutory appeal are:

(1) Where immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and

(2) The order involves a controlling and unresolved question of law. For purposes of this rule, an ''unresolved question of law'' is a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court.

(c) Procedure in the Trial Court. The party seeking to appeal shall move for certification or submit a stipulation signed by all parties within 14 days after the date of the order to be appealed, stating that the appeal is not being sought for purposes of delay. The trial court may, in its discretion, certify an order as immediately appealable, but if all parties stipulate, the trial court must forthwith certify the order. Denial of a motion for certification is not appealable.

(d) Procedure in the Appellate Court. If the trial court certifies an order for an interlocutory appeal, the party seeking an appeal shall file a petition to appeal with the clerk of the court of appeals with an advisory copy served on the clerk of the trial court within 14 days of the date of the trial court's certification.

(1) *Docketing of Petition and Fees; Form of Papers.* Upon the filing of a petition to appeal, appellant shall pay to the clerk of the court of appeals the applicable docket fee. All papers filed under this rule shall comply with C.A.R. 32.

(2) *Number of Copies to be Filed and Served.* An original of any petition or brief shall be filed. One set of supporting documents shall be filed.

(3) *Content of Papers and Service.*

(A) The petition shall contain a caption that complies with C.A.R. 3(d)(1) and C.A.R. 32.

(B) To enable the court to determine whether the petition should be granted, the petition shall disclose in sufficient detail the following:

(i) The identities of all parties and their status in the proceeding below;

(ii) The order being appealed;

(iii) The reasons why immediate review may promote a more orderly disposition or establish a final disposition of the litigation and why the order involves a controlling and unresolved question of law;

(iv) The issues presented;

(v) The facts necessary to understand the issues presented;

(vi) Argument and points of authority explaining why the petition to appeal should be granted and why the relief requested should be granted; and

(vii) A list of supporting documents, or an explanation of why supporting documents are not available.

(C) The petition shall include the names, addresses, email addresses and telephone and fax numbers, if any, of all parties to the proceeding below; or, if a party is represented by counsel, the attorney's name, address, email address and telephone and fax numbers.

(D) The petition shall be served upon each party and the court below.

(4) *Supporting Documents.* A petition shall be accompanied by a separate, indexed set of available supporting documents adequate to permit review. Some or all of the following documents may be necessary:

(A) The order being appealed;

(B) Documents and exhibits submitted in the proceeding below that are necessary for a complete understanding of the issues presented;

(C) A transcript of the proceeding leading to the order below.

(5) *No Initial Response to Petition Allowed.* Unless requested by the court of appeals, no response to the petition shall be filed prior to the court's determination of whether to grant or deny the petition.

(6) *Briefs.* If the court grants the petition to appeal, the petition to appeal shall serve as appellant's opening brief. The appellee shall file an answer brief and the appellant may file a reply brief according to a briefing schedule established by the court in its order granting the petition to appeal. The petition and briefs shall comply with the limitations on length contained in C.A.R. 28(g).

(7) *Oral Argument.* Oral argument is governed by C.A.R. 34.

(8) *Petition for Rehearing.* In all proceedings under this Rule 4.2, where the court of appeals has issued an opinion on the merits of the interlocutory appeal, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

(e) Stay of Trial Court Proceedings.

(1) The filing of a petition under this rule does not stay any proceeding below or the running of any applicable time limit. If the appellant seeks temporary stay pending the court's determination of whether to grant the petition to appeal, a stay ordinarily shall be sought in the first instance from the trial court. If a request for stay below is impracticable or not promptly ruled upon or is denied, the appellant may file a separate motion for temporary stay in the court of appeals supported by accompanying materials justifying the requested stay.

(2) An order granting the petition to appeal by the court of appeals automatically stays all proceedings below until final determination of the interlocutory appeal in the court of appeals unless the court, sua sponte, or upon motion lifts such stay in whole or in part.

(f) Effect of Failure to Seek or Denial of Interlocutory Review. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal from entry of the final judgment.

(g) Supreme Court Review. Denial of a petition to appeal is not subject to certiorari review. A decision of the court of appeals on the merits shall be subject to certiorari review. No provision of this rule limits the jurisdiction of the Supreme Court under C.A.R. 21.

(h) All matters in the Court of Appeals under this rule shall be heard and determined by a special or regular division of three judges as assigned by the Chief Judge.

Source: Entire rule added and effective January 13, 2011; (c) and IP(d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 23, 2014.

ANNOTATION

Law reviews. For article, ''Interlocutory Appeals in Civil Cases Under C.A.R. 4.2'', see 41 Colo. Law. 67 (Apr. 2012). For article, ''Knowing When to Change Trains: The Ins and Outs of Interlocutory Appeals'', see 41 Colo. Law. 31 (June 2012).

Interlocutory resolution would not promote a more orderly disposition. Where plaintiff petitioned for interlocutory review of district court's order that economic loss rule barred plaintiff's other claims against defendants, immediate review would not have avoided a trial.

Therefore, interlocutory resolution of the economic loss question would not promote a more orderly disposition of the litigation. Wahrman v. Golden W. Realty, 313 P.3d 674 (Colo. App. 2011).

Trial court cannot certify sua sponte an issue for interlocutory review. In Interest of M.K.D.A.L., 2014 COA 148, 410 P.3d 559.

A trial court has no authority to extend the deadline contained in section (c). This rule itself says nothing about extending the deadlines established therein. Further, a trial court lacks inherent authority to extend that deadline. Farm Deals, LLLP v. State, 2012 COA 6, 300 P.3d 921.

The 14-day deadline in section (d) is jurisdictional. A party's failure to timely file a petition to appeal deprives the appellate court of jurisdiction to consider the appeal. Farm Deals, LLLP v. State, 2012 COA 6, 300 P.3d 921.

An appellate court may, for good cause, extend the time for filing under section (d) of this rule. Pursuant to C.A.R. 26(b), an appellate court may, for good cause shown, enlarge time prescribed under the Colorado appellate rules. Farm Deals, LLLP v. State, 2012 COA 6, 300 P.3d 921.

Motion to trial court to reconsider disqualification order did not toll the provisions of section (c) requiring the filing of a motion or stipulation for certification by the trial court within 14 days after the date of the disqualification order. The trial court does not have authority pursuant to C.R.C.P 6(b) to extend the 14-day deadline for filing a motion for certification of issues in the trial court. The department of human services' motion for reconsideration was not a C.R.C.P. 59 motion. Further, C.A.R. 26(b) does not apply because the failure to timely file was not the result of excusable neglect. People in Interest of A.M.C., 2014 COA 31, 411 P.3d 90.

Generally, an issue of contract interpretation that applies well-settled principles is not a "question of law" for purposes of this rule. Rich v. Ball Ranch P'ship, 2015 COA 6, 345 P.3d 980.

Applied in Kowalchik v. Brohl, 2012 COA 25, 277 P.3d 885; Triple Crown v. Vill. Homes of Colo., 2013 COA 144, 389 P.3d 888.

Rule 5. Entry of Appearance and Withdrawal

(a) Entry of Appearance. No attorney shall appear in any matter before the court until the attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; and (d) the attorney registration number.

(b) Withdrawal. An attorney may withdraw from a case only upon order of court. Such approval shall rest in the sound discretion of the court, and shall not be granted until the attorney seeking to withdraw has made reasonable efforts to give actual notice to the client:

(1) That the attorney wishes to withdraw;

(2) That the court retains jurisdiction;

(3) That the client has the burden of keeping the court informed where notices, pleadings or other papers may be served;

(4) That the client has the obligation to prepare for all appellate proceedings, or secure other counsel to so prepare;

(5) That if the client fails or refuses to meet these burdens, the court may impose appropriate sanctions;

(6) Of the dates of any proceedings and that the holding of such proceedings will not be affected by the withdrawal of counsel;

(7) If the client is not a natural person, that it must be represented by counsel in any appellate proceeding unless it is a closely held entity and first complies with section 13-1-127, C.R.S.;

(8) That process may be served upon the client at his last known address; and

(9) Of the client's right to object within 14 days of the date of the notice.

(c) Written Notification Certificate. The attorney seeking to withdraw shall prepare a notification certificate stating that the above notification requirements have been met and the manner by which such notification was given to the client, and setting forth the client's last known address and telephone number. The notification certificate shall be filed with the court and a copy mailed to the client and all other parties. The client and opposing counsel shall have 14 days prior to entry of an order permitting withdrawal or such lesser time as the court may permit within which to file objections to the withdrawal. After order

permitting withdrawal, the client shall be notified by the withdrawing attorney of the effective date of the withdrawal and all pleadings, notices or other papers may be served on the party directly by mail at the last known address of the party until new counsel enters an appearance.

(d) Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics. The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

(e) Notice of Limited Representation Entry of Appearance and Withdrawal. An attorney may undertake to provide limited representation to a pro se party involved in a civil appellate proceeding. Upon the request and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party to file a notice of appeal and designation of transcripts in the court of appeals or the supreme court, to file or oppose a petition or cross-petition for a writ of certiorari in the supreme court, to respond to an order to show cause issued by the supreme court or the court of appeals, or to participate in one or more specified motion proceedings in either court, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance in the appellate court in which the attorney appeared, a copy of which may be filed in any other court, except that an attorney filing a notice of appeal or petition or cross-petition for writ of certiorari is obligated, absent leave of court, to respond to any issues regarding the appellate court's jurisdiction. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceedings(s) for which the attorney appears. The provisions of this C.A.R. 5(e) shall not apply to an attorney who has filed an opening or answer brief pursuant to C.A.R. 31.

(f) Termination of Representation. When an attorney has entered an appearance, other than a limited appearance pursuant to C.A.R. 5(e), on behalf of a party in an appellate court without having previously represented that party in the matter in any other court, the attorney's representation of the party shall terminate at the conclusion of the proceedings in the appellate court in which the attorney has appeared, unless otherwise directed by the appellate court or agreed to by the attorney and the party represented. Counsel may file a notice of such termination of representation in any other court.

Source: Entire rule added August 30, 1985, effective January 1, 1986; (b)(2) amended and effective April 7, 1994; (b) amended and effective April 5, 2010; (b)(9) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (e), (f), and Comment added and effective October 11, 2012; (e) amended and adopted October 26, 2017, effective January 1, 2018.

COMMENT

The purpose of C.A.R. 5(e) is to establish a procedure similar to that set forth in Colorado Rule of Civil Procedure 121 Section 1-1(5). This procedure provides assurance that an attorney who makes a limited appearance for a pro se party in a specified appellate case proceeding(s), at the request of and with the consent of the pro se party, can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court. The purpose of C.A.R. 5(f) is to make clear that when an attorney appears for a party, whom he or she has not previously represented, in an appellate court and the proceedings in that court have concluded, the attorney is not obligated to represent the party in any other proceeding on remand or in any review of the appellate court's decision by any other court. Nothing in this provision would prevent the attorney from entering a limited or general appearance on behalf

of the party in another court (for example, on a writ of certiorari to the supreme court), if agreed to by the attorney and the party.

Rule 6. No Colorado Rule

Rule 7. Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the trial court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $250 unless the trial court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the appellate court may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the trial court objections to the form of the bond or to the sufficiency of the surety. The provisions of C.A.R. 8(b) apply to a surety upon a bond given pursuant to this Rule.

ANNOTATION

Law reviews. For article, ''Bonds in Colorado Courts: A Primer for Practitioners'', see 34 Colo. Law. 59 (Mar. 2005).

An indigent plaintiff should be allowed to proceed on appeal under this rule without payment of a cost bond. In re Delahoussaye, 924 P.2d 1210 (Colo. App. 1996).

This rule does not apply to an appeal filed directly from an administrative agency. For the purposes of this rule, an administrative hearing is not a ''civil case''. Anheuser Busch, Inc. v. Indus. Claim Appeals Office, 28 P.3d 969 (Colo. App. 2001).

Applied in Caldwell v. Armstrong, 642 P.2d 47 (Colo. App. 1981).

Rule 8. Stay or Injunction Pending Appeal

(a) Motions for Stay.

(1) Initial Motion in District Court. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in Appellate Court; Conditions on Relief. A motion for relief under Rule 8(a)(1) may be made to the appellate court or to an appellate justice or judge.

(A) any such motion must:

(i) show that moving first in the district court would be impracticable, or

(ii) show that the district court has denied an application, or has failed to afford the relief requested, and state the reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements if the facts are in dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the clerk but in exceptional cases where such filing would be impracticable due to the requirements of time, the motion may be made to and considered by a single justice or judge.

(E) Except as provided in Rule 8(c), the appellate court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceedings Against Sureties. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district court clerk as the surety's agent on whom any documents affecting the surety's liability on the bond or undertaking may be served. On motion, the surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district court clerk, who must mail a copy to each surety whose address is known.

(c) When Bond Not Required. The appellate court may, in its discretion, dispense with or limit the amount of bond when the appellant is an executor, administrator, conservator, or guardian of an estate and has given sufficient bond as such. The appellate court shall not require the following to furnish bond:

(1) the state;

(2) the county commissioners of the various counties;

(3) cities;

(4) towns;

(5) school districts;

(6) charitable, educational, and reformatory institutions under the patronage or control of the state; and

(7) public officials when suing or defending in their official capacities for the benefit of the public.

(d) Bond; Release of Lien or of Notice of Lis Pendens. If a money judgment has been made a lien upon real estate, the lien will be released when a bond is given. The clerk of the court that granted a stay will issue a certificate that the judgment has been stayed. The certificate may be recorded with the recorder of the county in which the real estate is situated. The certificate may also be served on any officer holding an execution. Upon such service, all proceedings under such execution must be discontinued, and the officer must return the same to the issuing court together with the certificate served on the officer. The return must indicate what the officer has done under the execution.

Source: Entire rule amended and effective January 7, 2015.

Cross references: For stay of proceedings to enforce a judgment, see C.R.C.P. 62.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mtn. L. Rev. 618 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''Some Observations on Colorado Appellate Practice'', see 34 Dicta 363 (1957).

This rule must be observed, and the supreme court will grant the application for supersedeas only after compliance with the rule. Alsup v. Alsup, 76 Colo. 260, 230 P. 796 (1924).

Trial court's jurisdiction usually lost upon perfection of appeal. Under normal appellate procedures a trial court loses its jurisdiction over a case as soon as an appeal is perfected in an appellate court. Hylton v. City of Colo. Springs, 32 Colo. App. 9, 505 P.2d 26 (1973).

But jurisdiction reinvested upon appellate court's decision. When an appellate court announces its decision to affirm, reverse, remand, or modify then a trial court is automatically reinvested with jurisdiction. Hylton v. City of Colo. Springs, 32 Colo. App. 9, 505 P.2d 26 (1973).

No power to stay writ of habeas corpus. A court has no power to stay proceedings upon an order of discharge of a prisoner upon a writ of habeas corpus. Geer v. Alaniz, 137 Colo. 432, 326 P.2d 71 (1958).

Court does not pass upon plaintiff's claim that the stay order was improperly entered when he did not formally protest that order by filing either a notice of appeal under C.A.R. 4

or a motion under this rule. DiMarco v. Dept. of Rev., MVD, 857 P.2d 1349 (Colo. App. 1993).

Although a habeas corpus proceeding is a civil action, this rule and Rule 62, C.R.C.P., do not apply, and stays of execution are not appropriate in such a proceeding. Geer v. Alaniz, 137 Colo. 432, 326 P.2d 71 (1958).

Applied in Bernstein v. Goldberg, 81 Colo. 39, 253 P. 477 (1927); Shotking v. Atchison, T. & S.F.R.R., 124 Colo. 141, 235 P.2d 990 (1951); Williams v. Guaranty Nat'l Ins. Co., 152 Colo. 457, 382 P.2d 802 (1963).

II. APPLICATION FOR STAY OR INJUNCTION.

"Supersedeas" defined. Supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up on appeal for review. Monks v. Hemphill, 119 Colo. 378, 203 P.2d 503 (1949).

Appeal may be had without supersedeas. The appeal and supersedeas are two separate things, and the appeal can be sustained without a supersedeas. Monks v. Hemphill, 119 Colo. 378, 203 P.2d 503 (1949).

But stay of execution must be sought by supersedeas. Where a stay of execution is desired by appellant, such relief must be sought by application for supersedeas. Alden Sign Co. v. Roblee, 119 Colo. 409, 203 P.2d 915 (1949).

Record must be complete before supersedeas will be granted. While the record must be complete before an application for supersedeas will be granted, in a case involving many parties and many causes of action and counterclaims, if it is complete so far as concerns those controversies in which error is assigned, it will be sufficient. Murray v. Stuart, 77 Colo. 167, 234 P. 1113 (1925).

Supersedeas not granted until application made therefor. Whether or not a supersedeas should be granted will not be considered until an application is made for the writ. Ward v. Ward, 89 Colo. 396, 3 P.2d 415 (1931).

Trial court may issue a stay either before or after a notice of appeal is filed. Odd Fellows Bldg. & Inv. Co. v. City of Englewood, 667 P.2d 1358 (Colo. 1983).

To determine whether to stay an order denying or granting an injunction, a court must consider four factors: (1) Whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Romero v. City of Fountain, 307 P.3d 120 (Colo. App. 2011).

The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury a plaintiff will suffer absent the stay. More of one excuses less of the other. Romero v. City of Fountain, 307 P.3d 120 (Colo. App. 2011).

Supersedeas not granted to stay execution for costs. Where a supersedeas would serve only to stay an execution for costs application for the writ will be denied. Hunter v. Stapleton, 77 Colo. 456, 236 P. 1013 (1925).

Stay of proceedings ordered. Zaharia v. County Court ex rel. County of Jefferson, 673 P.2d 378 (Colo. App. 1983).

III. BOND; SURETIES; WHEN BOND NOT REQUIRED.

Law reviews. For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

Trial court erred in entering an order staying all proceedings relative to enforcement of family support order without requiring appellant to file supersedeas bond. Muck v. Arapahoe County Dist. Court, 814 P.2d 869 (Colo. 1991).

Charitable institution may execute supersedeas bond as principal. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Bond in form of cost bond not within rule. A bond in the form prescribed by § 13-16-101 for a cost bond is not a supersedeas bond and is not within this rule. Fifer v. Fifer, 120 Colo. 10, 206 P.2d 336 (1949).

Sureties subject themselves to judgment. In entering into the bond the sureties agreed, in effect, to abide by the law permitting the entry of judgment. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Burden to show cause why the execution should not issue. In a proceeding by scire facias to obtain execution upon a judgment on a supersedeas bond, the burden is upon the surety to show cause why the execution should not issue. Bosworth v. Garwood, 79 Colo. 391, 246 P. 555 (1926).

Corporation held not under patronage or control of state. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925), appeal dismissed, 273 U.S. 640, 47 S. Ct. 106, 71 L. Ed. 818 (1926).

Rule 8.1. Stays in Criminal Cases

(a) Stay of Execution.

(1) **Death.** A sentence of death shall be stayed upon the filing of a notice of appeal.

(2) **Imprisonment.** A sentence of imprisonment shall be stayed if a notice of appeal is filed and a defendant elects not to commence service of the sentence or is admitted to bail. The sentencing court shall, upon written notice of the defendant for a stay and stating that he intends to seek review, stay a sentence of imprisonment but for not more than sixty days if the defendant is not admitted to bail.

(3) **Fine.** A sentence to pay a fine or a fine and costs may be stayed by the trial court upon such terms as the court deems proper if a notice of appeal is filed. The court may require the defendant to deposit the whole or any part of the fine and costs in the registry of the trial court or to give bond for the payment thereof, or to submit to an examination of assets, and it may make an appropriate order to restrain the defendant from dissipating his assets.

(4) **Probation.** An order placing the defendant on probation shall remain in effect pending review by an appellate court unless the court grants a stay of probation.

(b) Bail. Admission to bail pending the determination of review as provided in Rule 46, Crim. P.

(c) Application for Relief Pending Review. If an application is made to an appellate court, or justice or judge thereof, for bail pending review or for an extension of time for filing the record or for any other relief which might have been granted by the trial court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the lower court action on the application did not afford the relief to which the applicant considers himself entitled.

Source: (a)(4) amended and effective January 26, 1995.

ANNOTATION

Defendant who elects not to commence service of his sentence cannot receive credit for time spent in jail pending disposition of an appeal. People v. Scott, 176 Colo. 86, 489 P.2d 198 (1971). See People v. Falgout, 176 Colo. 94, 489 P.2d 195 (1971).

Once the choice has been made, the defendant is bound by his election not to commence service of his sentence. People v. Scott, 176 Colo. 86, 489 P.2d 198 (1971).

Once probationary period has expired and an order terminating defendant's probation is entered, the prosecution cannot rely on the notice of appeal filed by defendant at the start of the probationary period as grounds that defendant's probation was stayed and that he never commenced his probation. People v. Chesnick, 797 P.2d 812 (Colo. App. 1990).

Section (a)(4) automatically stays a probation order when a notice of appeal is filed, and the trial court lacked jurisdiction to revoke defendant's probation. Defendant did not waive the right to a stay of the probation order by participating in the probation program. People v. Taylor, 876 P.2d 130 (Colo. App. 1994) (decided prior to 1995 amendment to section (a)(4)).

No automatic stay of probation order pending appeal. Under section (a)(4), as amended, the trial court retains jurisdiction to modify and terminate probation during the pendency of an appeal. People v. Widhalm, 991 P.2d 291 (Colo. App. 1999).

Applied in People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976).

Rule 9. Release in Criminal Cases

(a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. An appellate court, or justice or judge thereof, may order the release of the appellant pending the appeal.

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the trial court. If the trial court refuses release pending appeal, or imposes conditions of release, the court

shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to an appellate court, or justice or judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. An appellate court, or justice or judge thereof, may order the release of the appellant pending disposition of the motion.

ANNOTATION

The trial court retains jurisdiction to grant or deny an appeal bond even after the defendant has filed a notice of appeal. The trial court retains jurisdiction to act with respect to matters that are not relative to or do not affect the order or judgment on appeal. Since the granting or denial of an appeal bond has no impact or bearing upon the underlying conviction or related issues pending on appeal, the trial court retains jurisdiction. People v. Stewart, 26 P.3d 17 (Colo. App. 2000), rev'd on other grounds, 55 P.3d 107 (Colo. 2002).

Rule 10. Record on Appeal

(a) Composition of the Record on Appeal. The record on appeal in all cases consists of:

(1) All documents filed in the trial court case as of the date of filing of a notice of appeal or any amended notice of appeal; and

(A) Transcripts designated by counsel as set forth in section (d); or

(B) In limited circumstances, such as when the transcript is unavailable, a statement of the evidence or proceedings certified by the trial court as set forth in section (e).

(2) If a timely filed motion pursuant to C.R.C.P. 59 has been filed, the record must also include that motion, any responses, and any order on the C.R.C.P. 59 motion.

(b) Format of the Record.

(1) **Electronic Record.** If all or part of the record is maintained in electronic format by the trial court, the clerk of the trial court is authorized to transmit the record electronically in accordance with procedures established by the appellate court.

(2) **Paper Record.** If all or part of the record is transmitted in paper format, the original papers in the record must be submitted. The paper-filed portion of the record must be properly paginated and fully indexed and must be prepared and bound in accordance with procedures established by the appellate court.

(c) Transmission.

(1) **Complete Record.** The clerk of the trial court must transmit the record to the clerk of the appellate court when it is complete. If the record includes any transcripts, the clerk of the trial court will not transmit the record to the clerk of the appellate court until transcripts are available.

(2) **Time.** The record on appeal must be transmitted to the appellate court within 63 days (9 weeks) after the date of filing of the notice of appeal unless the time is shortened or extended by an order of the appellate court.

(A) For good cause shown, the appellate court may extend the time for transmitting the record. A request for extension must be made by the clerk of the trial court or the clerk of the trial court's designee within the time originally prescribed or as previously extended.

(B) Any request for extension of the period of time based upon a court reporter's inability to complete the transcript must be supported by an affidavit of the reporter specifying why the transcript has not yet been prepared and the date by which the transcript will be completed. If the reason stated in a court reporter's affidavit for the reporter's inability to complete the record is the failure of the designating party to make adequate arrangement for payment of the transcripts, the designating party must file a response to the affidavit with the appellate court within 7 days.

(C) The appellate court may direct the trial court to expedite the preparation and transmittal of the record on appeal and, upon motion or of its own initiative, take other appropriate action regarding preparation and completion of the record.

(3) **Oversized Exhibits.** Documents of unusual bulk or weight and physical exhibits will not be transmitted by the clerk of the trial court unless directed to do so by the appellate court.

(4) **Sexually Exploitative Material.** Transmission of sexually exploitative material will be in accordance with Chief Justice Directive 16-03.

(d) Designation of Transcripts.

(1) If appellant intends to include transcripts of any hearings or trial included in the record on appeal, the appellant must file a designation of transcripts with the trial court and an advisory copy with the appellate court within 7 days of the date of filing the appellant's notice of appeal.

(2) Form 8 must be used to file any designation of transcripts. Any party designating transcripts must comply with the policies adopted by the appellate and trial courts for designating transcripts.

(3) The appellant must include in the record transcripts of all proceedings necessary for considering and deciding the issues on appeal. Unless the entire transcript is to be included, the appellant must include in the designation of transcript a description of the part of the transcript that the appellant intends to include in the record and a statement of the issues to be presented on appeal. The appellee may, within 14 days after the notice of appeal is filed, file with the trial court and an advisory copy with the appellate court its own designation of transcripts if the appellee deems additional transcripts or parts thereof necessary.

(e) Statement of the Evidence or Proceedings. Upon the agreement of the parties, or in cases where a transcript of the evidence or proceedings at a hearing or trial is unavailable, the parties may file a statement of the evidence or proceedings in lieu of designating transcripts with the trial court, and the trial court must certify a statement of the evidence or proceedings in lieu of a transcript.

(f) Supplementing the Record on Appeal.

(1) **Before Record is Transmitted.** If any material part of the trial court record is omitted or missing from the trial court's record or is misstated therein by error or accident before the record is transmitted to the appellate court, the parties, by stipulation, or the trial court may direct that the omission or misstatement be corrected.

(2) **After Record is Transmitted.** If any material part of the trial court record is omitted or missing from the record by error or accident or is misstated therein after the record is transmitted to the appellate court, the appellate court, on motion or of its own initiative, may order that the supplemental record be certified and transmitted. Form 9 must be used by any party requesting to supplement the record after the record has been filed in the appellate court.

(g) Settling the Record on Appeal.

(1) If any difference arises as to whether the record truly discloses what occurred in the trial court or a portion of the record is not in the possession of the trial court, the difference must be submitted to and settled by the trial court. The party moving to settle the record must file a motion to stay the appellate court proceedings in the appellate court while the trial court considers the motion to settle the record.

(2) All other questions as to the form and content of the record must be presented to the appellate court.

Source: Amended and effective June 18, 1992; (a)(2) and (b) amended and adopted October 30, 1997, effective January 1, 1998; (a)(3) and (b) amended and adopted April 27, 1998, effective July 1, 1998; (a)(4) and (a)(5) amended and effective September 7, 2006; (b) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule and comments rewritten and adopted October 26, 2017, effective for appeals filed on or after January 1, 2018.

COMMENT

2018

[1] The rule contains the substance of former C.A.R. 11, Transmission of Record. With the adoption of the 2018 revisions, C.A.R. 11 has been deleted from the Colorado Appellate Rules.

[2] The amendments are designed to provide better organization and to create a more comprehensive records rule. With the 2018 revisions, designation of the record, found in prior versions of C.A.R. 10, has been deleted from the rule.

[3] Two new forms, Designation of Transcripts (Form 8) and Motion to Supplement the Record (Form 9) were adopted with the rule change.

Cross references: For inclusion of cost of reporter's transcript in taxable costs of appeal, see C.A.R. 39.

ANNOTATION

I. General Consideration.
II. Transmission of Record.
III. Enlargement of Time.

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Problem of Delay in the Colorado Court of Appeals", see 58 Den. L.J. 1 (1980).

Annotator's note. Since former C.A.R. 11 is similar to this rule as amended in 2017, the following annotations refer to cases decided under former C.A.R. 11 and rules antecedent to that rule.

Supreme court requires strict compliance with this rule providing the time within which a reporter's transcript must be lodged. Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970).

Compliance with the rules in the preparation, certification and lodging of the reporter's transcript is imperative if it is desired to make it a part of the record on error. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954).

This rule must be interpreted to give it a practical effect. Pueblo v. Mace, 130 Colo. 162, 273 P.2d 1015 (1954).

Applied in People v. Boivin, 632 P.2d 1038 (Colo. App. 1981).

II. TRANSMISSION OF RECORD.

Duties of appellant in appellate and trial courts. A litigant desiring a review of his case upon appeal is confronted with the accomplishment of two projects: One in the supreme court and the other in the trial court. In the supreme court he must make certain that the notice of appeal is timely filed and that his record on appeal is filed within the time prescribed by this rule, or such enlargement thereof as may be fixed. In the trial court, where preparation of the record on appeal is under the jurisdiction of the trial court in manner as provided by C.A.R. 10, he must see to it that the reporter's transcript, if he desires that it be included in the record on appeal, is prepared and lodged within the time fixed therefor by said C.A.R. 10 and this rule, or within such extended period as may be granted by appropriate court order. Cont'l Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Appellant's duty to designate portions of record he deems necessary for appeal, and to see that the record is transmitted, and the appellant will not be permitted to take advantage of his own failure to designate the pertinent portions of the transcript as part of the record on appeal. Till v. People, 196 Colo. 126, 581 P.2d 299 (1978).

Transcript may not be filed only when "convenient". Transcripts, like briefs, may not be filed whenever or wherever counsel may find it convenient. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

Transcript stricken for inexcusable delay in transmission. Cont'l Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957); Furer v. Allied Steel Co., 174 Colo. 171, 483 P.2d 212 (1971).

Where transcript of testimony is not certified to either the court of appeals or to the supreme court, the findings made by the trial court are binding upon the supreme court. Hobbs v. Smith, 177 Colo. 299, 493 P.2d 1352 (1972).

III. ENLARGEMENT OF TIME.

Petition to show cause does not stay time to proceed. The filing of a petition to show cause in the supreme court within a 10-day period following entry of final judgment, coupled with the filing of a motion in a trial court to suspend proceedings, does not stay the time to file a motion for a new trial under Rule 59, C.R.C.P., or stay the time to proceed under C.A.R. 4 and this rule. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957) (decided prior to 1983 amendment).

Enlargement of time primarily a function of the trial court. While the supreme court has

the inherent power to enlarge the time within which a reporter's transcript may be lodged, this function lies primarily and especially within the province and jurisdiction of the trial court. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954) (decided prior to 1983 amendment).

Granting of extension rests in discretion of court. The granting of an extension of the period allowed under section (a) of this rule for the filing of a reporter's transcript rests within the sound discretion of the trial court, and the action taken will not be disturbed on review in the absence of a clear showing of abuse of that discretion. Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952) (decided prior to 1983 amendment).

Effective date of final judgment in the trial court does not terminate the authority of the judge of that court. This rule extends the authority of the trial court to order extensions of time. King v. Williams, 131 Colo. 286, 281 P.2d 163 (1955) (decided prior to 1983 amendment).

Failure to apply for enlargement under C.R.C.P. 6 rarely excusable. Under C.R.C.P. 6(b)(1), enlargements of time are so readily obtainable where application is made therefor within apt time that there is rarely an occasion where failure to do so would appear to be excusable. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954).

The press of work or other activities of an attorney does not constitute excusable neglect. Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970); Laugesen v. Witkins Homes, Inc., 29 Colo. App. 58, 479 P.2d 289 (1970).

Cases Decided Under Former C.A.R. 10

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mtn. L. Rev. 618 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''Some Observations on Colorado Appellate Practice'', see 34 Dicta 363 (1957). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev. 551 (1968). For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J.1 (1980).

This rule is not inherently constitutionally invalid. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Intent of this rule, in dealing with the preparation of transcripts, is to insure that the appellate court will be given sufficient information to arrive at a just and reasoned decision. City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288 (1978); People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

For three-part test to determine whether a new trial is warranted as relief for an inadequate or missing court record, see Knoll v. Allstate Fire & Cas. Ins., 216 P.3d 615 (Colo. App. 2009).

Trial court to supervise preparation of record. The intention of this rule is that the trial court shall supervise the preparation of the record on appeal as designated by the party seeking same. Cont'l Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Appellant must overcome adverse judgment by record. A judgment entered by a court of general jurisdiction is presumed to be correct. A litigant suffering an adverse judgment has the burden of overcoming this presumption, and the supreme court must look to the record alone to determine whether the trial court acted properly in the premises. Laessig v. May D & F, 157 Colo. 260, 402 P.2d 183 (1965).

Appellant's duty to obtain record. The party prosecuting an appeal shall do any and all things necessary under this rule to obtain the record on appeal. Cont'l Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

It is the appellant's duty to designate portions of record he deems necessary for appeal, and to see that the record is transmitted, and the appellant will not be permitted to take advantage of his own failure to designate the pertinent portions of the transcript as part of the record on appeal. Till v. People, 196 Colo. 126, 581 P.2d 299 (1978); People v. Tippett, 733 P.2d 1183 (Colo. 1987).

It is the responsibility of an appellant to designate the record on appeal or such parts thereof as he deems necessary for his appeal and to ensure that the record is transmitted to the appellate court. People v. Velarde, 200 Colo. 374, 616 P.2d 104 (1980); People v. Rollins, 759 P.2d 816 (Colo. App. 1988).

Duty rests upon counsel to present a complete record in cases brought to the supreme court. Nutter v. Wright, 132 Colo. 304, 287 P.2d 655 (1955).

Appeal subject to dismissal for failure to comply with rule. Where a record on review fails to conform with this rule, the appeal may be dismissed either on motion or the court's own initiative. Williams v. Williams, 110 Colo. 473, 135 P.2d 1016 (1943); George W. Clayton Coll. v. District Court, 110 Colo. 365, 135 P.2d 138 (1943).

A reviewing court may of its own motion dismiss a proceeding where the record is con-

fused or incomplete. Hinshaw v. Dyer, 166 Colo. 394, 443 P.2d 992 (1968).

Appellant's appeal dismissed when appellant argued insufficient evidence but failed to designate the entire transcript. Appellee not required to supplement the appellant's designation. Northstar Project Mgmt. v. DLR Group, 2013 CO 12, 295 P.3d 956.

But court has discretion to pass on questions presented. Although a record on appeal may not comply with this rule, the supreme court may, in its discretion, elect to pass upon questions presented in order that further delay and expense to the parties may be avoided. Williams v. Williams, 110 Colo. 473, 135 P.2d 1016 (1943).

Appellant who does not correctly anticipate appellee's and court's conceptions of what should be included in a record should not forfeit his case. City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288 (1978).

Presumption that trial court's findings are supported by evidence. An appellate court must presume that the trial court's findings and conclusions are supported by the evidence where the appellant has failed to provide a complete record on appeal. People v. Morgan, 199 Colo. 237, 606 P.2d 1296 (1980); People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Where no transcript of evidence considered by lower court is made part of record on appeal and there is no showing to contrary, an appellate court must presume that findings are supported by evidence presented to and considered by court. People v. Gallegos, 179 Colo. 211, 499 P.2d 315 (1972).

Where the record does not contain any of the trial court's instructions, a reviewing court will presume that an instruction given by the trial court correctly and clearly stated the law and that defendant's objection is that the evidence does not support the giving of the instruction. Nunn v. People, 177 Colo. 87, 493 P.2d 6 (1972).

Claim not raised in trial court will not be considered on appeal. Cmty. Mgt. Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973).

An issue not before the trial court in the motion for new trial will not be considered on appeal. Cady v. City of Arvada, 31 Colo. App. 85, 499 P.2d 1203 (1972).

Ineffective assistance of counsel claim procedurally barred where appellant failed to specially designate on appeal any and all exhibits that were necessary to a resolution of the claim. Bunton v. Atherton, 613 F.3d 973 (10th Cir. 2010).

Defendant cannot bottom error upon occurrence in a portion of the trial which he has specifically agreed is not to be reported, for there is no way for an appellate court to review the alleged error. Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971).

Issue must be raised by parties, not "amicus curiae". Where issue is not raised by parties to appeal, but is raised in brief of "amicus curiae" issue will not be considered by appellate court. Eugene Cervi & Co. v. Russell, 31 Colo. App. 525, 506 P.2d 748 (1972), aff'd, 184 Colo. 282, 519 P.2d 1189 (1974).

Error cannot be asserted on prosecution's evidence alone. Where upon trial court's denial of defendant's motion for acquittal at close of people's case, defendant proceeds to offer evidence warranting submission of case to jury, defendant cannot assert error on people's evidence alone. People v. Olinger, 180 Colo. 58, 502 P.2d 79 (1972).

Applied in People ex rel. Dunbar v. South Platte Water Conservancy Dist., 139 Colo. 503, 343 P.2d 812 (1959); Hinshaw v. Dept. of Welfare, 157 Colo. 447, 403 P.2d 206 (1965); Schroeder v. Bd. of County Comm'rs, 152 Colo. 313, 381 P.2d 820 (1963); Threadgill v. Capra, 161 Colo. 453, 423 P.2d 318 (1967); In re People in Interest of A.R.S., 31 Colo. App. 268, 502 P.2d 92 (1972); People v. Slender Wrap, Inc., 36 Colo. App. 11, 536 P.2d 850 (1975); Tucker v. Shoemaker, 190 Colo. 267, 546 P.2d 951 (1976); Lemier v. Real Estate Comm'n, 38 Colo. App. 489, 558 P.2d 591 (1976); C.M. v. People in Interest of J.M., 198 Colo. 436, 601 P.2d 1364 (1979); Augustin v. Barnes, 626 P.2d 625 (Colo. 1981); In re Edilson, 637 P.2d 362 (Colo. 1981).

II. COMPOSITION OF RECORD.

A. In General.

Purpose of the notice of appeal is to require the clerk of the court in which the judgment complained of is entered to certify the record for review. Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P.2d 791 (1935); Wheeler Kelly Hagny Trust Co. v. Williamson, 111 Colo. 515, 143 P.2d 685 (1943).

This rule retains a vestige of the bill of exceptions procedure not contained in the federal rules, for section (a) requires certification of the reporter's transcript by the trial judge, but Federal Rule of Appellate Procedure 10(a) has no such requirement. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

The right to an appeal is not denied by the absence of written findings of fact or conclusions of law in the record. Neither C.R.C.P. 52(a) nor this rule, requires written findings of fact and conclusions of law. Dunbar v. District Court, 131 Colo. 483, 283 P.2d 182 (1955).

Trial court's findings held adequate for purpose of appellate review. In re People in Interest of D.S., 31 Colo. App. 300, 502 P.2d 95 (1972).

No requirement that appellate record be all inclusive. This rule does not require that every folio with any conceivable relationship to an issue raised on appeal be designated as part of the appellate record. Rather, this rule gives the appellant the discretion to determine what is necessary, and the appellant himself may, if it appears he has not included enough, supplement the record; or an appellee who feels that the designated record is lacking in some essential respect may file and serve on the appellant a designation of additional parts of the record to be included. City of Aurora v. Webb, 41 Colo. App. 11, 585 P.2d 288 (1978).

Certification of the record is an official act of the inferior tribunal. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

And is not necessarily contingent upon certification of the transcript of the proceedings by a certified shorthand reporter. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

Judicial notice may generally not be taken of municipal ordinances or resolutions, and thus, it is a party's responsibility to introduce into the record copies of municipal ordinances or resolutions on which reliance is placed. Concrete Contractors v. City of Arvada, 621 P.2d 320 (Colo. 1981).

Where the district court considered the provisions of a city's charter, a municipal ordinance, and a municipal resolution in reaching its decision, the court of appeals abused its discretion in failing to ensure that those provisions of municipal law were made a part of the record in the case. Concrete Contractors v. City of Arvada, 621 P.2d 320 (Colo. 1981).

B. Judgment.

"Judgment" construed. To constitute a judgment there must be an express adjudication to that effect, but, subject to the requirements of statute or court rule or practice, no particular form or verbal formula is required in a court proceeding to render its order a judgment, provided the rights of the parties may be ascertained therefrom. Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956).

Inclusion of the judgment in the record is mandatory. J. & R. A. Savageau, Inc. v. Larsen, 117 Colo. 229, 185 P.2d 1012 (1947); Horlbeck v. Walther, 131 Colo. 36, 279 P.2d 434 (1955). French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955); Nutter v. Wright, 132 Colo. 304, 287 P.2d 655 (1955); Abbott v. Poynter, 153 Colo. 147, 385 P.2d 120 (1963).

Failure to include judgment requires dismissal. Without a compliance with this rule requiring the inclusion of the judgment in the record, there is nothing for this court to review; consequently, an order of dismissal should be entered. J. & R. A. Savageau, Inc. v. Larsen, 117 Colo. 229, 185 P.2d 1012 (1947); Horlbeck v. Walther, 131 Colo. 36, 279 P.2d 434 (1955).

Unless a final judgment appears in the record, the appeal will be dismissed. Sutley v. Davis, 131 Colo. 75, 279 P.2d 848 (1955); French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955); Nutter v. Wright, 132 Colo. 304, 287 P.2d 655 (1955).

Where the record did not disclose any final judgment entered in the court below in violation of this rule, there was nothing presented for review. Howard v. Am. Law Book Co., 121 Colo. 5, 212 P.2d 1006 (1949).

Litigant has duty to ensure record contains proper judgment. The entry of judgment upon the court's order is a ministerial duty of the clerk, but if a litigant desires a review on appeal, it is his duty to see that the record on appeal is properly prepared and contains a final judgment; otherwise dismissal will follow. French v. Haarhues, 132 Colo. 216, 287 P.2d 278 (1955); Nutter v. Wright, 132 Colo. 304, 287 P.2d 655 (1955).

It is the duty of one who seeks review in the supreme court to see to it that an actual judgment has been pronounced by the trial court and entered by the clerk and that such judgment appears in the record on appeal. Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956); Abbott v. Poynter, 153 Colo. 147, 385 P.2d 120 (1963).

Ruling is not substitute for judgment. A ruling by the trial court at the close of plaintiff's evidence granting a motion to dismiss and dispensing with the motion for new trial does not rise to the dignity of a judgment, and its inclusion in the record is not a substitute for the requirement of this rule that the record must include the judgment to be reviewed. Jones v. Galbasini, 134 Colo. 64, 299 P.2d 503 (1956); Abbott v. Poynter, 153 Colo. 147, 385 P.2d 120 (1963).

Where the designation of record on error requests that the record include the judgment entered and the direction for entry of the same judgment, the record contains the ''order and judgment'' and the order to the clerk of the court for entry of judgment, and this rule requires no more. Flournoy v. McComas, 175 Colo. 526, 488 P.2d 1104 (1971).

C. Reporter's Transcript.

Compliance with rule imperative. Compliance with the rules in the preparation, certification, and lodging of the transcript is imperative if it is desired to make it a part of the record on appeal. Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

Transcript is not an absolute necessity in the reviewing court. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Because it is only part of record. The reporter's transcript is not the record on appeal, but only a part thereof. Cont'l Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Transcript is not, by definition, a writ, process, or proceeding. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Only relevant portions of the trial proceedings need be included in the record, as may be necessary to present the issues on appeal. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970); Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Transcript must be certified by the judge. Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

Authentication is judicial act. In the authentication of the full transcript, the trial judge acts as a judge under the solemnity of his official oath, and is presumed to have faithfully and honestly performed his duty. Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

It is presumed that a court acts under the solemnity of its oath in determining the authenticity of the transcript. Churning v. Staples, 628 P.2d 180 (Colo. App. 1981).

When certified transcript considered true. A transcript of the record as originally prepared by the reporter which is authenticated by a certificate signed by the trial judge, and transmitted to the supreme court under the seal of the clerk of the trial court, is to be considered true as if the parties had agreed to it. Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

Imperfection in a reporter's transcript cannot be cured by guesswork or by indulging in inferences or presumptions. Hinshaw v. Dyer, 166 Colo. 394, 443 P.2d 992 (1968).

Uncertified transcript of evidence filed with reviewing court is not properly before it. Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

Uncertified transcript stricken. Rechnitz v. Rechnitz, 135 Colo. 165, 309 P.2d 200 (1957).

Lacking transcript, support of findings presumed. There being no reporter's transcript properly before the supreme court for consideration due to untimely filing, the regularity of the judgment and support of the findings of fact by the evidence must be presumed. Bonham v. City of Aurora, 133 Colo. 276, 294 P.2d 267 (1956).

Where a transcript of the evidence not filed pursuant to this rule cannot be considered because of the trial judge's justifiable refusal to certify it, the regularity of the judgment and support of it in evidence must be presumed. Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

In the absence of a transcript, the supreme court is bound to presume that the findings and conclusions of the trial court are correct and that the evidence presented supports the judgment. Cox v. Adams, 171 Colo. 37, 464 P.2d 513 (1970); Furer v. Allied Steel Co., 174 Colo. 171, 483 P.2d 212 (1971).

Unless there is before the supreme court a certified transcript of the proceedings, the supreme court is unable to state that the trial court abused its discretion or that it was arbitrary and capricious. Rechnitz v. Rechnitz, 135 Colo. 165, 309 P.2d 200 (1957).

Where there is no transcript before the court on appeal, the regularity of the trial court's judgment and the competency of the evidence upon which that judgment is based must be presumed. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Where no transcript is provided on appeal the court must look to the record alone to determine whether the trial court acted properly. Statements made in the briefs of litigants cannot supply that which must appear in a certified record. Loomis v. Seely, 677 P.2d 400 (Colo. App. 1983).

Reconstruction of the record in the trial court is not appropriate when the precise language of the testimony is critical. People v. Killpack, 793 P.2d 642 (Colo. App. 1990).

Where defendant's argument on appeal is ascertainable from the existing record and the record is sufficient for appellate review, a complete transcript is unnecessary for purposes of reconstructing the record for one of the days during trial. People v. Jackson, 98 P.3d 940 (Colo. App. 2004).

The statements of counsel may not substitute for that which must appear of record. Subsequent Injury Fund v. Gallegos, 746 P.2d 71 (Colo. App. 1987).

Litigant must make his own arrangements with the reporter if he desires a transcript. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Transcript fees may not be waived by court. The preparation of a transcript by a reporter of his notes is a service which is not covered by his salary. Hence, the fees for such service are not payable to the court and the court cannot waive them. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Free transcript need not be provided when the furnishing of a transcript would be a vain and useless gesture. Snavely v. Shannon, 182 Colo. 223, 511 P.2d 905 (1973).

Since the provisions of sections (c) and (d) provide for a constitutionally permissible alternative method of proceeding on appeal where no reporter's transcript is available, there is no deprivation of due process or equal protection because indigents cannot obtain a cost-free re-

porter's transcript. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

And denial does not preclude appellate remedy. The denial of a request for a free transcript does not deny an indigent litigant any appellate remedy. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Or deny constitutional right. By virtue of the waiver of costs provided by § 13-16-103, and the alternative methods of furnishing a trial court record provided by this rule, courts of justice, both trial and appellate, are ''open'' and available to the indigent litigant, and there is no denial of any constitutional right embraced within the language or interpretation of § 6 of art. II, Colo. Const. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

D. Alternatives to Transcript; Agreed Statement.

Reporter's transcript is not only means provided by sections (a) through (e) of this rule for preserving and presenting to the appellate courts alleged error involving evidentiary or factual issues. Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Requirements in circumstances in which stenographic transcipt unavailable. Appellant must prepare a statement from recollection that is first submitted to trial court for approval. If it is necessary to add to record parts of evidence or proceedings that were not recorded by the reporter, the provisions of section (c) must be followed. Where there was no compliance with this rule, the appellate court has an inadequate basis to evaluate the parties' claims and the trial court's ruling. Halliburton v. Pub. Serv. Co., 804 P.2d 213 (Colo. App. 1990); In re McSoud, 131 P.3d 1208 (Colo. App. 2006); Knoll v. Allstate Fire & Cas. Ins., 216 P.3d 619 (Colo. App. 2009).

Nothing in section (c) prohibits a trial court from using its own notes or recollection in record reconstruction. People v. Jackson, 98 P.3d 940 (Colo. App. 2004).

The trial court in doing so in an impartial manner eliminates any need for the trial judge to testify before a different judge regarding the reconstruction to maintain impartiality. People v. Jackson, 98 P.3d 940 (Colo. App. 2004).

Duty to follow procedures of this rule if no transcript available. An appellant is required to take the necessary steps to provide an adequate record for review. In those circumstances in which a stenographic transcript is not available, section (c) provides that the appellant should prepare a statement of the evidence or proceedings from the best available means, serve the statement upon opposing counsel for comments and changes, and then submit the final statement to the trial court for settlement, approval, and inclusion in the record on appeal. In the event the parties are unable to reach agreement concerning the contents of this statement, section (d) provides a mechanism for resolution of these differences. People v. Conley, 804 P.2d 240 (Colo. App. 1990).

Sections (c), (d), and (e) were promulgated specifically to reduce the cost of appellate review to the litigants and to conserve review time by the court itself. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970); Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972).

Section (e) of this rule insures adequate consideration of any issue involving evidentiary or factual material. Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970).

Statements made in briefs insufficient to establish record. Statements made in briefs of litigants cannot supply what must appear from a certified record or an agreed statement. Laessig v. May D & F, 157 Colo. 260, 402 P.2d 183 (1965); Hinshaw v. Dyer, 166 Colo. 394, 443 P.2d 992 (1968); McCall v. Meyers, 94 P.3d 1271 (Colo. App. 2004).

Although this rule does not on its face apply to appellate review of an administrative agency decision, the underlying principle is applicable to such review. Earl v. District Court, 719 P.2d 321 (Colo. 1986); Schaffer v. District Court, 719 P.2d 1088 (Colo. 1986).

III. CORRECTION OR MODIFICATION OF RECORD.

Certification to the transcript of the proceedings is final. Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

This is true where the objectors produced no evidence or sworn testimony contradicting the transcript as finally certified and approved by the trial judge during the lengthy hearing on their objections. Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

Inaccuracies in certified transcript were not prejudicial. Although each of 98 inaccuracies in the certified transcript does alter the particular sentence somewhat, reviewing all of the changes elicited at the evidentiary hearing before the trial court, the supreme court concluded that reasonable men, considering the transcript in its entirety, would be compelled to find that the content of the transcript is not materially altered. Since this evidence showed no errors of any substance and since appellee did not show that the corrected record was in any manner false or untrue, he was not prejudiced by the changes and the transcript is a fair and accurate record of the civil service commission's proceedings which may be reviewed. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

Although the juvenile court was not the proper forum to resolve a motion to narrow the record on appeal which had been designated pursuant to this rule, any error arising from the limitation imposed by the trial court was, under the circumstances, harmless error. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

Nothing in the plain language of this rule precludes an appellate court from considering a motion to correct a misstatement in the record after an opinion has been announced. It was reasonable for the trial court to correct the record and an injustice would occur here if an appeal were decided on the basis of an incorrect record. People v. Wolfe, 9 P.3d 1137 (Colo. App. 1999).

Court rejected defendant's argument that People's attempt to correct the record was barred by doctrine of laches and waiver. Trial court properly concluded that the interest in finality of the opinion was outweighed by the importance of ensuring an accurate result on appeal. People v. Wolfe, 9 P.3d 1137 (Colo. App. 1999).

Rule 10.1. Court of Appeals Accelerated Docket Procedure — Civil Appeals

Repealed September 23, 1983, effective January 1, 1984.

Rule 11. Transmission of Record

Repealed October 26, 2017, effective January 1, 2018.

Source: (b) and (d) amended and adopted April 27, 1998, effective July 1, 1998; (b) amended and effective September 7, 2006; (a), (a) comment, and (d) comment amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); repealed October 26, 2017, effective January 1, 2018.

Cross references: For provisions similar to the repealed rule 11, see Colorado Appellate Rule 10.

Rule 12. Docketing the Appeal and Fees; Proceedings in Forma Pauperis; Filing of the Record

(a) Docketing the Appeal; Fees of Clerk. At the time of the filing of the notice of appeal or the time of filing any documents with an appellate court before the filing of the notice of appeal, the appellant shall pay to the clerk of the appellate court the docket fee as required by section 13-4-112(1) and the clerk shall enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal on the docket at the written request of that party. The party appealing shall docket the case as nearly as possible under the title given to the action in the trial court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title. Unless necessary to show the relationship of the parties, such caption shall not include the names of parties not involved in the appeal. The docket fee for an appellee as required by section 13-4-112(1) shall be paid upon the entry of appearance of the appellee. After an initial appellant or appellee has paid the docket fee, any additional appellants, appellees or cross-appellants entering an appearance by an attorney who is not already of record in the case, shall also pay the docket fee as required by section 13-4-112(1). A cross-appellant shall pay the docket fee amount at the time the cross-appeal is filed. Extension of time shall not be granted for paying docket fees.

Comment: This revision calls for the payment of appellant's docket fee when the notice of appeal is filed, or, at the time of filing of the initial documents with the appellate court. It also eliminates designation of parties form.

(b) Leave to Proceed on Appeal in Forma Pauperis from Trial Court to Appellate Court. A party to an action in a trial court who desires to proceed on appeal in forma pauperis shall file in the trial court a motion for leave so to proceed, together with an affidavit showing an inability to pay fees and costs or to give security, a belief that the

party is entitled to redress, and a statement of the issues which the party intends to present on appeal. If the motion is granted, the party may proceed without further application to the appellate court and without prepayment of fees or costs in either court or the giving of security. If the motion is denied, the trial court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the trial court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the trial court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the trial court shall state in writing the reasons for such certification or finding. A party proceeding under this subparagraph (b) shall attach a copy of the trial court's order granting or denying leave to proceed in forma pauperis in the trial court with the appendix to the notice of appeal.

(c) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings. A party to a proceeding before an administrative agency, board, commission, or officer who desires to proceed on appeal or review in the appellate court in forma pauperis shall file in the said court a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of section (a) of this Rule.

(d) Form of Briefs and Other Papers. Parties allowed to proceed in forma pauperis may file briefs and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(e) Filing of the Record. Upon receipt of the record, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

Comment: This change is necessary because ''docketing'' has been eliminated.

(f) Deleted September 23, 1983, effective January 1, 1984.

Source: (a) amended August 30, 1985, effective January 1, 1986; (b) amended May 15, 1986, effective November 1, 1986; (a) and (e) amended and effective February 7, 2008; (e) amended and adopted October 26, 2017, effective January 1, 2018.

Cross references: For current rule concerning dismissal for failure to timely docket, see C.A.R. 38(a); for waiver of costs incurred by poor persons, see § 13-16-103, C.R.S.

ANNOTATION

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mtn. L. Rev. 618 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev. 551 (1968). For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J. 1 (1980).

Failure to comply with rule will cause dismissal. Where appellants fail to comply with this rule in that they do not file designation of parties or pay docket fee within time fixed for transmission of record, failing to do so for approximately 90 days thereafter, where appellants fail to show good cause for noncompliance, where appellee moves for dismissal based thereon, and where 60-day extension of time for transmission of record has been granted, appeal will be dismissed. Gonzales v. Petriken, 31 Colo. App. 415, 502 P.2d 1110 (1972).

Failure to comply with rule may be waived by failure to file objection, but where sufficient and timely objection is made and there is no adequate excuse for failure to comply, it is an appellate court's duty to enforce this rule. Gonzales v. Petriken, 31 Colo. App. 415, 502 P.2d 1110 (1972).

Leave to proceed in forma pauperis granted. In re Petition of Griffin, 152 Colo. 347, 382 P.2d 202 (1963); In re Petition of Pigg, 152 Colo. 500, 384 P.2d 267 (1963).

Supreme court will not consider unintelligible petitions and motions which have no legal significance and which do not meet the requirements of established procedures in appellate practice, in view of the right of an indigent defendant to have counsel appointed to

prosecute an appeal. In re Petition of Griffin, 152 Colo. 347, 382 P.2d 202 (1963).

Issue cannot be reviewed on appeal when the record does not contain a transcript of the testimony taken in the trial court. Buder v. Reynolds, 175 Colo. 28, 486 P.2d 432 (1971).

When a reporter fails within 60 days to file a reporter's transcript or seek an extension of time, the trial court will order that the transcript be stricken from the record on error. Buder v. Reynolds, 175 Colo. 28, 486 P.2d 432 (1971).

Determination of indigency lies within the discretion of the trial court. A party who proceeded as an indigent in the trial court may proceed as an indigent on appeal without further authorization unless the court finds, in writing, that the party is no longer entitled to so proceed. The trial court may order the production of any documents or evidence it deems necessary to determine continuing indigency. People in Interest of M.N., 950 P.2d 674 (Colo. App. 1997).

Because trial court had previously permitted defendant to proceed in forma pauperis on direct appeal, it was unnecessary for defendant to reapply to the trial court to proceed in forma pauperis on his motion for postconviction relief; thus trial court's failure to address defendant's motion to proceed in forma pauperis on appeal contemporaneously with his motion for postconviction relief was not error. People v. Boyd, 23 P.3d 1242 (Colo. App. 2001).

Applied in Denbow v. District Court, 652 P.2d 1065 (Colo. 1982).

Rules 13 to 20. No Colorado Rules

ORIGINAL JURISDICTION

Rule 21. Procedure in Original Proceedings

(a) Original Jurisdiction Under the Constitution.

(1) This rule applies only to the original jurisdiction of the supreme court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution and to the exercise of the supreme court's general superintending authority over all courts as provided in Section 2 of Article VI of the Colorado Constitution. Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the supreme court. Such relief will be granted only when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available.

(2) Petitions to the supreme court in the nature of mandamus, certiorari, habeas corpus, quo warranto, injunction, prohibition and other forms of writs cognizable under the common law are subject to this rule. The petitioner need not designate a specific form of writ when seeking relief under this rule.

(b) How Sought; Proposed Respondents. Petitioner must file a petition for a rule to show cause specifying the relief sought and must request the court to issue to one or more proposed respondents a rule to show cause why the relief requested should not be granted. The proposed respondent(s) should be the real party (or parties) in interest.

(c) Docketing of Petition and Fees; Form of Pleadings. Upon the filing of a petition for a rule to show cause, petitioner must pay to the clerk of the supreme court the docket fee of $225.00. All documents filed under this rule must comply with C.A.R. 32.

(d) Content of Petition and Service.

(1) The petition must be titled, ''In Re [Caption of Underlying Proceeding].'' If there is no underlying proceeding, the petition must be titled, ''In Re [Petitioner v. Proposed Respondent].''

(2) The petitioner has the burden of showing that the court should issue a rule to show cause. To enable the court to determine whether a rule to show case should be issued, the petition must disclose in sufficient detail the following:

(A) the identity of the petitioner and of the proposed respondent(s), together with, if applicable, their party status in the underlying proceeding (e.g., plaintiff, defendant, etc.);

(B) the identity of the court or other underlying tribunal, the case name and case number or other identification of the underlying proceeding, if any, and identification of any other related proceeding;

(C) the identity of the persons or entities against whom relief is sought;

(D) the ruling, action, or failure to act complained of and the relief being sought;

(E) the reasons why no other adequate remedy is available;

(F) the issues presented;
(G) the facts necessary to understand the issues presented;
(H) argument and points of authority explaining why the court should issue a rule to show cause and grant the relief requested; and
(I) a list of supporting documents, or an explanation of why supporting documents are not available.

(3) The petition must include the names, addresses, telephone numbers, e-mail addresses (if any), and fax numbers (if any) of all parties to the underlying proceeding; or, if a party is represented by counsel, the attorney's name, address, telephone number, e-mail address (if any), and fax number (if any).

(4) The petition must be served upon each party and proposed respondent and, if applicable, upon the lower court or tribunal.

(e) Supporting Documents. A petition must be accompanied by a separate, indexed set of available supporting documents adequate to permit review. In cases involving an underlying proceeding, the following documents must be included:

(1) the order or judgment from which relief is sought if applicable;
(2) documents and exhibits submitted in the underlying proceeding that are necessary for a complete understanding of the issues presented;
(3) a transcript of the proceeding leading to the underlying order or judgment if available.

(f) Stay; Jurisdiction.

(1) The filing of a petition under this rule does not stay any underlying proceeding or the running of any applicable time limit. If the petitioner seeks a temporary stay in connection with the petition pending the court's determination whether to issue a rule to show cause, a stay ordinarily must be sought in the first instance from the lower court or tribunal. If a request for stay below is impracticable, not promptly ruled upon, or is denied, the petitioner may file a separate motion for a temporary stay in the supreme court supported by accompanying materials justifying the requested stay.

(2) Issuance of a rule to show cause by the supreme court automatically stays all underlying proceedings until final determination of the original proceeding in the supreme court unless the court, acting on its own, or upon motion, lifts the stay in whole or in part.

(g) No Initial Responsive Pleading to Petition Allowed. Unless requested by the supreme court, no responsive pleading to the petition may be filed prior to the court's determination of whether to issue a rule to show cause.

(h) Denial; Rule to Show Cause.

(1) The court in its discretion may issue a rule to show cause or deny the petition without explanation and without an answer by any respondent.

(2) The clerk, by first class mail, will serve the rule to show cause on all persons ordered or invited by the court to respond and, if applicable, on the judge or other officer in the underlying proceeding.

(i) Response to Rule to Show Cause.

(1) The court in its discretion may invite or order any person in the underlying proceeding to respond to the rule to show cause within a fixed time and may invite amicus curiae participation. Any person in the underlying proceeding may request permission to respond to the rule to show cause but may not respond unless invited or ordered to do so by the court. Those ordered by the court to respond are the respondent.

(2) The response to any order of the court must conform with C.A.R. 28(g) and 32. Any responses submitted by amicus curiae must comply with C.A.R. 29.

(3) Two or more respondents may respond jointly.

(j) Reply to Response to Rule to Show Cause. The petitioner may submit a reply brief within the time fixed by the court. Any reply must conform with C.A.R. 28(g) and 32.

(k) No Oral Argument. There will be no oral argument unless ordered by the court.

(l) Opinion Discretionary. The court, upon review, in its discretion may discharge the rule or make it absolute, in whole or in part, with or without opinion.

(m) Petition for Rehearing. In all proceedings under this rule, where the supreme court has issued an opinion discharging a rule or making a rule absolute, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40(c)(2).

Source: Entire rule repealed and readopted November 19, 1998, effective January 1, 1999; (d) amended and adopted June 27, 2002, effective July 1, 2002; (c) amended and adopted February 27, 2003, effective March 3, 2003; entire rule amended and adopted June 7, 2018, effective July 1, 2018.

Cross references: For relief available in the nature of remedial writs in the district court generally, see C.R.C.P. 106; for jurisdiction of supreme court to issue remedial and original writs in general, see § 3 of art. VI, Colo. Const.

ANNOTATION

I. General Consideration.
II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mtn. L. Rev. 618 (1951). For note, ''Habeas Corpus in Colorado for the Convicted Criminal'', see 30 Rocky Mt. L. Rev. 145 (1958). For article, ''One Year Review of Civil Procedure and Appeals'', see 37 Dicta 21 (1960). For note, ''One Year Review of Colorado Law — 1964'', see 42 Den. L. Ctr. J. 140 (1965). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev. 551 (1968). For note, ''Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19—the 'Procedural Phantom' Still Stalks in Colorado'', see 46 U. Colo. L. Rev. 609 (1974-75). For comment, ''Reporter's Privilege: Pankratz v. District Court'', see 58 Den. L.J. 681 (1981). For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For article, ''Original Proceedings in the Colorado Supreme Court'', see 12 Colo. Law. 413 (1983). For article, ''Knowing When to Change Trains: The Ins and Outs of Interlocutory Appeals'', see 41 Colo. Law. 31 (June 2012). For article, ''Raising New Issues on Appeal: Waiver and Forfeiture in Colorado's Federal and State Appellate Courts'', see 46 Colo. Law. 25 (July 2017).

Annotator's note. For other annotations concerning original jurisdiction of supreme court, see Const. Colo., art. VI, sec. 3.

Purpose of original proceedings. Original proceedings are authorized to test whether the trial court is proceeding without or in excess of its jurisdiction and to review a serious abuse of discretion where an appellate remedy would not be adequate. Margolis v. District Court, 638 P.2d 297 (Colo. 1981); People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994); Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998); Kourlis v. District Court, 930 P.2d 1329 (Colo. 1997); Hawkinson v. Biddle, 880 P.2d 748 (Colo. 1994); Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

The general function of a writ of prohibition is to enjoin an excessive or improper assumption of jurisdiction. Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977).

An original proceeding is an appropriate way to challenge a district court ruling allegedly in excess of the court's jurisdiction. Chavez v. District Court, 648 P.2d 658 (Colo. 1982).

An original proceeding pursuant to this rule is not a substitute for an appeal and is limited to an inquiry into whether the trial court exceeded its jurisdiction or abused its discretion. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993); Lambdin v. District Ct. of Arapahoe Cty., 903 P.2d 1126 (Colo. 1995); Pearson v. District Court, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

An original proceeding is appropriate to prevent an excess of jurisdiction by a lower court when no other remedy would be adequate. Paul v. People, 105 P.3d 628 (Colo. 2005).

The supreme court may exercise original jurisdiction and review a discovery order if it appears that a trial court has abused its discretion in circumstances in which a remedy on appeal would be inadequate. Gateway Logistics, Inc. v. Smay, 2013 CO 25, 302 P.3d 235.

Original and remedial writs are the common-law writs. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

But present authority to entertain original and remedial writs is conferred by the constitution. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Colorado supreme court's original jurisdiction has its source in § 3 of art. VI, Colo. Const.; its exercise is discretionary and governed by the circumstances of the case. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

C.R.C.P. 106 and this rule are to be construed together. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Prohibition is not available where party has adequate remedies at law, or where it will supersede the functions of an appeal. Fitzgerald v. District Court, 177 Colo. 29, 493 P.2d 27 (1972).

Where a municipal court has jurisdiction over the defendants and the subject matter of the action, and an adequate remedy at law is available, original proceedings in prohibition will

not be entertained. Douglas v. Mun. Court, 151 Colo. 358, 377 P.2d 738 (1963).

Court will not consider issues not presented below. The orderly administration of justice requires that parties first present all evidence and arguments to the trial court. Simply stated, the supreme court will not consider issues and evidence presented for the first time in original proceedings. Panos Inv. Co. v. District Court, 662 P.2d 180 (Colo. 1983).

Petitioner responsible for providing substantiating record. A petitioner seeking prohibition has the responsibility of providing the supreme court with a record that will substantiate the request for extraordinary relief. Mitchell v. District Court ex rel. Eighth Judicial Dist., 672 P.2d 997 (Colo. 1983).

In the absence of a compelling need, this rule may not serve as a substitute for an adequate appellate remedy that a party simply fails to exercise. C.A.R. 3.4 provides adequate process for appellants to the court of appeals in dependancy and neglect cases. People ex rel. A.H., 216 P.3d 581 (Colo. 2009).

Original writ disfavored where appeal available. There is a general policy which disfavors the use of an original writ where an appeal would be an appropriate remedy. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Absent a showing that appellate review would not afford adequate relief, relief by original proceedings is disfavored. Coquina Oil Corp. v. District Court, 623 P.2d 40 (Colo. 1981).

In contempt proceedings to enforce an order, the validity of the questioned order can be challenged and defendants will be afforded full opportunity to justify their failure or refusal to comply therewith. If, by any judgment entered by the trial court in those proceedings, the parties feel aggrieved, their remedy by appeal is speedy and altogether adequate for the protection of their rights, and there is no occasion for invoking the original jurisdiction of the supreme court. Valas v. District Court, 130 Colo. 21, 273 P.2d 1017 (1954); Meaker v. District Court, 134 Colo. 151, 300 P.2d 805 (1956).

But to be used where appeal inadequate. Where an appeal is not a plain, speedy, and adequate remedy, one may be entitled to an original writ of prohibition. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

A proceeding under this rule is appropriate to review a serious abuse of discretion where an appellate remedy would not be adequate. Halliburton v. County Court ex rel. City & County of Denver, 672 P.2d 1006 (Colo. 1983); Direct Sales Tire Co. v. District Court, 686 P.2d 1316 (Colo. 1984).

Where the damage that may result from the court's abuse of discretion cannot be cured on appeal, mandamus will lie to ensure observance of the rules of civil procedure. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Although the questions involved upon which the relief in original jurisdiction is asked may be reviewed on appeal, that is not conclusive against the right as to relief if in the judgment of the court, such remedies are not plain, speedy, and adequate. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); People ex rel. L'Abbe v. District Court, 26 Colo. 386, 58 P. 604, 46 L.R.A. 850 (1899).

A writ in the nature of prohibition is an extraordinary remedy and should be granted only in cases where the party seeking relief does not have an adequate remedy on appeal. Valas v. District Court, 130 Colo. 21, 273 P.2d 1017 (1954); Meaker v. District Court, 134 Colo. 151, 300 P.2d 805 (1956).

Original proceedings are only applicable to those matters in which an adequate remedy is not available on appeal. DeLong v. District Court, 151 Colo. 364, 377 P.2d 737 (1963).

Original jurisdiction under this rule will be invoked where appellate remedies are inadequate. People v. District Court, 664 P.2d 247 (Colo. 1983); Hawkinson v. Biddle, 880 P.2d 748 (Colo. 1994); Kourlis v. District Court, El Paso County, 930 P.2d 1329 (Colo. 1997).

The exercise of original jurisdiction is appropriate where a pre-trial ruling will place a party at a significant disadvantage in litigating the merits of the controversy and conventional appellate remedies are inadequate. Mitchell v. Wilmore, 981 P.2d 172 (Colo. 1999).

Original jurisdiction under this rule appropriate where trial court's erroneous order allowing defendant access to alleged victim's home would irreparably damage her privacy rights. People v. Chavez, 2016 CO 20, 368 P.3d 943.

A trial court's decision to vacate a jury-imposed death verdict is a matter of public importance invoking original jurisdiction. People v. Harlan, 109 P.3d 616 (Colo. 2005).

Original jurisdiction may be exercised to entertain an interlocutory appeal that was improperly brought pursuant to another rule. People v. Braunthal, 31 P.3d 167 (Colo. 2001).

Prohibition is an appropriate remedy when the trial court has abused its discretion and where an appellate remedy would not be adequate and in this case the supreme court exercised original jurisdiction to address issues of significance not yet examined. City & County of Denver v. District Court, 939 P.2d 1353 (Colo. 1997).

Original jurisdiction is proper under this rule, prior to dismissal of the underlying action or appeal, on issue of sanctions. While the court of appeals is not without jurisdiction to determine the issue of propriety of sanctions issued by a settlement conference judge, the

appellate remedy under such circumstances would not assist petitioner who is under order to comply or risk contempt. Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992).

Original jurisdiction under this rule is proper when appellate review of trial court's evidentiary ruling would not afford adequate relief since jeopardy will have attached and the defendant cannot be retried. People v. District Court of El Paso County, 869 P.2d 1281 (Colo. 1994).

Appeal held adequate remedy. The mere fact that a new trial may be necessary to correct an improper denial of a third-party complaint does not in itself render an appeal inadequate as a remedy for the third-party plaintiff. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

Original writs cannot supersede the ordinary functions of an appeal. People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927); White v. District Court, 695 P.2d 1133 (Colo. 1984).

Original proceedings may not be employed as a substitute for an appeal. Douglas v. Mun. Court, 151 Colo. 358, 377 P.2d 738 (1963); DeLong v. District Court, 151 Colo. 364, 377 P.2d 737 (1963); Coquina Oil Corp. v. District Court, 623 P.2d 40 (Colo. 1981).

Prohibition may not be used in lieu of an appeal. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967); First Nat'l Bank v. District Court, 164 Colo. 9, 432 P.2d 1 (1967); Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977); Lincoln First Bank v. District Court, 628 P.2d 615 (Colo. 1981).

Prohibition cannot be converted into, or made to serve the purpose of, an appeal, or writ of review to undo what already has been done. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Original jurisdiction may not be utilized to avoid the requirements of finality of judgments and orders set forth in C.A.R. 1. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Prohibition is preventive, rather than corrective, remedy, and usually issues only to prevent the commission of a future act, rather than to undo an act already performed. People ex rel. Long v. District Court, 28 Colo. 161, 63 P. 321 (1900); Stiger v. District Court, 188 Colo. 407, 535 P.2d 508 (1975).

A writ of prohibition is designed to restrain rather than remedy an abuse of jurisdiction. Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977).

The remedy of prohibition is primarily preventive or restraining, not corrective, and only incidentally remedial in the sense of giving relief to the parties. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

The office of the writ of prohibition is preventive in that it restrains excessive or improper assumption of jurisdiction by a tribunal possessing judicial or quasi-judicial powers. City of Aurora v. Congregation Beth Medrosh Hagodol, 140 Colo. 462, 345 P.2d 385 (1959).

Relief in the nature of prohibition is discretionary with the supreme court. People ex rel. L'Abbe v. District Court, 26 Colo. 386, 58 P. 604, 46 L.R.A. 850 (1899); People ex rel. Bonfils v. District Court, 29 Colo. 83, 66 P. 1068 (1901); People ex rel. Barnum v. District Court, 74 Colo. 48, 218 P. 912 (1923); People ex rel. Zalinger v. County Court, 77 Colo. 172, 235 P. 370 (1925); Meaker v. District Court, 134 Colo. 151, 300 P.2d 805 (1956); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); City of Aurora v. Congregation Beth Medrosh Hagodol, 140 Colo. 462, 345 P.2d 385 (1959); Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977); Coquina Oil Corp. v. District Court, 623 P.2d 40 (Colo. 1981); White v. District Court, 695 P.2d 1133 (Colo. 1984); Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992); People v. District Court, Arapahoe County, 868 P.2d 400 (Colo. 1994); Pearson v. District Court, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

It is a supervisory power. Prohibition is a power conferred by the constitution by means of which, when necessary, supervisory control may be exercised over inferior tribunals, acting without or in excess of their jurisdiction. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

And prohibition not granted unless the inferior court has no jurisdiction to act. People ex rel. Barnum v. District Court, 74 Colo. 48, 218 P. 912 (1923); People ex rel. Zalinger v. County Court, 77 Colo. 172, 235 P. 370 (1925); People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957); Hampton v. District Court, 199 Colo. 104, 605 P.2d 54 (1980).

When prohibition proper remedy. Relief in the nature of prohibition is a proper remedy only in those cases where the district court is proceeding without or in excess of its jurisdiction or has abused its discretion in exercising its functions. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974); People v. Gallagher, 194 Colo. 121, 570 P.2d 236 (1977); Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); Lincoln First Bank v. District Court, 628 P.2d 615 (Colo. 1981); Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S.

1107 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982); People v. District Court, 825 P.2d 1000 (Colo. 1992); Beckord v. District Court, 698 P.2d 1323 (Colo. 1985); Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992).

Relief in the nature of prohibition is appropriate where the district court is proceeding without or in excess of its jurisdiction, or has abused its discretion. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977); Marquez v. District Court, 200 Colo. 55, 613 P.2d 1302 (1980).

An aggrieved party may petition the supreme court for relief in the nature of prohibition when an inferior tribunal has allegedly exceeded its jurisdiction. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

An order in the nature of prohibition should be entertained where it is apparent that no judgment in favor of the plaintiff in the court below could be affirmed for want of jurisdiction over the person of the defendant. Carlson v. District Court, 116 Colo. 330, 180 P.2d 525 (1947); Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

Relief in the nature of prohibition in an original proceeding is proper where a trial court is proceeding, or threatens to proceed, without jurisdiction. Andrews v. Lull, 139 Colo. 536, 341 P.2d 475 (1959).

Although a district court may have jurisdiction of a case, prohibition still may lie upon a clear showing that the court has grossly abused its discretion and that an appeal would not provide an adequate remedy. W. Food Plan, Inc. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979).

Mandamus proper remedy where court has abused its discretion. Relief in the nature of mandamus under this rule is a proper remedy in a case in which a district court has abused its discretion in exercising its functions. Gonzales v. District Court, 198 Colo. 505, 602 P.2d 857 (1979).

A writ in the nature of mandamus will issue only upon a showing that the trial court has abused its discretion and that the damage sustained as a result of the abuse of discretion cannot be remedied on appeal. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

The issuance of a writ to mandate the vacation of the reference order to a master is necessary to protect the rights of the petitioner where the court is proceeding in excess of its power, for to await the final judgment based on the master's report would be too late, any appeal at that point a futile act, the expenditure of both time and money would already have occurred, and there would then be no way to undo what had already been erroneously done. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Prohibition will not issue when the petitioner has failed to act with reasonable promptness. James v. James, 95 Colo. 1, 32 P.2d 821 (1934).

Nor where attention of lower court must be directed to jurisdiction question. Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction, since one summoned can appear specially in the court or quasi-judicial agency to move that process be quashed as to him. City of Thornton v. Pub. Utils. Comm'n, 154 Colo. 431, 391 P.2d 374 (1964).

The attention of the trial court must be called to any lack of jurisdiction before a writ of prohibition will issue from the supreme court. Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967); LeGrange v. District Court, 657 P.2d 454 (Colo. 1983).

Nor to prevent court from proceeding to final conclusion. Prohibition will not issue to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967); First Nat'l Bank v. District Court, 164 Colo. 9, 432 P.2d 1 (1967).

Nor to restrain court from error in case properly before it. Prohibition may never be used to restrain a trial court from committing error in deciding a question properly before it. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967); First Nat'l Bank v. District Court, 164 Colo. 9, 432 P.2d 1 (1967).

If an inferior court has jurisdiction of the subject, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify a resort to the extraordinary remedy of prohibition; there must be excess of jurisdiction, and not mere error in the exercise of a conceded jurisdiction. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

A writ of prohibition does not correct mere error. Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977); Alspaugh v. District Court, 190 Colo. 282, 545 P.2d 1362 (1976).

The writ of prohibition cannot be sued for appealing cases on the installment plan and it will not be issued on account of irregularities where the trial court had both jurisdiction of the subject matter and of the person of a defendant.

Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Questions on the merits of the case may be reviewed only by appeal; the supreme court will not use its constitutional supervisory power to prevent error in a trial court. Toll v. City & County of Denver, 139 Colo. 462, 340 P.2d 862 (1959).

And will not issue when lower court may properly and fully determine question. The supreme court will not exercise original jurisdiction when the question may be properly submitted and determined and the rights of the petitioner fully protected and enforced in the lower court. Rogers v. Best, 115 Colo. 245, 171 P.2d 769 (1946); Kemper v. District Court, 131 Colo. 325, 281 P.2d 512 (1955); Medberry v. Patterson, 174 F. Supp. 720 (D. Colo.), cert. denied, 358 U.S. 932, 79 S. Ct. 320, 3 L. Ed. 2d 304 (1959).

Review limited to questions of jurisdiction and abuse of discretion. Under this rule, the authority of the supreme court extends no further than to determine whether a trial court exceeds its jurisdiction or abuses its discretion. Toll v. City & County of Denver, 139 Colo. 462, 340 P.2d 862 (1959); People v. Martinez, 24 P.3d 629 (Colo. 2001).

When a writ of prohibition is presented to the supreme court, its only inquiry is whether the inferior judicial tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction over the subject matter and the parties, has exceeded its legitimate powers. City of Aurora v. Congregation Beth Medrosh Hagodol, 140 Colo. 462, 345 P.2d 385 (1959); City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

And court may not adjudicate rights of non-parties. Where parties who enjoyed favorable ruling in a trial court are not parties in prohibition proceedings in the supreme court, the court is in no position to adjudicate their rights. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

But court may prevent future proceedings or enter proper order. Where an unauthorized act of an inferior tribunal has been performed, and something remains to be done to give full effect to the judgment in a matter beyond the lower court's jurisdiction, prohibition may be granted to prevent such further action and also to undo what has already been done by directing the lower court to set aside its order and enter a proper order. People ex rel. Long v. District Court, 28 Colo. 161, 63 P. 321 (1900).

When more than preventive relief available. Ordinarily, relief only lies to prevent the lower court from proceeding further with the cause, but where this would not give the relator the relief to which he is entitled, it may direct that all proceedings had in excess of jurisdiction be quashed and the order entered which should have been. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

Application must show prima facie circumstances justifying jurisdiction. A party seeking to invoke the original jurisdiction of the supreme court under this rule, must be able to show, prima facie at least, circumstances justifying the exercise of such jurisdiction. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

And failure to do so is fatal defect. The application to invoke original jurisdiction is fatally defective in that there is no allegation that sets forth the circumstances which rendered it necessary or proper that the supreme court exercise its original jurisdiction. Rogers v. Best, 115 Colo. 245, 171 P.2d 769 (1946); Medberry v. Patterson, 174 F. Supp. 720 (D. Colo.), cert. denied, 358 U.S. 932, 79 S. Ct. 320, 3 L. Ed. 2d 304 (1959).

Burden is on petitioner. In an original proceeding pursuant to this rule, the burden is on the petitioner to clearly establish that the respondent trial court is proceeding without or in excess of its jurisdiction, or has seriously abused its discretion. Brewer v. District Court, 655 P.2d 819 (Colo. 1982); Miller v. District Court, 737 P.2d 834 (Colo. 1987).

Lower court and judge are indispensable parties. In an application to the appellate tribunal for relief against an inferior court, the court and judge thereof are indispensable parties. James v. James, 95 Colo. 1, 32 P.2d 821 (1934).

In a proceeding seeking a writ of mandamus, the district court and the district court judge, acting in his capacity as judge, should be named as the appropriate respondents. Wesson v. Bowling, 199 Colo. 30, 604 P.2d 23 (1979).

No time limit on filing specified. This rule does not specify any time limit on filing. Application of the doctrine of laches may bar consideration of original proceedings by the supreme court; nevertheless, a three-month delay may not be unreasonable. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978).

This rule tolls statutory speedy trial period. People v. Jamerson, 198 Colo. 92, 596 P.2d 764 (1979); People v. Beyette, 711 P.2d 1263 (Colo. 1986).

Although proceeding not technically interlocutory appeal. Section 18-1-405 and Crim. P. 48 exclude, from the computation of the time in which a defendant shall be brought to trial the period of delay caused by an interlocutory appeal, but an original proceeding under this rule is, technically speaking, not an interlocutory appeal. People v. Medina, 40 Colo. App. 490, 583 P.2d 293 (1978).

No authority for issuing writs of prohibition against attorney general. Although this rule provides for prohibition against district courts in appropriate circumstances, it expresses no authority for issuing such writs against the

attorney general. W. Food Plan, Inc. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979).

No authority to enforce civil subpoenas against out-of-state nonparties. Such enforcement, if any, is left to the states in which the discovery is to take place. Colo. Mills, LLC v. SunOpta Grains & Foods Inc., 2012 CO 4, 269 P.3d 731.

Applied in Berger v. People, 123 Colo. 403, 231 P.2d 799, cert. denied, 342 U.S. 837, 77 S. Ct. 62, 96 L. Ed. 633 (1951); Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952); Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953); Farrell v. District Court, 135 Colo. 329, 311 P.2d 410 (1957); Garrimore v. Justice Court, 143 Colo. 403, 355 P.2d 116 (1960); Scheer v. District Court, 147 Colo. 265, 363 P.2d 1059 (1961); Colo. State Council of Carpenters v. District Court, 155 Colo. 54, 392 P.2d 601 (1964); Schwader v. District Court, 172 Colo. 474, 474 P.2d 607 (1970); People ex rel. Heckers v. District Court, 170 Colo. 533, 463 P.2d 310 (1970); People ex rel. Dunbar v. District Court, 180 Colo. 107, 502 P.2d 420 (1972); City & County of Denver v. Juvenile Court, 182 Colo. 157, 511 P.2d 898 (1973); People v. Spencer, 185 Colo. 377, 524 P.2d 1084 (1974); Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975); City of Louisville v. District Court, 190 Colo. 33, 543 P.2d 67 (1975); Clinic Masters, Inc. v. District Court, 192 Colo. 120, 556 P.2d 473 (1976); Shon v. District Court, 199 Colo. 90, 605 P.2d 472 (1980); Barnes v. District Court, 199 Colo. 310, 607 P.2d 1008 (1980); Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980); In re Henne, 620 P.2d 62 (Colo. App. 1980); People v. Jones, 631 P.2d 1132 (Colo. 1981); Sandefer v. District Court, 635 P.2d 547 (Colo. 1981); People v. Clerkin, 638 P.2d 808 (Colo. App. 1981); Cavanaugh v. State, Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982); Cont. Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982); Pleasant v. Tihonovich, 647 P.2d 236 (Colo. 1982); Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982); People v. Anderson, 649 P.2d 720 (Colo. App. 1982); Greenwell v. Gill, 660 P.2d 1305 (Colo. App. 1982); Pignatiello v. District Court, 659 P.2d 683 (Colo. 1983); People v. Smith, 984 P.2d 50 (Colo. 1999); People v. Villapando, 984 P.2d 51 (Colo. 1999); Associated Gov'ts v. Pub. Utils., 2012 CO 28, 275 P.3d 646; Coffman v. The Castle Law Grp., 2016 CO 54, 375 P.3d 128.

II. ILLUSTRATIVE CASES.

Trial court found proceeding without jurisdiction. Carlson v. District Court, 116 Colo. 330, 180 P.2d 525 (1947); Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953); Warwick v. District Court, 129 Colo. 300, 269 P.2d 704 (1954); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

Question of constitutionality is matter to be raised by appeal, and not by a petition for prohibition. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

Supreme court's discharge of a rule to show cause improvidently granted has no substantive significance and does not indicate approval or disapproval of trial court ruling, and, thus, trial court erred in using such discharge as a basis for dismissing criminal charges against a defendant. People v. McGraine, 679 P.2d 1084 (Colo. 1984).

But prohibition proper to prevent prosecution barred by statute of limitations. An original proceeding in prohibition is proper to prevent a trial judge from proceeding with a prosecution on an indictment which showed on its face that the indictment had not been returned within the time fixed by statute, as a court may not proceed contrary to the inhibitions contained in the statute of limitations. Markiewicz v. Black, 138 Colo. 128, 330 P.2d 539, 75 A.L.R.2d 678 (1958).

Where a trial court is without jurisdiction to try defendant under an indictment showing on its face that prosecution is barred by the statute of limitations, prohibition is the proper remedy for relief. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Or to prevent double jeopardy. Where it appears that defendants were in jeopardy and that a court is about to place them in jeopardy a second time for the same offense, prohibition is the proper proceeding to protect defendants in their constitutional right against being twice put in jeopardy for the same offense. Markiewicz v. Black, 138 Colo. 128, 330 P.2d 539, 75 A.L.R.2d 678 (1958).

This rule is an appropriate method for a defendant to challenge an erroneous ruling on probable cause. Habeas corpus relief is generally not available unless other relief is unavailable. Blevins v. Tihonovich, 728 P.2d 732 (Colo. 1986).

This rule provides an appropriate procedural mechanism, absent any other adequate remedy, to mandate compliance by the department of corrections with trial court sentencing orders. People v. Dixon, 133 P.3d 1176 (Colo. 2006).

Original proceeding could have been filed to test preliminary hearing finding probable cause. White v. MacFarlane, 713 P.2d 366 (Colo. 1986).

Exercise of original jurisdiction proper to prevent confusion among prosecutors and uncertainty of defendants where pre-trial ruling declared death penalty statute to be unconstitutional. People v. Young, 814 P.2d 834 (Colo. 1991).

Exercise of original jurisdiction proper to resolve question of juvenile court's authority to order department of institutions not to send youths to out-of-state facility. McDonnell v. Juvenile Court, 864 P.2d 565 (Colo. 1993).

Supreme court had original jurisdiction to determine whether trial court exceeded its jurisdiction or seriously abused its discretion in not allowing petitioner to proceed in forma pauperis. Magistrate's denial of motion did not constitute reversible error or prejudice to petitioner where magistrate determined petitioner's subsequent claims, and denied relief. Hawkinson v. Biddle, 880 P.2d 748 (Colo. 1994).

Exercise of jurisdiction under this rule proper to review trial court's ruling denying plaintiffs' request to proceed without filing cost bond since ruling had an obvious impact on the ability to litigate claims. Walcott v. District Ct., 2nd Jud. Dist., 924 P.2d 163 (Colo. 1996).

Exercise of jurisdiction proper under this rule, where the trial court abused its discretion in discharging defendant from the department of corrections and where appeal would be inadequate to remedy defendant's immediate and improper release from the department. People v. Miller, 25 P.3d 1230 (Colo. 2000).

Exercise of original jurisdiction proper to address the district courts staying of an employee's Wage Claim Act claim against an employer pending conclusion of arbitration proceedings when appellate review of the arbiter's final decision would not have been an adequate remedy because the underlying issue of the right to pursue compensation through the Colorado court system would not be resolved. Lambdin v. District Ct. of Arapahoe Cty., 903 P.2d 1126 (Colo. 1995).

Or where court lacks subject matter jurisdiction. Prohibition is applicable to restrain a trial court from proceeding with a criminal trial when it has no jurisdiction over the subject matter. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Or personal jurisdiction. Prohibition is the proper remedy to invoke in a civil action where a district court is proceeding without jurisdiction of the person of a defendant. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Where a court lacked jurisdiction to determine a party's right to custody in a habeas corpus proceeding, prohibition is a proper remedy to challenge a custody order from that court. Lopez v. Smith, 146 Colo. 180, 360 P.2d 967 (1961); Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

Where an application is made to a licensing authority for a retail liquor license and the license is duly issued, the district court does not have jurisdiction to reverse the findings of the licensing authority and revoke the license in review proceedings if the licensee is not made a party. The petitioner-licensee, not being a party to the review proceedings, has no remedy by appeal and properly sought relief by invoking the original jurisdiction of the supreme court. Short v. District Court, 147 Colo. 52, 362 P.2d 406 (1961).

Writ of mandamus will issue to insure full observance with the rules of civil procedure. In a proper case, a writ of mandamus will issue to insure the full observance of the rules of civil procedure, and, in such a case, it must be shown that the damage to petitioner cannot be cured by appeal and that judicial discretion has been abused. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

Pretrial discovery may be proper subject for original writ. Matters relating to pretrial discovery are ordinarily within the trial court's discretion and are reviewable only by appeal rather than in an original proceeding; however, if it is shown that judicial discretion has been grossly abused and that damage to the petitioners could not be cured by appeal, an original writ in the nature of prohibition may issue. Chicago Cutlery Co. v. District Court, 194 Colo. 10, 568 P.2d 464 (1977).

When a procedural ruling will have a significant effect on a party's ability to litigate the merits of the controversy and the damage to a party could not be cured on appeal, an original proceeding is an appropriate remedy to challenge a trial court's order relating to matters of pretrial discovery. Kerwin v. District Court, 649 P.2d 1086 (Colo. 1982).

Although matters of pretrial discovery are ordinarily within the discretion of the trial court, they are not exempted from extraordinary relief under appropriate circumstances. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

Although orders relating to pretrial discovery are interlocutory in nature and normally not reviewable in an original proceeding, the supreme court has not hesitated to exercise its original jurisdiction when a discovery order places a party at an unwarranted disadvantage in litigating the merits of his claim. Caldwell v. District Court, 644 P.2d 26 (Colo. 1982).

Where the trial court's order both prevented the plaintiff from accessing the sole source of factual information for which she demonstrated substantial need and departed significantly from the court's precedent in mandating that plaintiff waive medical record privileges, the court properly exercised its jurisdiction. Cardenas v. Jerath, 180 P.3d 415 (Colo. 2008).

As may be denial of amendment of complaint. Denial of petitioner's motion to amend his complaint was a ruling justifying the supreme court's exercise of original jurisdiction. Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

And pretrial rulings on issues involving admissibility of evidence and imposition of sanctions against prosecution in criminal cases are claims which are properly before the supreme court for a decision on the merits in an original proceeding. People v. District Court, 664 P.2d 247 (Colo. 1983); People v. Casias, 59 P.3d 853 (Colo. 2002).

Relief was appropriate under this rule where the trial court's ruling barring introduction of DNA evidence would impair the prosecution's ability to present its case and double jeopardy would bar a retrial if the defendant were acquitted. The supreme court held that the trial court erred in refusing to admit the DNA evidence and that exclusion of the evidence was an abuse of discretion. People v. Shreck, 22 P.3d 68 (Colo. 2001).

And reviewing an erroneous discovery order that could place an unnecessary burden on the prosecution that is not mandated by the rules. People v. Vlassis, 247 P.3d 196 (Colo. 2011).

And psychiatric examination ordered in violation of C.R.C.P. 35(a). Petitioner's allegations that respondent court exceeded its jurisdiction and abused its discretion by ordering a psychiatric examination in violation of C.R.C.P. 35(a) presented a proper case for exercise of the supreme court's original jurisdiction. Post-judgment appeal obviously cannot reverse the possible adverse consequences of a pretrial psychiatric examination of petitioner. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

And denial of intervention of right. In cases in which an order denies the right to intervene, situations may arise (e.g., where intervention is a matter of right) where the determination in the action may bind the intervenors and where the denial can be considered as a final order affecting the rights of the persons seeking to intervene. In such instances an order denying intervention may justify invoking the original jurisdiction of the supreme court to prevent a denial or miscarriage of justice. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

And improper consolidation of actions. Contention that district court had no power under § 38-22-111 (1) to consolidate one action which was pending with another action which had been dismissed without prejudice, and thus was proceeding without in personam jurisdiction, was a proper matter to be resolved in a proceeding for a writ of mandamus. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

And question of improper venue. The supreme court may consider the question of improper venue on an original writ in view of the importance of determining the question raised and of preventing the delay and expense of a retrial. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

In an action on contract, it appearing that defendant was entitled to have the case tried in the county of his residence, relief is allowed against the trial in another county. People ex rel. Barnum v. District Court, 74 Colo. 121, 218 P. 1047 (1923).

And denial of dismissal for failure to grant speedy trial. Where a trial court has denied his motion for dismissal for failure to grant a speedy trial, a criminal defendant may seek a writ of prohibition. Hampton v. District Court, 199 Colo. 104, 605 P.2d 54 (1980).

Relief in the nature of prohibition under this rule is an appropriate remedy when a district court is proceeding without jurisdiction to try a defendant in violation of his right to a speedy trial. Marquez v. District Court, 200 Colo. 55, 613 P.2d 1302 (1980).

And protection of judgment lienor. An appeal following a trial on the merits may not be an adequate remedy for a judgment lienor whose priority might be destroyed by the sale of the encumbered property by a judgment creditor whose rights attached subsequent to the default judgment; thus, an original proceeding is proper. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

And review of order for temporary possession in condemnation proceeding. Because an order for temporary possession in a condemnation proceeding is interlocutory, and review must be by an original proceeding. Larson v. Chase Pipe Line Co., 183 Colo. 76, 514 P.2d 1316 (1973).

And failure to provide transcript of preliminary hearing to indigent. Failure to provide a transcript of a preliminary hearing at the request of an indigent defendant in a criminal case, when the transcript is necessary for an effective defense, is an abuse of discretion by the district court and is subject to review by the supreme court on an original writ. Gonzales v. District Court, 198 Colo. 505, 602 P.2d 857 (1979).

And question of reasonableness of bail. The proper remedy to the question of the reasonableness of the amount set as bail is by way of original proceedings in the supreme court. Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965).

Supreme court has jurisdiction to review trial court's order on attorney fees for a court-appointed attorney as an independent original proceeding, but, if there is an appeal on some aspect of the underlying action, the attorney fees issue may be raised in such appeal without the necessity of bringing the independent original proceeding. Bye v. District Court, 701 P.2d 56 (Colo. 1985).

Supreme court has jurisdiction to review controversy over sanctions, because it implicates entirely different legal theory than underlying action, is collateral to the merits of that action, and involves parties which are different than the parties to the underlying action. Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992).

But order granting intervention not reviewable on original writ. An order of a trial court granting intervention under C.R.C.P. 24 is not reviewable by the supreme court in an action invoking the court's original jurisdiction under this rule. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Nor application to set aside default judgment. The only proper procedure to secure review of a trial court's order granting or denying an application to set aside a default judgment is by appeal after final judgment. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. Stiger v. District Court, 188 Colo. 407, 535 P.2d 508 (1975).

And prohibition not usable to limit hearing by regulatory commission. Where the jurisdiction of the public utilities commission was invoked by the utility when it filed its application, the commission scheduled a hearing, and notice was directed to be given to those whom the commission envisioned might be interested, the supreme court certainly cannot enjoin the hearing or direct the scope thereof in order to prevent error, nor can it limit the parties to whom notice should be given; thus, a petition for prohibition is premature. City of Thornton v. Pub. Utils. Comm'n, 154 Colo. 431, 391 P.2d 374 (1964).

Revocation of conditional plea agreement in criminal proceeding by district court, which retains jurisdiction over agreement at least until the express condition has been satisfied, goes beyond the scope of supreme court review cognizable under this rule. White v. District Court, 695 P.2d 1133 (Colo. 1984).

Supreme court has no original jurisdiction to issue a writ of prohibition against an independent regulatory commission like the public utilities commission. Intermountain R.E.A. v. Pub. Utils. Comm'n, 723 P.2d 142 (Colo. 1986).

Supreme court has jurisdiction to review a defendant's sentence if the trial court's sentence is illegal. People v. District Court, 673 P.2d 991 (Colo. 1983).

Supreme court has jurisdiction to review the court of appeals' stay of the Colorado state board of medical examiners' suspension of a doctor's license to practice medicine. Bd. of Med. Exam'rs v. Court of Appeals, 920 P.2d 807 (Colo. 1996).

Interlocutory review granted to address the propriety of the trial court's orders for mediation, where trial court ordered mediation despite petitioner's claims of physical and psychological abuse by husband and appellate review would not prevent the harm petitioner sought to avoid. Pearson v. District Court, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

Prohibition generally improper where new trial ordered. Relief in the nature of prohibition is not a proper remedy in cases where the trial court orders a new trial, unless the trial court's decision to grant or deny the new trial reflects a clear showing of an abuse of discretion. People in Interest of P.N., 663 P.2d 253 (Colo. 1983).

Issuance of injunctive orders without complying with rules of civil procedure. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

The court may set aside a lower court order allowing a person or entity to operate without a license when the lower tribunal has abused its discretion or acted outside of its jurisdiction to defeat exercise of the agency's authority delegated to it by the legislature. Due regard for the agency's role in carrying out the legislative design is at the heart of the court's inquiry in this regard. Kourlis v. District Court, El Paso County, 930 P.2d 1329 (Colo. 1997).

Rule to show cause issued why Boulder county district court should not grant the petitioners' motion for a change of venue and held that the district court erroneously denied the petitioners' motion for change of venue under C.R.C.P. 98 (b)(2). Executive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

Rule to show cause made absolute where district court issued case management order that required the trial to be set within 30 days; the date of issuance of the order extended the deadline for setting of trial by 30 days. Becker v. District Ct. for Arapahoe County, 969 P.2d 700 (Colo. 1998).

Rule to show cause made absolute where trial court refused plaintiffs' uncontested motions to postpone the deadline for disclosure of expert testimony and to continue the trial. Parties were in agreement to wait for the NTSB's plane crash investigative report instead of hiring expert investigators on short notice. Burchett v. S. Denver Windustrial, 42 P.3d 19 (Colo. 2002).

Given the liberal interpretation afforded to procedural rules, district court abused its discretion by dismissing petitioner's motion for transfer as untimely filed under C.R.C.P. 520(b) and appellate remedy would be inadequate. Accordingly, court makes the rule to show cause absolute and directs direct court to

grant petitioner's motion for transfer to county court. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Rule 21.1. Certification of Questions of Law

(a) Power to Answer. The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or other federal court, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the supreme court.

(b) Method of Invoking. This rule may be invoked by an order of any of the courts referred to in section (a) upon said court's own motion or upon the motion of any party in which the certified question arose.

(c) Contents of Certification Order. A certification order must set forth:

(1) The questions of law to be answered; and

(2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(d) Preparation of Certification Order. The certifying court must prepare the certification order, which must be signed by the judge presiding at the hearing, and the clerk of the certifying court must forward the certification order under its official seal to the supreme court. The supreme court may require the original or copies of all or of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the supreme court, the record or a portion thereof may be necessary in answering the certified questions.

(e) Fees and Costs of Certification. Fees and costs of certification are the same as in civil appeals docketed before the supreme court and will be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Briefs and Argument. If the supreme court agrees to answer the questions certified to it, the court will notify all parties. The parties may not file any briefs unless ordered to do so by the court. If ordered to file briefs, the plaintiff in the trial court, or the appealing party in the appellate court must file its opening brief within 42 days from the date of receipt of the notice, and the opposing party or parties must file an answer brief within 35 days from service of the opening brief. A reply brief may be filed within 21 days of the service of the answer brief. Briefs must comply with the form and service requirements of C.A.R. 28, 31, and 32. Oral arguments may be allowed as provided in C.A.R. 34.

(g) Opinion. The written opinion of the supreme court stating the law governing the questions certified will be sent by the clerk under the seal of the supreme court to the certifying court and to the parties.

Source: (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and adopted June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''Hybrids: When Colorado and Federal Appeals Cross-Pollinate'', see 46 Colo. Law. 24 (Dec. 2017).

Utilization of rule to obtain binding opinion from Colorado supreme court. See Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1973), aff'd, 523 F.2d In re A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1978); Moore v. McFarlane, 642 P.2d 496 (Colo. 1982).

Applied in Imel v. United States, 523 F.2d 853 (10th Cir. 1975); United States v. United Banks, 542 F.2d 819 (10th Cir. 1976); People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978); In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340

(1980); City & County of Denver v. Bergland, 517 F. Supp. 155 (D. Colo. 1981); Keller v. A.O. Smith Harvestore Prods., 819 P.2d 69 (Colo. 1991); Leonard v. McMorris, 63 P.3d 323 (Colo. 2003); Hoery v. United States, 64 P.3d 214 (Colo. 2003).

Rules 22 and 23. No Colorado Rules

Rule 24. Proceedings in Forma Pauperis

(See C.A.R. 12(b).)

GENERAL PROVISIONS

Rule 25. Filing and Service

(a) Filing. Documents required or permitted to be filed in the appellate court must be filed with the clerk. Filing may be accomplished by e-filing pursuant to C.A.R. 30, by mail addressed to the clerk, or by hand delivery to the clerk's office. The date of filing of documents is the date they are received by the clerk regardless of method of filing.

(b) Inmate Filings. Documents filed by an inmate confined to an institution will be deemed filed when filed in accordance with C.A.R. 25(b). Documents filed by an inmate confined in an institution are timely filed with the court if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

(c) Service of all Documents Required. Copies of all documents filed by any party and not required by these rules to be served by the clerk must, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel must be made on counsel.

(d) Manner of Service. Service may be personal or by mail or E-Service. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. E-Service is complete upon the time and date of transmission by the E-Service provider.

(e) Proof of Service. Documents presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the documents filed. The clerk may permit documents to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Source: Entire rule amended and adopted May 17, 2001, effective July 1, 2001; (d) amended and effective February 7, 2008; entire rule amended and effective October 17, 2014.

ANNOTATION

With respect to the service of process requirement of § 8-53-119 (3), service upon the attorney general constitutes service upon industrial commission (now industrial claim appeals office). Butkovich v. Indus. Comm'n, 723 P.2d 1306 (Colo. 1985).

Applied in In re Lowery v. Indus. Comm'n, 666 P.2d 562 (Colo. 1983).

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed or allowed by these rules the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted including holidays, Saturdays and Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in these Rules, ''legal holiday'' includes the first day of January, observed as New Year's Day; the

third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement of Time. The appellate court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal beyond that prescribed in C.A.R. 4(a). Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission, or officer of the State of Colorado, except as specifically authorized by law.

(c) Additional Time After Service by Mail. Repealed.

Source: (a) amended and effective August 4, 1994; (a) amended and adopted June 27, 2002, effective July 1, 2002; (a) amended and effective and committee comment added and effective January 12, 2006; (a) amended and (c) repealed and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012; entire rule and committee comment amended and effective June 23, 2014.

COMMITTEE COMMENT

The rule as amended conforms to C.R.C.P. 6(a).

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P.33 (January 2012).

Time computation is sometimes ''forward,'' meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting ''backward'' means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

Law reviews. For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J. 1 (1980). For article, '''Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines'', see 41 Colo. Law. 33 (Jan. 2012).

Appellate court cannot enlarge the time for filing notice of appeal in civil cases beyond that prescribed in C.A.R. 4(a). Chapman v. Miller, 29 Colo. App. 8, 476 P.2d 763 (1970).

The provisions of section (b) of this rule prohibit an appellate court from enlarging the time for filing a notice of appeal under C.A.R. 4(a). People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973).

Although no enlargement may be made for

filing a notice of appeal under C.A.R. 4(a), there is no like exception under this rule for C.A.R. 4.2(d). Hence, the appellate court may extend the time for filing under C.A.R. 4.2(d). Farm Deals, LLLP v. State, 2012 COA 6, 300 P.3d 921.

Filing appeal within time set by statute vests court of appeals with jurisdiction and the court itself cannot enlarge time set by statute. Denver v. Bd. of Assessment Appeals, 748 P.2d 1306 (Colo. App. 1987).

New requirement that notice of appeal be filed with the appellate court is jurisdictional and strict compliance with the rule is required. Therefore, a notice of appeal erroneously filed in the trial court was of no effect under the new rules, and trial court was without authority to grant an extension of time to correctly file a notice of appeal. Collins v. Boulder Urban Renewal Auth., 684 P.2d 952 (Colo. App. 1984).

But can enlarge time in criminal cases. An appellate court may, for good cause shown, enlarge the time for filing under C.A.R. (4)(a). People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973).

Although counsel's neglect in timely filing a notice of appeal is inexcusable, the court should consider whether other factors, such as the potential prejudice the appellee may suffer from a late filing, the interests of judicial economy, and the propriety of requiring the defendant to pursue other remedies to redress his counsel's neglect, weigh heavily in favor of permitting the late filing. Estep v. People, 753 P.2d 1241 (Colo. 1988).

Estep v. People factors equally important in a juvenile case when appellate review of a judgment of delinquency entered by a magistrate is foreclosed by counsel's failure to file a timely petition for district court review pursuant to § 19-1-108 (5). People ex rel. M.A.M., 167 P.3d 169 (Colo. App. 2007) (decided prior to 2007 repeal of § 19-1-108 (5)).

A knowing and intentional failure to file an appeal does not constitute good cause for extending the filing time pursuant to section (b). People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Assertions inadequate to show excusable neglect. This rule is clear as to when and where the petition to appeal must be filed. Hence, statements by counsel that he was unfamiliar with the electronic filing and service system and that his secretary initially filed petition with trial court instead of appellate court constitute mere carelessness, not excusable neglect. Farm Deals, LLLP v. v.State, 2012 COA 6, 300 P.3d 921.

Judicial economy may constitute excusable neglect under section (b) only when accepting the appeal prevents the case from going back to the trial court on a new motion. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Section (c) is inapplicable as extension of time limit for petition for rehearing set forth in C.A.R. (40)(a). Garrett v. Garrett, 30 Colo. App. 167, 505 P.2d 39 (1971).

Application for time extension must generally be made before time prescribed expires. The application for extension, except on the happening of an unforeseen contingency, must be made before the time to take the step for which further time is asked has expired. La Junta & Lamar Canal Co. v. Fort Lyon Canal Co., 25 Colo. 515, 55 P. 728 motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

Otherwise, right to perform act lost. Under C.R.C.P. 6 and C.A.R. 31, a right to file an answer brief is lost where no request for extension of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Time extension granted where good cause shown. When the required steps in each case cannot be taken within the time limited, on good cause shown such time may be extended. La Junta & Lamar Canal Co. v. Fort Lyon Canal Co., 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

When an appellant pleads for an enlargement of time under this rule solely on the basis that his counsel neglected to file the notice of appeal, such neglect constitutes ''good cause'' only if it satisfies the excusable neglect standard set forth in Farmers Ins. Group (507 P.2d 865). Estep v. People, 753 P.2d 1241 (Colo. 1988).

The determination of whether good cause exists for enlargement of time pursuant to this rule for the late filing of a notice of appeal is within the broad discretion of the court of appeals, but such discretion cannot be exercised in a manner that is manifestly arbitrary, unreasonable, or unfair. Estep v. People, 753 P.2d 1241 (Colo. 1988).

Stipulations fixing or extending time disregarded unless expressly approved. Parties cannot by stipulation or agreement fix or extend the time for filing briefs in the supreme court contrary to the rules, and, unless such agreements are approved by the court, they will be disregarded. Wilson v. People, 25 Colo. 375, 55 P. 721 (1898); La Junta & Lamar Canal Co. v. Fort Lyon Canal Co., 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898); Estep v. People, 753 P.2d 1241 (Colo. 1988).

The time for filing an appeal to a decision of the title board is five days after the board denies the motion for rehearing and not five days from the date the secretary of state certifies the documents requested for appeal. Matter of

Title, Ballot Title for 1997-98 No. 62, 961 P.2d 1077 (Colo. 1998).

The requirement that an appeal be filed within five days from the board's denial of a motion for rehearing is to be construed in conjunction with this rule, thus limiting the computation of five days to exclude Saturday and Sunday. Matter of Title, Ballot Title for 1997-98 No. 62, 961 P.2d 1077 (Colo. 1998).

General rule on time computation does not affect specific time limits imposed by statute. A party to a proceeding who received notice of the industrial claim appeals office's order by mail, and who did not file an appeal within 20 days after the date of the certificate of mailing of the order as required by the applicable statute, was not entitled to the additional three days allowed by this rule for service by mail. Indus. Claim Appeals Office v. Zarlingo, 57 P.3d 736 (Colo. 2002).

Applied in Widener v. District Court, 200 Colo. 398, 615 P.2d 33 (1980); People v. Boivin, 632 P.2d 1038 (Colo. App. 1981); Cline v. Farmers Ins. Exch., 792 P.2d 305 (Colo. App. 1990); Garcia v. Medved Chevrolet, Inc., 240 P.3d 371 (Colo. App. 2009), aff'd, 263 P.3d 92 (Colo. 2011); Petition of Heostis v. Dept. of Educ., 2016 COA 6, 375 P.3d 1232.

Rule 27. Motions

(a) In General.

(1) Application for Relief. An application for an order or other relief must be made by filing a motion, unless these rules prescribe another form.

(2) Content and Service of Motion.

(A) Grounds and Relief Sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Accompanying Documents. Any affidavit or other documents necessary to support a motion must be filed with the motion, including documents required by a specific provision of these rules governing such a motion.

(C) Documents Barred. The following documents are barred:

(i) a separate brief;

(ii) a separate notice of motion; and

(iii) a proposed order.

(D) Service. The motion must be served on all other parties pursuant to Rule 25. A motion to consolidate an appeal with another appeal must be served on all parties in both appeals.

(3) Response to Motion.

(A) Time to File. Any party may file a response in opposition to a motion, other than a motion for a procedural order pursuant to section (b) of this rule. The response must be filed within 7 days after service of the motion unless the court shortens or extends the time. In its discretion, the court may act on a motion authorized by Rule 8, 8.1, 9, or 41 before the 7 day period runs.

(B) Cross-Motion for Affirmative Relief. A response may include a cross-motion for affirmative relief. The time to respond to the new motion for affirmative relief is governed by Rule 27(a)(3)(A). The title of the response must alert the court to the request for relief.

(b) Determination of Stipulated Motions and Motions for Procedural Orders. The court may act on a stipulated motion signed by all parties or a motion for a procedural order, including a motion under Rule 26(b), at any time without awaiting a response. Any party adversely affected by the court's action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion specifically requesting that relief must be filed.

(c) Power of a Single Justice or Judge to Decide a Motion. In addition to the authority expressly conferred by these rules or by law, a single justice or judge may act alone on non-dispositive motions and on voluntary or uncontested dispositive motions. The appellate court may provide by rule or by order that only the court or a division of the court may act on any motion or class of motions. The court or a division of the court may review the action of a single justice or judge.

(d) Form of Motions. All documents and pleadings relating to motions must comply with Rule 32.

(e) No Oral Argument. A motion will be decided without oral argument unless the court orders otherwise.

Source: (d) amended August 30, 1985, effective January 1, 1986; (a) amended and adopted April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective January 7, 2015.

ANNOTATION

Law reviews. For article, ''Motions Practice in the Court of Appeals'', see 23 Colo. Law. 1797 (1994). For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must be entitled ''opening brief'' and must contain the following under appropriate headings and in the order indicated:

(1) a certificate of compliance as required by C.A.R. 32(h);

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a statement of the issues presented for review;

(5) a concise statement identifying the nature of the case, the relevant facts and procedural history, and the ruling, judgment, or order presented for review, with appropriate references to the record (see C.A.R. 28 (e));

(6) a summary of the arguments, which must:

(A) contain a succinct, clear, and accurate statement of the arguments made in the body of the brief;

(B) articulate the major points of reasoning employed as to each issue presented for review; and

(C) not merely repeat the argument headings or issues presented for review;

(7) the arguments which must contain:

(A) under a separate heading placed before the discussion of each issue, statements of the applicable standard of review with citation to authority, whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled; and

(B) appellant's contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies;

(8) a short conclusion stating the precise relief sought; and

(9) any request for attorney fees.

(b) Appellee's Brief. The appellee's answer brief must be entitled ''answer brief'' and must conform to the requirements of C.A.R. 28 (a) except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the appellant's statement. For each issue, the answer brief must, under a separate heading placed before the discussion of the issue, state whether the appellee agrees with the appellant's statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not. The answer brief must also contain any request for attorney fees or state any opposition to attorney fees requested in the opening brief.

(c) Reply Brief. The appellant may file a brief, which must be entitled ''reply brief'' in reply to the answer brief. A reply brief must comply with C.A.R. 28(a)(1)-(3), and must state any opposition to attorney fees requested in the answer brief. No further briefs may be filed except with leave of court.

(d) References in Briefs to Parties. Parties should minimize use of the terms ''appellant'' and ''appellee.'' Parties should use the designations used in the lower court or agency

proceeding, the parties' actual names or initials, or descriptive terms such as ''the employee,'' ''the injured person,'' or ''the taxpayer.''

(e) References to the Record. Reference to the record and to material appearing in an addendum to the brief should generally follow the format detailed in the ''Court of Appeals Policy on Citation to the Record.'' Record references, including abbreviations, must be clear and readily identifiable.

(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of regulations, ordinances, or any statutes or rules not currently in effect or not generally available in an electronic format, the relevant parts may be reproduced in an addendum at the end of the brief.

(g) Length of Briefs.

(1) An opening brief and an answer brief must contain no more than 9,500 words. A reply brief must contain no more than 5,700 words. Headings, footnotes, and quotations count toward the word limitations. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block do not count toward the word limit.

(2) A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten opening or answer brief of not more than 30 double-spaced and single-sided pages, or a reply brief of no more than 18 double-spaced and single-sided pages. Such a brief must otherwise comply with C.A.R. 32.

(3) A party may file a motion to exceed the word limitation explaining the reasons why additional words are necessary. The motion must be filed with the brief.

(h) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a single brief, and any party may adopt by reference any part of another's brief, but a party may not both file a separate brief and incorporate by reference the brief of another party. Parties may also join in reply briefs. In cases involving a single appellant or appellee with multiple opposing parties, the single party must file a single brief in response to multiple opposing parties' briefs. Except by permission of the court, such a brief is restricted to the page and word limits set forth in C.A.R. 28(g), regardless of the cumulative page and word counts of the opposing parties' briefs. Multiple parties represented by the same counsel must file a joint brief.

(i) Citation of Supplemental Authorities. If pertinent and significant new authority comes to a party's attention after the party's brief has been filed, a party may promptly advise the court by giving notice, with a copy to all parties. The notice must set forth the citation and state, without argument, the reason for the supplemental citation, referring either to the page of the brief or to a point argued orally. The body of the notice must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Source: IP(a), (b), (c), (g), and (h) amended March 17, 1994, effective July 1, 1994; entire rule amended and adopted December 4, 2003, effective January 1, 2004; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (k) and committee comment added and effective June 22, 2006; (e) amended and effective September 7, 2006; (g) amended and effective May 28, 2009; entire rule and comments amended and effective June 25, 2015.

COMMENTS

2006

Compliance with subsection (k) does not warrant lengthy discussion but requires only the declaration of the applicable standard of review and the record reference to where the issue was preserved. The following are examples:

(1) An appellate court reviews the wording of an instruction for abuse of discretion. [cite case]. Because this is a criminal case and no objection was made or alternative instruction tendered in the trial court, the issue should be reviewed for plain error [cite case].

(2) The admissibility of expert testimony is reviewed for abuse of discretion. [cite case] This issue was preserved by appellant's offer of proof. R. _____, p. _____.

2015

Prior subsection (h) entitled, ''Briefs in Cases Involving Cross-Appeals,'' has been deleted

from C.A.R. 28. The substance of prior subsection (h) now appears in C.A.R. 28.1, which sets forth briefing requirements for cases involving cross-appeals.

Prior subsection 28(k) entitled, ''Standard of Review; Preservation,'' has been deleted, but parties must continue to comply with its substantive requirements, which are now set forth in subsections 28(a)(7)(A) and (b). Compliance with subsections 28(a)(7)(A) and (b) does not warrant lengthy discussion but requires only the declaration of the applicable standard of review with citation to authority and the record reference to where the issue was preserved. The following are examples:

(1) An appellate court reviews the wording of an instruction for abuse of discretion. [cite case]. Because this is a criminal case and no objection was made or alternative instruction tendered in the trial court, the issue should be reviewed for plain error [cite case].

(2) The admissibility of expert testimony is reviewed for abuse of discretion. [cite case] This issue was preserved by appellant's offer of proof. R. CF, p.

The deletion of prior subsections (h) and (k) required the re-lettering of the substance of previous subsections (i), ''Briefs in Cases Involving Multiple Appellants or Appellees,'' and (j) ''Citation of Supplemental Authorities,'' to new subsections (h) and (i), respectively.

ANNOTATION

Law reviews. For article, ''How Not to Write a Brief'', see 22 Dicta 109 (1945). For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mt. L. Rev. 618 (1951). For article, ''Colorado Criminal Procedure — Does It Meet Minimum Standards?'', see 28 Dicta 14 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''Some Observations on Colorado Appellate Practice'', see 34 Dicta 363 (1957). For article, ''Some Observations on Brief Writing'', see 33 Rocky Mt. L. Rev. 23 (1960). For note, ''Colorado Appellate Procedure'', see 40 U. Colo. L. Rev. 551 (1968). For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005). For article, ''Complying With C.A.R. 28 and 32'', see 39 Colo. Law. 65 (Nov. 2010). For article, ''Raising New Issues on Appeal: Waiver and Forfeiture in Colorado's Federal and State Appellate Courts'', see 46 Colo. Law. 25 (July 2017).

Where court could discern that certain issues manifested themselves from a search of the briefs, fact appellant's brief was deficient relative to the requirements of this rule did not require dismissal. Barr Lake Vill. Metro. Dist. v. Colo. Water Quality Control Comm'n, 835 P.2d 613 (Colo. App. 1992).

Purpose of rules of court. Rules of court are for the purpose of enforcing an orderly and diligent preparation and submission of causes. La Junta & Lamar Canal Co. v. Fort Lyon Canal Co., 25 Colo. 515, 55 P. 728, motion to set aside order dismissing appeal granted, 25 Colo. 513, 55 P. 729 (1898).

Requirements of this rule adopted as aid to court in disposing of causes. The requirements of this rule were not adopted merely for the protection or convenience of litigants, but in a large measure as aids to the court in disposing of causes submitted. Dubois v. People, 26 Colo. 165, 57 P. 187 (1899).

Counsel cannot determine for themselves in what manner they shall prepare a case for hearing, in disregard of the requirements prescribed by the rules. Dubois v. People, 26 Colo. 165, 57 P. 187 (1899).

Failure to comply with this rule may result in dismissal. Denver, W. & Pac. Ry. v. Woy, 7 Colo. 556, 5 P. 815 (1884); Meyer v. Helland, 2 Colo. App. 209, 29 P. 1135 (1892); McDonald v. McLeod, 3 Colo. App. 344, 33 P. 285 (1893); Hammond v. Herdman, 3 Colo. App. 379, 33 P. 933 (1893); Buckey v. Phenicie, 4 Colo. App. 204, 35 P. 277 (1894); Wilson v. People, 25 Colo. 375, 55 P. 721 (1898); Dubois v. People, 26 Colo. 165, 57 P. 187 (1899); Meldrum v. Bassler, 40 Colo. 506, 90 P. 1033 (1907); Knapp v. Fleming, 127 Colo. 414, 258 P.2d 489 (1953); Waters v. Culver, 130 Colo. 360, 275 P.2d 936 (1954).

Or affirmance of judgment. A judgment may be affirmed upon appellant's failure to comply with the requirements for printing briefs. Mitchell v. Pearson, 34 Colo. 281, 82 P. 447 (1905).

General composition of briefs. Gardner v. City of Englewood, 131 Colo. 210, 282 P.2d 1084 (1955).

Length and contents of appellate briefs. It is neither necessary nor advisable that every previous procedural move and ruling be presented to the appellate court. Only those procedural steps which are relevant to the issues raised in the appellate court need be recited. People v. Galimanis, 728 P.2d 761 (Colo. App. 1986).

For when the limit on length may be modified, see People v. Galimanis, 728 P.2d 761 (Colo. App. 1986).

Rule does not extend an open invitation to counsel to conduct additional research after the close of briefing and then present the fruits of such research to the court on the eve of

argument. Glover v. Innis, 252 P.3d 1204 (Colo. App. 2011).

Sufficient statement of the case is presented by relating only the facts material to a decision. F. W. Woolworth Co. v. Peet, 132 Colo. 11, 284 P.2d 659 (1955).

This rule requires a statement in the brief of the facts material to a decision of the case. Lowe v. United States Fid. & Guar. Co., 171 Colo. 215, 466 P.2d 73 (1970).

Rule provides for a summary of argument. Farrell v. Bashor, 140 Colo. 408, 344 P.2d 692 (1959).

Appellant required to set out part of record supporting contentions of error. The elimination of the requirement of an abstract of the record does not relieve the appellant of the duty of setting out such parts of the pleadings, the evidence, the findings, and the judgment as are required to support his contentions of error. In re Hay's Estate, 127 Colo. 411, 257 P.2d 972 (1953).

As court will not search through briefs to discover errors and supporting evidence. The court will not search through briefs to discover what errors are relied on, and then search through the record for supporting evidence. It is the task of counsel to inform the court, as required by the rules, both as to the specific errors relied on and the grounds and supporting facts and authorities therefor. Mauldin v. Lowery, 127 Colo. 234, 255 P.2d 976 (1953); Westrac, Inc. v. Walker Field, 812 P.2d 714 (Colo. App. 1991); Castillo v. Koppes-Conway, 148 P.3d 289 (Colo. App. 2006).

Where a taxpayer appeals from an adverse decision in a quo warranto action challenging right of member of the federal rent advisory board to hold office as a city councilman and the federal statutes were not quoted or cited or summarized or analyzed in the record or in the taxpayer's brief, the appellate court will not search through the federal statutes to find grounds of technical disability in order to remove the councilman from office. People ex rel. Miller v. Cavender, 123 Colo. 175, 226 P.2d 562 (1950).

Argument that is merely a bald assertion of error violates section (a) of this rule and is not properly presented for review. Sinclair Transp. Co. v. Sandberg, 2014 COA 76M, 350 P.3d 924.

Brief held inadequate. Mauldin v. Lowery, 127 Colo. 234, 255 P.2d 976 (1953); In re Hay's Estate, 127 Colo. 411, 257 P.2d 972 (1953); Westrac, Inc. v. Walker Field, 812 P.2d 714 (Colo. App. 1991); Castillo v. Koppes-Conway, 148 P.3d 289 (Colo. App. 2006).

Scurrilous brief attacking trial judge stricken. Knapp v. Fleming, 127 Colo. 414, 258 P.2d 489 (1953).

Briefs stricken and appeal dismissed due to uncivil language and inadequate argument. Martin v. Essrig, 277 P.3d 857 (Colo. App. 2011).

Applied in Barlow v. Staples, 28 Colo. App. 93, 470 P.2d 909 (1970).

Rule 28.1. Briefs in Cases Involving Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and C.A.R. 34. These designations may be modified by the parties' agreement or by court order.

(c) Appellant's Opening Brief. The appellant must file an opening brief in the appeal. This brief must be entitled ''opening brief'' and must comply with C.A.R. 28(a) and (d)-(h).

(d) Appellee's Opening-Answer Brief. The appellee must file an opening brief in the cross-appeal and must, in the same brief, respond to the opening brief in the appeal. This brief must be entitled ''opening-answer brief'' and must comply with C.A.R. 28(a), (b), and (d)-(h), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement of the case.

(e) Appellant's Answer-Reply Brief. The appellant must file a brief that responds to the portion of the opening-answer brief that constitutes an opening brief in the cross-appeal, and may, in the same brief, reply to the portion of the opening-answer brief that constitutes an answer brief in the appeal. This brief must be entitled ''answer-reply brief'' and must comply with C.A.R. 28(b)-(h).

(f) Appellee's Reply Brief. The appellee may reply to the portion of the answer-reply brief that constitutes an answer brief. This brief must be entitled ''reply brief'' and must comply with C.A.R. 28(c)-(h) and must be limited to the issues raised in the cross-appeal. No further briefs may be filed except with leave of court.

(g) Length of Briefs.

(1) An opening, opening-answer, and answer-reply brief must contain no more than 9,500 words. An appellee's reply brief must contain no more than 5,700 words. Headings,

footnotes, and quotations count toward the word limitations. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block do not count toward the word limit.

(2) A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten opening, opening-answer, or answer-reply brief of not more than 30 double-spaced and single-sided pages, or a reply brief of no more than 18 double-spaced and single-sided pages. Such a brief must otherwise comply with C.A.R. 32.

(3) A party may file a motion to exceed the word limitation explaining the reasons why additional words are necessary. The motion must be filed with the brief.

(h) Citation of Supplemental Authorities. If pertinent and significant new authority comes to a party's attention after the party's brief has been filed, a party may promptly advise the court by giving notice, with a copy to all parties. The notice must set forth the citation and state, without argument, the reason for the supplemental citation, referring either to the page of the brief or to a point argued orally. The body of the notice must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Source: Entire rule added and effective June 25, 2015.

COMMENT

2015

The new rule is similar to Fed. R. App. P. 28.1 and applies to briefs involving cross-appeals. The portions of the previous version of C.A.R. 28(h) and (g) referencing cross-appeals have been removed. The substance of those subsections has been imported into C.A.R. 28.1.

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. An amicus curiae may file a brief only by leave of court or at the court's request.

(b) Motion for Leave to File. The motion to file an amicus brief must identify the movant's interest and state the reasons why an amicus brief would be helpful to the court. The brief must be conditionally filed with the motion, unless the court grants leave to file the motion without the brief.

(c) Content and Form. An amicus brief must comply with Rule 32. The caption page on the brief must indicate whether the brief is submitted in support of a party, and if so must identify the party or parties supported. The brief must also comply with Rule 28(a)(2) and (3) and must include the following:

(1) a certificate of compliance as required by Rule 32(h);

(2) a concise statement of the identity of the amicus curiae and its interest in the case; and

(3) an argument, which may be preceded by a summary but need not include a statement of the applicable standard of review or whether the issue was preserved.

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of the amicus brief.

(e) Time for Filing. An amicus curiae must file its brief within the deadline for filing the principal brief of the party being supported. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's opening brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief. Unless the court orders otherwise, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission, which will be granted only for extraordinary reasons. A motion to

participate in oral argument must state that the supported party does not object and will share its allotted time with amicus. The length of oral argument will not be extended to accommodate amicus participation.

Source: Entire rule amended and effective June 25, 2015.

ANNOTATION

Law reviews. For article, ''What Amici Curiae Can and Cannot Do with Amicus Briefs'', see 46 Colo. Law. 23 (Apr. 2017).

Amicus curiae limited to questions raised by appealing parties. An appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. Denver United States Nat'l Bank v. People ex rel. Dunbar, 29 Colo. App. 93, 480 P.2d 849 (1970).

Applied in First Lutheran Mission v. Dept. of Rev., 44 Colo. App. 417, 613 P.2d 351 (1980).

Rule 30. E-Filing

(a) Definitions.

(1) ***Document.*** A pleading, motion, brief, writing or other paper filed or served under Colorado Appellate Rules.

(2) ***E-Filing/Service System.*** The E-Filing/Service System **("E-System")** approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(3) ***Electronic Filing.*** Electronic filing **("E-Filing")** is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) ***Electronic Service.*** Electronic service **("E-Service")** is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service via the E-System.

(5) ***E-System Provider.*** The E-Service/E-Filing System Provider authorized by the Colorado Supreme Court.

(6) ***S/Name.*** A symbol representing the signature of the person whose name follows the ''S/'' on the electronically or otherwise signed form of the E-Filed or E-Served document.

(b) Types of Cases Applicable. E-Filing and E-Service are permissible in all cases.

(c) To Whom Applicable.

(1) Attorneys licensed to practice law in Colorado may register to use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(d) E-Filing — Date and Time of Filing. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(e) E-Service — When Required — Date and Time of Service. Documents submitted to the court through E-Filing shall be served under C.A.R. 25 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(f) Filing Party to Maintain the Signed Copy — Paper Document Not to Be Filed — Duration of Maintaining of Document. A printed or printable copy of an E-Filed or E-Served document with original or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(g) Documents Requiring E-Filed Signatures. For all E-Filed and E-Served documents, signatures of attorneys and parties may be in S/Name typed form to satisfy signature requirements, once the necessary signatures have been obtained on a paper form of the document. Attorneys and parties may also use an electronic ink signature.

(h) Documents Under Seal. A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the direction of the court; however, the filing party may object to this procedure.

(i) Transmitting of Orders, Notices, Opinions and Other Court Entries. Appellate courts shall distribute orders, notices, opinions, and other court entries using the E-System in cases where E-Filings were received from any party.

(j) Form of E-Filed Documents. E-Filed documents shall comply with all requirements as to form contained within these rules.

(k) E-Filing May be Mandated. The Chief Justice may mandate, or, with the permission of the Chief Justice, the Chief Judge of the court of appeals may mandate E-Filing for specific case classes or types of cases. An appellate justice or judge may mandate E-Filing and E-Service for a specific case for submitting documents to the court and serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory an appellate justice or judge may exclude pro se parties from mandatory E-Filing requirements.

(l) Relief in the Event of Technical Difficulties.

(1) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (a) an error in the transmission of the document to the E-System Provider which was unknown to the sending party; (b) a failure of the E-System Provider to process the E-Filing when received, or (c) other technical problems experienced by the filer or E-System Provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(m) Form of Electronic Documents.

(1) ***Electronic Document Format, Size and Density.*** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01, as amended.

(2) ***Multiple Documents.*** Multiple documents may be filed in a single electronic filing transaction. Each document in that filing must bear a separate document title.

(3) The Court authorized service provider for the program is Colorado Courts E-Filing (www.courts.state.co.us).

Source: Entire rule added and effective February 7, 2008; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 23, 2014; (m)(3) adopted and effective October 26, 2017.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File Briefs. The appellant must serve and file the opening brief within 42 days after the record is filed. The appellee must serve and file the answer brief within 35 days after service of the opening brief. The appellant may serve and file a reply brief within 21 days after service of the answer brief. In cases involving cross-appeals the appellant must serve and file the opening brief within 42 days after the record is filed, the cross-appellant's opening-answer brief and the appellant's answer-reply brief shall be served and filed within 35 days after service of the opposing party's brief. The cross-appellant may serve and file a reply brief within 21 days after service of the appellant's answer-reply brief.

(b) Consequence of Failure to File. If an appellant or cross-appellant fails to file a brief within the time provided by this rule, or within an extended time as permitted by the court, the court may dismiss the appeal on its own motion or a motion to dismiss filed by the appellee or cross-appellee.

Source: (a) amended March 17, 1994, effective July 1, 1994; (b) and (c) amended May 12, 1994, effective July 1, 1994; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (a) and (b) amended and (c) repealed and effective June 25, 2015.

ANNOTATION

Law reviews. For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J. 1 (1980).

Purpose and observance of rule. This rule is for the proper dispatch of business, and its observance is required in the interests of litigants generally. Wilson v. People, 25 Colo. 375, 55 P. 721 (1898); People v. J. H. Cooper Enterprises, 111 Colo. 338, 141 P.2d 414 (1943).

Briefs may not be filed whenever or wherever counsel may find it convenient. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

Burden is clearly on appellants to make a timely filing of their opening brief pursuant to this rule and § 24-4-106(4), C.R.S. Warren Village, Inc. v. Bd. of Assmt. Appeals, 619 P.2d 60 (Colo. 1980); Wilkinson v. Motor Vehicle Div., 634 P.2d 1016 (Colo. App. 1981).

Right to file answer brief is lost where no request for extension of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Court's discretion to dismiss. Dismissal for failure to comply with statutory time limitations for filing briefs is within the discretion of the trial court. Wilkinson v. Motor Vehicle Div., 634 P.2d 1016 (Colo. App. 1981).

Time for filing when motion to dismiss appeal denied. Time for filing an answer brief on the merits, where a motion to dismiss an appeal is denied, shall commence to run on the date of the announcement of the opinion; otherwise, this rule will control in the matter of filing briefs. Johnson v. George, 119 Colo. 153, 200 P.2d 931 (1948).

Judicial review of agency action pursuant to § 24-4-106(4), C.R.S., is subject to the time limitations specified in section (a) of this rule. Dismissal for failure to comply with statutory time limitations for filing briefs is left within the trial court's discretion. DuPuis v. Charnes, 668 P.2d 1 (Colo. 1983).

Agreement between parties extending time not binding on court. A court is not bound by an agreement between parties which extends the time for filing briefs. Wilkinson v. Motor Vehicle Div., 634 P.2d 1016 (Colo. App. 1981).

Applied in Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979); People v. Boivin, 632 P.2d 1038 (Colo. App. 1981).

Rule 32. Form of Briefs and Appellate Documents

(a) Form of Briefs and Other Appellate Documents. Except as otherwise provided in this rule or by leave of court, all briefs and other appellate documents must comply with the following standards:

(1) Type Size. The typeface must be 14-point or larger, including footnotes, except that the caption may be in 12-point if necessary to fit on one page.

(2) Typeface. The type must be a plain, Roman style with serifs. Italics or boldface may be used for emphasis. Cited case names must be italicized or underlined.

(3) Paper Size, Line Spacing, and Margins. All documents must be on 8 1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least 1 1/2 inches on the top and 1 inch on the left, right, and bottom. Page numbers are required and may be placed in the bottom margin, but no text may appear there.

(4) Length. If a brief or other appellate document is subject to a word limit, it must include a certificate by the attorney, or by a self-represented party, that the document complies with the applicable word limit. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document. The certificate must state the number of words in the document.

(b) Documents Submitted by Self-Represented Parties. A self-represented party who does not have access to a word-processing system must file typewritten or legibly handwritten briefs and other appellate documents. Such documents must otherwise comply

with the form requirements of this rule and the requirements of C.A.R. 28 and, if applicable, C.A.R. 28.1.

(c) Binding and Reproduction. Briefs and other appellate documents may be produced by any process that yields a clear black image on white paper. The paper must be opaque and unglazed. Only one side of the paper may be used. Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy. Consecutive sheets must be stapled together at the top left margin.

(d) Caption. The first page of each brief or other appellate document must contain a caption that includes the following basic document information:

(1) the name and address of the court in which the proceeding is filed;

(2) the nature of proceeding (e.g., Appeal, Petition for Writ of Certiorari, Petition for Rule to Show Cause); name of the court(s), agency, or board below; and the lower court judge(s), and case number(s);

(3) the names of parties with appellate court party designations as follows:

(A) In the Supreme Court: Appellant(s) or Appellee(s) in cases in which the Supreme Court has original appellate jurisdiction; Petitioner(s) or Respondent(s) in original proceedings filed pursuant to C.A.R. 21 and certiorari proceedings.

(B) In the Court of Appeals: Petitioner(s) or Respondent(s) in appeals filed pursuant to C.A.R. 3.1 and 3.4 (see Appendix to Chapter 32); Appellant(s) or Appellee(s) in all other appeals.

(4) the name, address, telephone number, e-mail address (if any), and fax number (if any) of counsel or self-represented party filing the document;

(5) if the document is filed by counsel, his or her attorney registration number;

(6) the title of the document (e.g., Opening Brief, Petition for Writ of Certiorari), identifying the party or parties for whom the document is filed; and

(7) on the top-right side (opposite filing court information), a blank area that is at least 2 1/2 inches wide and 1 3/4 inches long, with the words ''Case Number.''

Form 7 illustrates the required caption for all documents created using a word-processing system. Form 7A illustrates the required caption for all documents filed by a self-represented party who does not have access to a word-processing system and is unable to obtain and complete Form 7.

(e) Signature. Every brief, motion, or other document filed with an appellate court must be signed by the party filing the document or, if the party is represented, by one of the party's attorneys.

(f) References to Sexual Assault Victims and Minors. Except as otherwise provided by this rule or by leave of court, the following individuals must not be named in briefs or other appellate documents and must be identified by initials or appropriate general descriptive terms such as ''victim'' or ''child'':

(1) sexual assault victims; and

(2) minors in criminal cases and cases brought under Title 19.

Any relative whose name could be used to determine the name of a person protected under this subsection must also be identified by initials or appropriate general descriptive terms. When the defendant in a criminal case is a family member of the person protected under this subsection, the defendant may be named.

(g) Non-Compliant Documents. If the clerk determines that a brief or other document does not comply with the Colorado Appellate Rules or is not sufficiently legible, the clerk will accept the document for filing but may require that a conforming document be filed.

(h) Certificate of Compliance. Each brief must include, on a separate page immediately behind the caption page, a certificate that the brief complies with all requirements of C.A.R. 28 and C.A.R. 32, and, if applicable, C.A.R. 28.1 or 29. Forms 6 and 6A are the preferred forms for a certificate of compliance and will be regarded as meeting the requirements of C.A.R. 32(a)(4).

Source: (a), (b), and (c)(2) amended and (d) added, effective July 8, 1993; entire rule amended and adopted March 13, 1997, effective July 1, 1997; (c) amended and Comment

added June 1, 2000, effective July 1, 2000; entire rule and Comment amended and adopted June 28, 2001, effective July 1, 2001; (c)(1)(II) and (c)(2)(II) corrected July 24, 2001, effective nunc pro tunc July 1, 2001; entire rule amended and adopted February 24, 2005, effective July 1, 2005; IP(a) amended and effective February 7, 2008; (f) added and effective May 28, 2009; entire rule and comment amended and effective October 17, 2014; entire rule and comments amended and effective June 25, 2015.

COMMENTS

2000

This rule conforms the appellate practice to the forms of case captions provided in C.R.C.P. 10 for all documents that are filed in Colorado courts, including both criminal and civil cases. The purpose of the form captions is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently.

The preferred case caption format for documents initiated by a party is found in subsection (c)(1)(I). The preferred caption for documents issued by the court or clerk of court is found in subsection (c)(1)(II). Because some parties may have difficulty formatting their documents to include vertical lines and boxes, alternate case caption formats are found in subsections (c)(2)(I) and (c)(2)(II). However, the box format is the preferred and recommended format.

The boxes may be vertically elongated to accommodate additional party and attorney information if necessary. The ''court use'' and ''case number'' boxes, however, shall always be located in the upper right side of the caption.

Forms approved by the State Court Administrator's Office (designated ''JDF'' or ''SCAO'' on pre-printed or computer-generated forms), forms set forth in the Colorado Court Rules, volume 12, C.R.S. (including those pre-printed or computer-generated forms designated ''CRCP'' or ''CPC'' and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, ''ICON,'' shall conform to criteria established by the State Court Administrator's Office with the approval of the Colorado Supreme Court. This includes pre-printed and computer-generated forms. JDF and SCAO forms and a flexible form of caption which allows the entry of additional party and attorney information are available and can be downloaded from the Colorado courts web page at http://www.courts.state.co.us/scao/Forms.htm.

2014

This rule conforms the appellate practice to the forms of case captions provided in C.R.C.P. 10 for all documents filed in Colorado appellate courts. The purpose of the form caption is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently. The preferred case caption format for documents initiated by a party is found in subsection (d)(1). Parties who cannot format documents to include vertical lines and boxes may use the alternate case caption format in subsections (d)(2). However, the box format is the preferred and recommended format.

2015

The purpose of the form caption is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently. The changes to this rule make the appellate practice caption forms consistent with the forms of case captions provided in C.R.C.P. 10 for all documents filed in Colorado appellate courts.

The required case caption format for documents created using a word-processing system is found in Form 7. Self-represented parties who do not have access to a word-processing system and cannot format documents to include vertical lines and boxes may use the alternate case caption format in Form 7A. However, Form 7 caption format is preferred and recommended.

Subsection (f) is a new subsection. It is based on the legislative requirements set forth in Colo. Rev. Stat. §§19-1-102(1.7), 19-1-109(1), and 24-72-304(4)(a), and is consistent with longstanding court practice.

Prior subsection (e), formerly titled ''Improper Form and Briefs of Other Papers,'' now titled ''Non-Compliant Documents'' and (f) titled ''Certificate of Compliance'' have been re-lettered to subsections (g) and (h), respectively. The substance of the prior subsections has not changed.

ANNOTATION

Law reviews. For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005). For article, ''Complying With C.A.R. 28 and 32'', see 39 Colo. Law. 65 (Nov. 2010).

Noncompliance will result in dismissal. Where an appellant fails to comply with this provision, the appeal will be dismissed. Dubois v. People, 26 Colo. 165, 57 P. 187 (1899).

Example of noncompliance. A reply brief which is in indistinct and blurred typewriting flagrantly violates this provision. Mitchell v. Pearson, 34 Colo. 281, 82 P. 447 (1905).

Rule 33. Prehearing Conference

Repealed effective January 7, 2015.

Source: Entire rule repealed effective January 7, 2015.

ANNOTATION

Law reviews. For article, ''The Problem of Delay in the Colorado Court of Appeals'', see 58 Den. L.J. 1 (1980).

Rule 34. Oral Argument

(a) In General. Oral argument may be allowed at the discretion of the court. A request for oral argument must be made in a separate document entitled ''request for oral argument.'' The request must be filed no later than 7 days after briefs are closed. The court may order oral argument regardless of whether any party requested oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties of the date, time, and place of oral argument. A motion to postpone the argument must be filed reasonably in advance of the argument date.

(c) Time Allowed for Argument.

(1) In the Supreme Court. Unless the court orders otherwise, each side will be allowed 30 minutes for argument. Any motion for additional time must be filed within 7 days after the briefs are closed and will be granted only if good cause is shown. The court may vacate or terminate the argument if, in its judgment, further argument is unnecessary.

(2) In the Court of Appeals. Unless the court orders otherwise, each side will be allowed 15 minutes for argument. Any motion for additional time must be filed within 7 days after the briefs are closed and will be granted only if good cause is shown. The court may vacate or terminate the argument if, in its judgment, further argument is unnecessary.

(d) Order and Content of Argument. The appellant opens the argument and may reserve a portion of its allotted time for rebuttal. Parties should not read at length from briefs, records, or authorities. Unless the court orders otherwise, oral arguments will be limited to the issues raised in the briefs.

(e) Cross-Appeals and Separate Appeals. If there is a cross-appeal, C.A.R. 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise a cross-appeal will be argued with the initial appeal as a single argument. The court may set separate appeals that involve the same or similar issues together for argument. In such cases, separate parties should avoid duplicative argument.

(f) Nonappearance of Parties. If the appellee fails to appear for argument, the court may hear argument by the appellant, if present. If the appellant fails to appear, the court may hear argument by the appellee. If neither party appears, the case will be decided on the briefs unless the court orders otherwise.

(g) Use of Physical Exhibits at Argument; Removal. Parties intending to use physical exhibits other than documents at the argument must arrange with the clerk of court to place them in the courtroom on the day of the argument before the court convenes. After the argument, the party must remove the exhibits from the courtroom unless the court

directs otherwise. The clerk may destroy or dispose of the exhibits if a party does not reclaim them within a reasonable time after the clerk has given notice to remove them.

(h) Supreme Court Sessions En Banc and in Departments. The chief justice may convene the court en banc at any time, and must do so on the written request of three justices. Subject to this provision, or as limited by the constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the justices to hear such arguments, will be under the direction and control of the chief justice.

(i) References to Minors and Sexual Assault Victims. Reference at oral arguments to sexual assault victims and minors must comply with the requirements of C.A.R. 32(f).

Source: (b)(1) and (c) amended March 15, 1985, effective July 1, 1985; (b) amended August 30, 1985, effective January 1, 1986; (d) amended and adopted April 4, 1996, effective July 1, 1996; (b)(2) amended and effective September 9, 2004; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule and comment amended and effective June 25, 2015.

COMMENTS

2015

Subsection (i) is a new subsection. It is consistent with new C.A.R. 32(f), and is based on the legislative requirements set forth in Colo. Rev. Stat. §§19-1-102(1.7), 19-1-109(1), and 24-72-304(4)(a), and is consistent with longstanding court practice.

ANNOTATION

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mt. L. Rev. 618 (1951).

Decision on briefs satisfies obligation of counsel on criminal appeal. Where counsel for the parties filed with the court a statement requesting a decision upon the briefs of the respective parties without oral argument pursuant to section (f), it was held that the statement was in accord with the standards of criminal justice, as they relate to the obligations of counsel for the defendant on appeal. Garcia v. People, 174 Colo. 372, 483 P.2d 1347 (1971).

Requests for further oral arguments. Where no request for further oral argument was made, nor was any request for an argument en banc made until after the announcement of the court's decision, the right, if it existed, was waived. Scott v. Shook, 80 Colo. 40, 249 P. 259, 47 A.L.R. 1108 (1926) (decided under former Supreme Court Rule 43).

Rule 35. Determination of Appeal

(a) Disposition of Appeal. The appellate court may, in whole or in part, dismiss an appeal; affirm, vacate, modify, reverse, or set aside a lower court judgment; and remand any portion of the case to the lower court for further proceedings. When reviewing a ruling or judgment dismissing criminal charges, the appellate court may approve or disapprove of the judgment if retrial of the defendant is prohibited. The appellate court may dismiss an appeal or affirm a lower court judgment without opinion, but it must issue a written opinion when vacating, modifying, reversing, setting aside, or remanding any portion of the lower court judgment.

(b) Equally Divided Supreme Court. When the supreme court acting en banc is equally divided in an opinion, the judgment being appealed will stand affirmed.

(c) Harmless Error. The appellate court may disregard any error or defect not affecting the substantial rights of the parties.

(d) Advancement on Docket. Any pending action may be advanced on the docket and may be disposed of in such order as the court deems appropriate. The court may make such orders relating to the time and necessity for the filing of briefs and for oral argument as it deems the circumstances demand.

(e) Published Opinions of Court of Appeals. A majority of all of the judges of the court of appeals shall determine which opinions of that court will be designated for official

publication. The opinions shall be published in the official publication designated by the supreme court. Opinions designated for official publication must be followed as precedent by all lower court judges in the state of Colorado. No court of appeals opinion shall be designated for official publication unless it satisfies one or more of the following standards:

(1) the opinion establishes a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation;

(2) the opinion involves a legal issue of continuing public interest;

(3) the majority opinion, dissent, or special concurrence directs attention to the shortcomings of existing common law or inadequacies in statutes; or

(4) the opinion resolves an apparent conflict of authority.

(f) Unpublished Opinions of Court of Appeals. A court of appeals opinion not designated for official publication must contain the following notation on the title page: ''NOT PUBLISHED PURSUANT TO C.A.R. 35(e).'' If the supreme court grants certiorari to a court of appeals opinion not designated for official publication, and if the supreme court announces an opinion in the case, the court of appeals' opinion will not be published unless otherwise ordered by the supreme court.

(g) Effect of Denial of Writ of Certiorari. The supreme court's denial of a writ of certiorari does not constitute approval of the lower court judgment.

(h) References to Minors and Sexual Assault Victims. Opinions and orders issued by the appellate courts will refer to sexual assault victims and minors in a manner consistent with C.A.R. 32(f).

Source: (f) amended and adopted June 27, 2002, effective July 1, 2002; (f) amended and effective February 7, 2008; (e) amended and effective April 5, 2010; entire rule amended and comment added, effective April 7, 2016.

Cross references: For provision on harmless error in proceedings before the trial court, see C.R.C.P. 61.

COMMENTS

2016

[1] Prior subsections (c), entitled, ''Affirmation;'' (d), entitled, ''Reversal;'' and (e), entitled, ''Disposition of Cause;'' were deleted to reflect current appellate practice, for readability, and because portions of these prior subsections addressed functions of the trial court rather than functions of an appellate court. The relevant substance of those prior subsections, however, has been relocated to new subsections (a), entitled ''Disposition of Appeal;'' (b) entitled ''Equally Divided Supreme Court;'' and (c), entitled ''Harmless Error.''

[2] Because prior subsections (c), (d), and (e) were deleted, prior subsection (f), entitled, ''Published Opinions of the Court of Appeals,'' has been re-lettered to subsection (e). For readability and organization, the contents of prior subsection (f) have been divided into new subsections (e); (f), entitled, ''Unpublished Opinions of the Court of Appeals;'' and (g) entitled, ''Effect of Denial of Writ of Certiorari.''

[3] New subsection (h) is consistent with C.A.R. 32(f) and 34, and is based on the legislative requirements set forth in Colo. Rev. Stat. §§ 19-1-102(1.7), 19-1-109(1), and 24-72-304(4)(a), and is consistent with longstanding court practice.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Supreme Court Proceedings: Rules 111-119'', see 23 Rocky Mt. L. Rev. 618 (1951). For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953). For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For article, ''Collecting Pre- and Post-Judgment In-

terest in Colorado: A Primer'', see 15 Colo. Law. 753 (1986).

Annotator's note. The following annotations include cases decided under prior versions of this rule.

Where question presented on appeal is moot, dismissal of the appeal is in order. People in Interest of P.L.V., 176 Colo. 342, 490 P.2d 685 (1971).

An appeal from order of foreclosure on real property was mooted where record reveals a conscious and voluntary choice by the defendants to allow the property to be sold to satisfy the judgment. Stenback v. Front Range Financial Corp., 764 P.2d 380 (Colo. App. 1988).

Appeal becomes moot if events subsequent to the filing of the appeal render the issues present moot. In re Hartley, 886 P.2d 665 (Colo. 1994).

A case is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy. In re Hartley, 886 P.2d 665 (Colo. 1994).

Decision on review reinvests jurisdiction in lower court. When a case is determined in the supreme court on review, the lower court is thereupon immediately reinvested with jurisdiction without the issuance of, or receipt by the clerk of the trial court, of a remittitur. Haggott v. Plains Iron Works Co., 74 Colo. 37, 218 P. 909 (1923).

Remittitur is not essential. The former rule directing the clerk to issue remittitur contained no suggestion that it is essential to further proceeding in the trial court. The practice from earliest times has been for the clerk to issue the mandate only upon request. Haggot v. Plains Iron Works Co., 74 Colo. 37, 218 P. 909 (1923).

Supreme court has jurisdiction to compel obedience to its remittitur to district court to require that court to show cause as to whether and in what manner remittitur had been complied with. Green v. Green, 170 Colo. 197, 460 P.2d 224 (1969).

Applied in Brinker v. City of Sterling, 121 Colo. 430, 217 P.2d 613 (1950); Lewis v. Oliver, 129 Colo. 479, 271 P.2d 1055 (1954); Pettingell v. Moede, 129 Colo. 484, 271 P.2d 1038 (1954); Bohn v. Bd. of Adjustment, 129 Colo. 539, 271 P.2d 1051 (1954); Am. Nat'l Bank v. Hereford State Bank, 139 Colo. 345, 338 P.2d 1032 (1959); Colo. Interstate Gas Co. v. Logan Props. Corp., 140 Colo. 411, 344 P.2d 693 (1959); McKenzie v. People, 178 Colo. 450, 497 P.2d 1262 (1972); People v. Chavez, 179 Colo. 69, 498 P.2d 341 (1972); Thornburg v. Homestead Minerals Corp., 184 Colo. 141, 518 P.2d 941 (1974); Coen v. Boulder Valley Sch. Dist. No. RE-2, 402 F. Supp. 1335 (D. Colo. 1975); People v. Morris, 190 Colo. 215, 545 P.2d 151 (1976); Martin v. District Court, 191 Colo. 107, 550 P.2d 864 (1976); Columbine Valley Constr. Co. v. Bd. of Dirs., 626 P.2d 686 (Colo. 1981); Jackson v. Harsco Corp., 653 P.2d 407 (Colo. App. 1982); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985); Banek v. Thomas, 733 P.2d 1171 (Colo. 1986); Coors v. Sec. Life of Denver Ins. Co., 112 P.3d 59 (Colo. 2005).

II. AFFIRMATION.

Findings of the trial court will not be disturbed on review unless they are clearly erroneous. C.K.A. v. M.S., 695 P.2d 785 (Colo. App. 1984), cert. denied, 705 P.2d 1391 (Colo. 1985).

Affirmance of the trial court's action disposes of all issues properly presented for review. Mills v. Saunders, 30 Colo. App. 462, 494 P.2d 1309 (1972).

Judgment affirmed where a retrial would result in the same judgment. Boyd v. Munson, 59 Colo. 166, 147 P. 662 (1915); Swanson v. First Nat'l Bank, 74 Colo. 135, 219 P. 784 (1923).

Or when supported by substantial evidence. A determination by a quasi-judicial body is not arbitrary or capricious, and thus not an abuse of discretion, where it is supported by substantial competent evidence, and it will be affirmed on review. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

Where the sufficiency of the evidence to support a guilty verdict is challenged, an appellate court must review the testimony in the light most favorable to the prosecution. If there is sufficient competent evidence to establish the essential elements of a crime, a guilty verdict will not be overturned by an appellate court even though there are conflicts and inconsistencies in the evidence. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

The court of appeals should not substitute its opinion of what damages are appropriate for that of the jury. Mere disagreement with the amount of damages awarded is not a sufficient ground to overturn an award of damages which is supported by competent evidence in the record as it is the sole province of the jury to fix fair and just damages, and only upon a showing of arbitrary or capricious jury action, or that the jury was swayed by passion or prejudice, should an appellate court overturn a jury verdict. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982); Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

Where the evidence is conflicting, a reviewing court should not disregard the jury's verdict, which has support in the evidence, in favor of its own view of the evidence, but must reconcile the verdict with the evidence if at all possible, and if there is any basis for the verdict, it will not be reversed for inconsistency. Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

There was evidence in the record to support the jury award of zero noneconomic damages, and the fact that the jury instruction mandated that the jury ''shall determine'' the amount of noneconomic damages did not necessarily require an affirmative award of damages since an award of such damages was required only if the damages were caused by the petitioners' negligence. Lee's Mobile Wash v. Campbell, 853 P.2d 1140 (Colo. 1993).

Deference is given to the trial court's findings of fact which will not be overturned as long as there is support for them. This is true even though a contrary position may find support in the record and even though the court might have reached a different result had it been acting as the finder of fact. People v. Thomas, 853 P.2d 1147 (Colo. 1993).

Correct judgment entered for the wrong reason will be affirmed. Klipfel v. Neill, 30 Colo. App. 428, 494 P.2d 115 (1972).

III. REVERSAL.

Retrial may be ordered on liability only. On reversal of a judgment in an action for damages, the reviewing court may order retrial only upon the question of liability, holding the amount of damages to have been established on the first trial. Boyle v. Bay, 81 Colo. 125, 254 P. 156 (1927).

Or on amount of damages. Where the amount of the judgment due plaintiff was determined on conflicting evidence, a reversal of the judgment will require that the amount be set aside in its entirety pending a trial court determination of the sum properly due plaintiff. Farmers Elevator Co. v. First Nat'l Bank, 30 Colo. App. 529, 497 P.2d 352 (1972) aff'd, 181 Colo. 231, 508 P.2d 1261 (1973).

Mixed questions of law and fact presented for determination must be decided by the trial court, and where left undecided, the cause will be remanded for additional findings. Cook v. Cook, 74 Colo. 339, 221 P. 883 (1923).

When court may direct that proper judgment be entered. Where on review the record clearly discloses the entry of a judgment by the trial court finding all issues for the plaintiff but for an erroneous sum, the cause may be remanded with directions to enter the proper judgment. Mystic Tailoring Co. v. Jacobstein, 94 Colo. 306, 30 P.2d 263 (1934).

In appeal involving challenge to sales and use tax provisions of municipal code, appropriate remedy on appeal is not remand to district court for de novo review under § 29-2-106.1 since taxpayer pursued review under municipal code. Arapahoe Roofing & Sheet Metal v. Denver, 831 P.2d 451 (Colo. 1992).

Judgment reversed where appeal and questions presented are moot. An ordinance passed while an action is pending on error renders the question before the supreme court moot, and a new zoning resolution adopted by the board of county commissioners even before the action is commenced renders the original action moot. Holding that the action before the lower court and the proceedings on appeal before the supreme court are on questions that are now moot, the judgment of the trial court is reversed and the cause is remanded with directions to dismiss the complaint. Bd. of Adjustment v. Iwerks, 135 Colo. 578, 316 P.2d 573 (1957).

Abstract claim, as an afterthought on appeal, will not support reversal. Anderson v. People, 176 Colo. 224, 490 P.2d 47 (1971), cert. denied, 405 U.S. 1042, 92 S. Ct. 1376, 31 L. Ed. 2d 583 (1972).

IV. DISPOSITION OF CAUSE.

A. In General.

Duties of trial court. Upon regaining jurisdiction, a trial court, through the use of its own enforcement procedures, is then responsible for execution on its own judgment in accordance with any directions issued by an appellate court. Hylton v. City of Colo. Springs, 32 Colo. App. 9, 505 P.2d 26 (1973).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

B. Equally Divided Court.

Affirmed by operation of law. Where one justice did not sit and the remaining six divided equally, the judgment is affirmed by operation of law. Speer v. People ex rel. Rush, 52 Colo. 325, 122 P. 768 (1912); City & County of Denver v. Gunter, 63 Colo. 69, 163 P. 1118 (1917); Menzel v. McKee Live Stock Comm'n Co., 71 Colo. 326, 206 P. 383 (1922); People v. Stapleton, 79 Colo. 629, 247 P. 1062 (1926); Craddock v. Craddock, 90 Colo. 284, 8 P.2d 1112 (1932); La Argo v. Cronbaugh, 90 Colo. 286, 8 P.2d 1112 (1932); Midland Oil Ref. Co. v. Allen, 93 Colo. 102, 23 P.2d 1119 (1933); People ex rel. Link v. Tucker, 96 Colo. 273, 42 P.2d 472 (1935); Pring v. Brown, 96 Colo. 284, 42 P.2d 607 (1935); Larson v. Kalcevic, 99 Colo. 279, 62 P.2d 572 (1936); Courtright v. Legislative Statutory Comm'n, 100 Colo. 82, 65 P.2d 710, cert. denied, 302 U.S. 695, 58 S. Ct. 13, 82 L. Ed. 537 (1937); Creel v. Pueblo

Masonic Bldgs. Ass'n, 100 Colo. 281, 68 P.2d 23 (1937); Taylor v. Bd. of Control of State Indus. Sch., 105 Colo. 219, 94 P.2d 184 (1939); Snyder v. Bd. for Appointment of Civil Serv. Comm'rs, 106 Colo. 83, 101 P.2d 436 (1940); Roenfeldt v. Rinker, 108 Colo. 359, 116 P.2d 964 (1941); Butler v. Byrne, 108 Colo. 507, 120 P.2d 196 (1941); Henderson v. Anderson, 108 Colo. 529, 120 P.2d 195 (1941); Hinkley v. Oriental Ref. Co., 116 Colo. 33, 178 P.2d 416 (1947); White v. Jensen, 116 Colo. 378, 182 P.2d 139 (1947); DeWitt v. Victor Am. Fuel Co., 116 Colo. 450, 181 P.2d 816 (1947); State v. Knight-Campbell Music Co., 117 Colo. 326, 187 P.2d 931 (1947); Oestereick v. Roper, 122 Colo. 59, 220 P.2d 551 (1950); Metropolitan Life Ins. Co. v. Hoffman, 122 Colo. 431, 222 P.2d 620 (1950); Eresch v. Hines, 122 Colo. 588, 225 P.2d 59 (1950); In re McNeal's Estate, 124 Colo. 99, 234 P.2d 622 (1951); Hix v. Stanchfield, 124 Colo. 422, 238 P.2d 200 (1951); Jabelonsky v. Fike, 125 Colo. 487, 244 P.2d 1081 (1952); City & County of Denver v. Bd. of County Comm'rs, 145 Colo. 451, 359 P.2d 1031 (1961); State Dept. of Hwys. v. Biella, 672 P.2d 529 (Colo. 1983); Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Constitutes no precedent. A judgment by an equally divided court constitutes no precedent. People ex rel. Walker v. Stapleton, 79 Colo. 629, 247 P. 1062 (1926).

Same question cannot be relitigated between the same parties merely by bringing in a different action. In re Craddock's Estate, 91 Colo. 79, 11 P.2d 807 (1932).

Because judgment has the same effect as if entered with the approval of all the justices. In re Craddock's Estate, 91 Colo. 79, 11 P.2d 807 (1932).

C. Error Not Affecting Substantial Rights of the Parties.

Error which clearly does not prejudice substantial rights of the complaining party is not ground for reversal. Swanson v. First Nat'l Bank, 74 Colo. 135, 219 P. 784 (1923); Thuro v. Meredith, 75 Colo. 471, 226 P. 867 (1924); Myers v. Hayden, 82 Colo. 98, 257 P. 351 (1927); Parker v. Ullom, 84 Colo. 433, 271 P. 187 (1928).

"Substantial right" defined. In construing this rule, as well as C.R.C.P. 61, a substantial right is one which relates to the subject matter and not to a matter of procedure and form. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948).

Variance between pleading and proof does not affect substantial rights. Hiner v. Cassidy, 92 Colo. 78, 18 P.2d 309 (1932).

The variance was not such as affected the substantial right of the parties and was, therefore, such error or defect as the supreme court may disregard. Southwestern Sur. Ins. Co. v. Miller, 63 Colo. 15, 164 P. 507 (1917); Otis & Co. v. Teal, 74 Colo. 336, 221 P. 884 (1923).

Harmless instruction does not affect substantial rights. Howard v. Mitchell, 27 Colo. App. 45, 146 P. 486 (1915).

Improper admission of evidence to a fact which is established by other sufficient evidence does not affect substantial rights. Patterson v. People ex rel. Parr, 23 Colo. App. 479, 130 P. 618 (1913).

Appellate review of trial court's determination pursuant to § 13-25-129 regarding admissibility of child's hearsay statement should be based upon record made at in limine hearing and may go beyond such record only if issue of harmless error or plain error is raised. People v. Bowers, 801 P.2d 511 (Colo. 1990).

Defect in summons. Error cannot be predicated on any defect in a summons unless the defect results in prejudice. Hocks v. Farmers Union Coop. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

Receipt of verdict in absence of trial judge is technical error. Although the trial judge was not present when the verdict was received, it did not appear that any substantial rights of the defendant were violated by the trial court's procedure, and, as directed by this rule, mere technicalities would not constitute ground for reversal. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948).

V. PUBLISHED OPINIONS OF COURT OF APPEALS.

An unpublished court of appeals decision has no value as precedent. In re Ballot Title 2005-06 No. 55, 138 P.3d 273 (Colo. 2006).

Courts may, but are not obligated to, consider unpublished opinions for their persuasive value. Patterson v. James, 2018 COA 173, __ P.3d __.

Should a party wish the court to consider an unpublished opinion, or should a court on its own discover such an opinion it finds persuasive, all parties should be provided with notice and an opportunity to argue its persuasive value to the court. Patterson v. James, 2018 COA 173, __ P.3d __.

Rule 36. Entry and Service of Judgment

An appellate judgment is entered when the court issues or announces its dispositive order or opinion. The clerk must serve the order or opinion on all parties on the day it is entered.

Source: Entire rule amended and comment added effective November 3, 2015.

COMMENTS

2015

This rule was changed for brevity and to reflect the current practice of the appellate courts.

Rule 37. Interest on Judgments

(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date on which the judgment was entered in the lower court.

(b) When the Court Does Not Affirm. If all or part of a judgment is dismissed, vacated, modified, reversed, or set aside with a direction that a money judgment be entered in the lower court, the mandate must contain instructions with respect to allowance of interest.

Source: Entire rule amended and effective November 3, 2015.

ANNOTATION

Annotator's note. The following annotations include cases decided under prior versions of this rule.

This rule is identical to Federal Appellate Rule 37. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975).

Appellate court's authority to determine interest is exclusive. While the appellate court may, of course, remand to the trial court for a determination of the proper statutory interest, the trial court, without such an instruction, lacks jurisdiction to enter any amount of interest not stated in the mandate. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975); In re Gutfreund, 148 P.3d 136 (Colo. 2006); Thompson v. United Sec. Alliance, 2016 COA 128, 433 P.3d 50, rev'd on other grounds, 2018 CO 95, 431 P.3d 224.

Proper method of attacking an appellate court's instructions as to interest is to petition for amendment or recall of the mandate. Such a procedure is available in Colorado. Pet Inc. v. Goldberg, 37 Colo. App. 257, 547 P.2d 943 (1975).

Applied in Loesekan v. Benefit Trust Life Ins. Co., 37 Colo. App. 493, 552 P.2d 36 (1976); Westec Constr. Mgmt. Co. v. Postle Enter. I, Inc., 68 P.3d 529 (Colo. App. 2002).

Rule 38. Sanctions

(a) General Powers of the Court; Sanctions for Non-Compliance. The appellate court may dismiss an appeal or other appellate proceeding or impose other sanctions it deems appropriate, including attorney fees, for the failure to comply with any of its orders or these appellate rules, including for failure to prosecute the appeal, cause timely transmission of the record, or file an opening brief.

(b) Sanctions for Frivolous Appeal. If the appellate court determines that an appeal or cross-appeal is frivolous, it may award damages it deems appropriate, including attorney fees, and single or double costs to the appellee or cross-appellee.

Source: Entire rule amended and effective June 23, 2014; entire rule and comment amended and effective November 3, 2015.

COMMENTS

1984

[1] This rule now gathers all the sanctions specified in the appellate rules into one rule and broadens the powers of the court by the addition of (e).

2015

[2] Prior subsections (b), entitled, ''Consequence of Failure to File Brief,'' (c), entitled, ''Failure to Prosecute Appeal,'' and (e), entited ''General Powers of the Court,'' have been de-

leted. The relevant substance of these prior subsections has been combined and condensed and now appears in revised subsection (a).

[3] The statement contained in prior subsection (b) that the court may dispense with oral argument if an appellant or cross-appellee fails to file a brief has been deleted from the Rule because, pursuant to C.A.R. 34, whether to allow oral argument is always at the discretion of the appellate court.

[4] Because prior subsections (b), (c), and (e) were deleted, prior subsection (d), entited ''Sanctions for Frivolous Appeal,'' has been relettered to subsection (b).

ANNOTATION

Law reviews. For comment, ''Attorney Fee Assessments for Frivolous Litigation in Colorado'', see 56 U. Colo. L. Rev. 663 (1985).

Annotator's note. The following annotations include cases decided under prior versions of this rule.

Due process considerations. When an appellate court imposes sanctions upon an appellant, due process requires that the appellant be afforded certain protections before being deprived of his property. He is entitled to notice and an opportunity to respond. Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984).

Award against state for damages may only be ordered if authorized by statute. People in Interest of A.L.B., 683 P.2d 813 (Colo. App. 1984).

No basis for damages where genuine issue in dispute. There is no basis for an award of damages pursuant to this rule where there is a genuine disputed issue in the matter on appeal. Rocky Mt. Sales & Serv., Inc. v. Havana RV, Inc., 635 P.2d 935 (Colo. App. 1981).

Even where trial court's entry of summary judgment in favor of defendant is upheld on appeal and no genuine issue of material fact is found to have existed, plaintiff's appeal is not automatically frivolous and defendant's request for fees may be denied. Price v. Conoco, Inc., 748 P.2d 349 (Colo. App. 1987).

Appeal held not frivolous because of absence of Colorado authority on the question forming basis of appeal. Jorgenson Realty, Inc. v. Box, 701 P.2d 1256 (Colo. App. 1985).

Abuse of discretion. In light of the significance of the issues on appeal (i.e., the state's obligation to maintain state prisoners in state correctional facilities and to reimburse counties for confining state prisoners) and the fact that both petitioner and respondent sought appellate review, court of appeals abused its discretion in dismissing case for failure to timely transmit the record. Dept. of Corr. v. Pena, 788 P.2d 143 (Colo. 1990).

Substantiality of issues. When determining whether dismissal is an appropriate sanction for failure to timely transmit the record, an appellate court should consider the substantiality of the issues on appeal and the full range of possible sanctions and should select the sanction most appropriate under the circumstances. Dept. of Corr. v. Pena, 788 P.2d 143 (Colo. 1990).

Because the theory propounded on appeal was not a "relitigation" of a settled issue, wholly lacking in precedential support, devoid of a plausible rationale, or brought vexatiously, it cannot be said to be "frivolous". Wood Brothers Homes, Inc. v. Howard, 862 P.2d 925 (Colo. 1993) (decided under former § 13-80-127); Adams v. Land Servs., Inc., 194 P.3d 429 (Colo. App. 2008).

Damages not awarded where amount not specified. Where a number of the issues raised by the appellant are frivolous, but where the appellee has not specified an amount requested for damages, the appellate court will decline to award damages. In re Mann, 655 P.2d 814 (Colo. 1982).

Appeal should be considered frivolous if the proponent can present no rational argument based on the evidence or law in support of a proponent's claim or defense, or the appeal is prosecuted for the sole purpose of harassment or delay. Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984).

Appeal held to be frivolous, and attorney's fees assessed. Rogers v. Charnes, 656 P.2d 1322 (Colo. App. 1982); Artes-Roy v. City of Aspen, 856 P.2d 823 (Colo. 1993); In re Purcell, 879 P.2d 468 (Colo. App. 1994); Martin v. Essrig, 277 P.3d 857 (Colo. App. 2011).

An appeal "lacks substantial justification" and is "substantially frivolous" when the appellant's brief fails to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error supported by legal authority. As a result, it is appropriate to assess attorney fees against the attorney prosecuting the appeal in this case. Castillo v. Koppes-Conway, 148 P.3d 289 (Colo. App. 2006).

Because appeal is not frivolous, court denies defendants' request for their appellate attorney fees pursuant to paragraph (d) of this rule. Lobato v. Taylor, 13 P.3d 821 (Colo. App. 2000), rev'd on other grounds, 71 P.3d 938 (Colo. 2002).

Board of education is entitled to reasonable attorney fees incurred in defending claim of breach of duty to teach morality in public schools where plaintiff relied primarily on overruled case law, constitutional and statutory provisions that imposed no duty, and where plaintiff presented no rational argument based on existing law. Skipworth v. Bd. of Educ., 874 P.2d 487 (Colo. App. 1994).

A claim is frivolous if the proponent can present no rational argument based on the evidence or the law in support thereof. Such test encompasses appeals that are manifestly insufficient or futile. Lego v. Schmidt, 805 P.2d 1119 (Colo. App. 1990).

No sanctions awarded for frivolous appeal even though the court rejected appellants' public policy argument. In re Estate of Schlagel, 89 P.3d 419 (Colo. App. 2003).

Request for costs pursuant to this rule denied. Dewar v. LeNard, 653 P.2d 82 (Colo. App. 1982); People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

Applied in In re Estate of Perini, 34 Colo. App. 201, 526 P.2d 313 (1974); In re Trask, 40 Colo. App. 556, 580 P.2d 825 (1978); Sports Premiums, Inc. v. Kaemmer, 42 Colo. App. 172, 595 P.2d 696 (1979); Applewood Gardens Homeowners' Ass'n v. Richter, 42 Colo. App. 510, 596 P.2d 1226 (1979); In re Erickson, 43 Colo. App. 319, 602 P.2d 909 (1979); In re Joseph, 44 Colo. App. 128, 613 P.2d 344 (1980); Wyatt v. United Airlines, 638 P.2d 812 (Colo. App. 1981); In re Norton, 640 P.2d 254 (Colo. App. 1981); People in Interest of W.M., 643 P.2d 794 (Colo. App. 1982); United Bank of Denver Nat'l Ass'n v. Pierson, 661 P.2d 1191 (Colo. App. 1982); Smith v. Colo. Dept. of Rev., 661 P.2d 1192 (Colo. App. 1982); Schoonover v. Hedlund Abstract Co. Inc., 727 P.2d 408 (Colo. App. 1986); Citicorp Mortg., Inc. v. Younger, 856 P.2d 52 (Colo. App. 1993); Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996); In re Custody of C.J.S., 37 P.3d 479 (Colo. App. 2001); Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Fritsche v. Thoreson, 2015 COA 163, 410 P.3d 630.

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as ordered by the trial court.

(b) Costs for and Against the State of Colorado. Costs for or against the State of Colorado or any of its agencies or officers will be assessed under subsection (a) only if authorized by law.

(c) Costs on Appeal Taxable in the Trial Court.

(1) Costs Allowed. The following costs on appeal are taxable in the trial court for the benefit of the party entitled to costs under this rule:

(A) the preparation and transmission of the record;

(B) the reporter's transcript, if needed to determine the appeal;

(C) premiums paid for a supersedeas or other bond to preserve rights pending appeal;

(D) docket fees charged pursuant to C.A.R. 12(a); and

(E) fees charged for E-Filing and E-Service as defined in C.A.R. 30(a).

(2) Bill of Costs. A party who wants costs to be taxed in the appellate court must file an itemized and verified bill of costs with the clerk of the trial court. The cost of printing or otherwise producing necessary copies of the record is taxable at rates not higher than those generally charged for such work in Denver. The bill of costs and proof of service must be filed within 14 days after entry of the appellate mandate. Any objection must be filed within 14 days after service of the bill of costs. Upon request of the trial court clerk, the clerk of the appellate court will provide a receipt reflecting docket fees paid pursuant to Rule 12 and fees paid for E-Filing and E-Service.

Source: (c) and (e) amended May 15, 1986, effective November 1, 1986; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and comments added November 3, 2015.

Cross references: For costs incurred in civil actions in general, see article 16 of title 13, C.R.S.

COMMENTS

2015

[1] This rule has been amended, in part, to be consistent with F.R.A.P. 39, which governs costs, and for clarity and readability. The rule was also revised to shift responsibility for taxing costs from the appellate courts to the trial courts, which reflects and is consistent with the current practice of the courts.

[2] Prior subsection (a), which was previously titled, ''To Whom Allowed,'' is now, more accurately titled, ''Against Whom Assessed.'' The substance of prior subsection (a) had not changed, but its contents are now organized in list form.

[3] Prior subsection (c), entitled ''Costs on Appeal Taxable in the Trial Courts,'' has been deleted, but its substance has been relocated to revised subsection (c)(2), entitled, ''Bill of Costs.''

[4] Prior subsection (d), entitled ''Clerk to Include Costs in Mandate,'' has been deleted.

[5] Prior subsection (e), entitled ''Costs of Appeal Taxable in the Trial Court,'' has been re-lettered to revised subsection (c) as a result of the deletion of prior subsections (c) and (d), and its title had been slightly revised to ''Costs on Appeal Taxable in the Trial Courts.''

ANNOTATION

Law reviews. For article, ''Appellate Procedure and the New Supreme Court Rules'', see 30 Dicta 1 (1953).

Costs, strictly so called, are a matter of statute or rule of court. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

Costs are recoverable only by virtue of the statute allowing them. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1899); Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Costs are limited to docket fees and the expense of producing necessary copies of briefs filed with the appellate court. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

The appellate court is the appropriate court for determination of an award of costs under this rule. Where the trial court awarded costs of the appeal on remand, following a denial by the appellate court of an untimely request for costs under this rule, the trial court erred. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Court discretion. The use of the word ''shall'' in section (a) does not mean that a trial court is required to award costs sought under section (e) to a prevailing party on appeal or that the court only has discretion with respect to the amount. In re Goodbinder, 119 P.3d 584 (Colo. App. 2005).

Costs and attorney fees distinguished. Where there is statutory authorization for an award of attorney fees incurred by the prevailing party in defending a judgment on appeal, the question of what court should determine the amount awarded is not governed by this or any other rule. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

In the absence of any statute, rule, or precedent limiting the trial court's jurisdiction to award prevailing party appellate attorney fees, an application to the trial court was appropriate. Giampapa v. Am. Family Mut. Ins. Co., 12 P.3d 839 (Colo. App. 2000), rev'd on other grounds, 64 P.3d 230 (Colo. 2003).

Costs are only to reimburse the successful party. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

For all trials of same cause. Where there is more than one trial of the same cause, the successful party is entitled to recover costs for all the trials. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922).

And including annexation proceedings. Under this rule the successful party may recover costs incurred in the supreme court upon appeal in annexation proceedings. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1898).

Where suit is instituted and prosecuted vexatiously, defendant's attorney fees may be taxed as costs. London v. Allison, 87 Colo. 27, 284 P. 776 (1930).

In action in mandamus to compel a city council to grant a permit, where judgment is for the plaintiff, he is entitled to recover from the defending officials who voted against granting the permit his costs taxed in the trial court, but not from those who voted in favor of granting the permit. City of Colo. Springs v. Street, 81 Colo. 181, 254 P. 440 (1927).

This rule does not include a case dismissed for want of jurisdiction. Bartels v. Hoey, 3 Colo. 279 (1877).

Objection barred after payment of costs. When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. Webber v. Phister, 71 Colo. 332, 206 P. 385 (1922).

Rationale for section (b) limitation. The limitation in section (b) stems from the basic

concept that costs should not be charged against a sovereign state, unless the proper authority so directs. People in Interest of W.M., 643 P.2d 794 (Colo. App. 1982).

Applied in In re Trask, 40 Colo. App. 556, 580 P.2d 825 (1978); Caldwell v. Armstrong, 642 P.2d 47 (Colo. App. 1981); Holcomb v. Steven D. Smith, Inc., 170 P.3d 815 (Colo. App. 2007); URS Group, Inc. v. Tetra Tech FW, Inc., 181 P.3d 380 (Colo. App. 2008); Lucht's Concrete Pumping, Inc. v. Horner, 224 P.3d 355 (Colo. App. 2009), rev'd on other grounds, 255 P.3d 1058 (Colo. 2011); Camp. Int. Watchdog v. Colo. Better Future, 2016 COA 56M, 378 P.3d 852.

Rule 39.1. Attorney Fees on Appeal

If attorney fees are recoverable for the appeal, the principal brief of the party claiming attorney fees must include a specific request, and explain the legal and factual basis, for an award of attorney fees. Any opposition to a request for attorney fees, and the legal and factual basis for the opposition, must be set forth in either the answer or reply brief, as appropriate. In its discretion, the appellate court may determine entitlement to and the amount of an award of attorney fees for the appeal, or may remand those determinations to the lower court or tribunal.

Source: Entire rule added and adopted December 4, 2003, effective January 1, 2004; entire rule corrected February 2, 2004, nun pro tunc December 4, 2003, effective January 1, 2004; entire rule renumbered and amended, effective June 9, 2016.

ANNOTATION

Annotator's note. The following annotations include cases decided under former Rule 39.5.

Merely identifying the statute under which fees are requested, without stating the specific grounds that justify an award of fees, does not adequately comply with this rule. In re Newell, 192 P.3d 529 (Colo. App. 2008).

Neither party is entitled to recover its appellate attorney fees from the estate where decedent's siblings and nieces are contesting who is entitled to the estate proceeds, and their respective attorneys are not employed by the personal representative. In re Estate of Evarts, 166 P.3d 161 (Colo. App. 2007).

No award of attorney fees to condominium association on appeal under this rule and § 38-33.3-123. Section 38-33-123 (1)(c) provides for recovery of attorney fees only in actions to ''enforce or defend the provision of this article or of the declaration, bylaws, articles, or rules and regulations''. Condominium association defended against purchasers' breach of contract action and sought declaratory action that contract was void. Neither purchasers' claims nor associations' counterclaims were to enforce or defend the article; thus, the statute does not apply. Platt v. Aspenwood Condo. Ass'n, 214 P.3d 1060 (Colo. App. 2009).

Contract provision concerning attorney fees should be considered on remand where it was not part of the record on appeal. Adams v. Land Servs., Inc., 194 P.3d 429 (Colo. App. 2008).

Appellate attorney fees are only awardable where requesting party states a legal basis for recovery. In re Wells, 252 P.3d 1212 (Colo. App. 2011).

Request for attorney fees on appeal under this rule properly denied. Respondent acted in good faith in attempting to find a means of enforcing her undisputed fee award. Accordingly, her appeal was not wholly frivolous and groundless. McGihon v. Cave, 2016 COA 78, 410 P.3d 647.

Rule 40. Petition for Rehearing

(a) Time to File; Contents; Answer; Oral Argument; Action by Court if Granted.

(1) Time. Unless the time is shortened or extended by order, a petition for rehearing may be filed within 14 days after entry of judgment.

(2) Contents. The petition must state with particularity each point of law or fact the petitioner believes the court has overlooked or misapprehended and must include an argument in support of the petition.

(3) Answer. Unless the court requests a response, no answer to a petition for rehearing is permitted.

(4) Oral Argument. Oral argument is not permitted on a petition for rehearing.

(5) Action by the Court. If a petition for rehearing is granted, the court may:

(A) make a final disposition of the case without reargument;
(B) restore the case to the calendar for reargument or resubmission; or
(C) issue any other order it deems appropriate.

(b) Form of Petition; Length. The petition must comply in form with C.A.R. 32. The petition must include the following in the caption:

(1) If filed in the supreme court: the name of the author justice; the name of any justice who wrote or participated in a separate opinion; the name of any justice who did not participate in the case; whether the decision was en banc; and, if a departmental decision, the names of the participating justices.

(2) If filed in the court of appeals: the names of the author judge and participating judges, and the name of any judge who wrote or participated in a separate opinion.

Except by permission of court, a petition for rehearing must not exceed 1,900 words, excluding material not counted under C.A.R. 28(g)(1).

(c) Petition for Rehearing in Supreme Court Proceedings. A petition for rehearing filed in proceedings before the supreme court must comply with the requirements of subsections (a) and (b) of this rule.

(1) In Direct Appeals. A petition for rehearing may be filed in a direct appeal to the supreme court only after issuance of an opinion. No petition for rehearing may be filed after issuance of an order affirming a lower court order.

(2) In Proceedings Under C.A.R. 21. A petition for rehearing may be filed after issuance of an opinion discharging a rule to show cause or making a rule absolute. No petition for rehearing may be filed after denial of a petition without explanation.

(3) In Certiorari Proceedings. A petition for rehearing may be filed after issuance of an opinion on the merits of a granted petition for writ of certiorari, or when, after granting a writ of certiorari, the court later denies the writ as having been improvidently granted. No petition for rehearing may be filed after issuance of an order denying a petition for writ of certiorari.

(4) In Interlocutory Appeals in Criminal Cases under C.A.R. 4.1. No petition for rehearing shall be permitted in interlocutory appeals filed pursuant to C.A.R. 4.1.

Source: (b) amended and adopted April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and comment added, effective April 7, 2016.

COMMENTS

2016

Subsection (c), entitled ''Petition for Rehearing in Supreme Court Proceedings'' is new. It explains when a petition for rehearing may be filed, see also C.A.R. 21(n) and 54(b); reiterates that a petition for rehearing shall not be permitted in interlocutory appeals in criminal cases, see C.A.R. 4.1(g); and clarifies that a petition for rehearing may not be filed after issuance of an order without explanation.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005).

Object of a petition for rehearing is to give the parties an opportunity to point out mistakes of law or fact, or both, which it may be claimed the court has made in reaching its conclusion. Norris v. Kelsey, 60 Colo. 297, 152 P. 1167 (1915).

Direct attack upon the judgment after the mandate has issued is not contemplated by the appellate rules. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Rule inapplicable to decision neither raised nor argued. The prohibitions of this rule do not apply where a cause is decided upon a question not raised by the record nor argued by counsel. Model Land & Irrigation Co. v. Baca Irrigating Ditch Co., 83 Colo. 131, 262 P. 517 (1927).

A certiorari denial is not a "judgment"

that would authorize a party to petition for rehearing under section (a). Al-Yousif v. Trani, 11 F. Supp. 3d 1032 (D. Colo. 2014), rev'd on other grounds, 779 F.3d 1173 (10th Cir. 2015).

Rule does not prohibit the citation of authorities, or a reference to those cited in the briefs. Book v. Book, 71 Colo. 502, 208 P. 474 (1922).

Appellate court has no duty to accept untimely petition. Nothing in the language of this rule would imply nor was it the intention of this court in drafting this language that there be a duty on the part of the appellate court to accept an untimely petition for rehearing. The only duty which this rule creates is that the court use its sound discretion in considering a request for any extension of time. Wiggins v. People, 199 Colo. 341, 608 P.2d 348 (1980).

Refusal to enlarge time was an abuse of discretion where the failure to timely file was due to the failure of the clerk of the court of appeals to mail copies of the court of appeals opinion to the third party defendants as required by C.A.R. 36. Brewster v. Nandrea, 705 P.2d 1 (Colo. 1985).

Appellate court's jurisdiction not relinquished pending petition for rehearing. The appellate court holds jurisdiction of the cause for a fixed period for the purpose of permitting an application for a rehearing, and in no case except upon special order, is this jurisdiction relinquished during such period. Norris v. Kelsey, 60 Colo. 297, 152 P. 1167 (1915).

If a petition for rehearing is filed, jurisdiction is retained until such application is finally disposed of, and which may result in a modification or even a reversal of the original judgment of the appellate court. Norris v. Kelsey, 60 Colo. 297, 152 P. 1167 (1915).

Jurisdiction of district court is not restored until cause is finally disposed of by appellate court. Norris v. Kelsey, 60 Colo. 297, 152 P. 1167 (1915).

Evenly divided vote denies petition. A three to three division of the supreme court on the question of granting or denying the first petition for a rehearing operates to deny that petition. For that reason, under this rule, the appellant was without legal right to file the second petition for rehearing, and should not have been permitted to do so. Such petition, if filed, should be stricken, or if not stricken, then denied. People ex rel. Link v. Tucker, 96 Colo. 273, 42 P.2d 472 (1935).

C.A.R. 26(c) inapplicable as time extension. C.A.R. 26(c), relating to additional time after service by mail, has no application as an extension of time limit set forth in section (a) of this rule. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Petition held to sufficiently state issue. A petition stating a point the court might have overlooked, and showing the relation of that point to the court's decision, and nothing irrelevant thereto, does not violate this rule. Colburn v. Ernst, 75 Colo. 120, 223 P. 759 (1924).

Petition which contains insulting criticism of the courts or flagrantly disregards court rules will be stricken. Goodrich v. Union Oil Co., 85 Colo. 218, 274 P. 935 (1929).

Applied in Honey v. Ranchers & Farmers Livestock Auction Co., 191 Colo. 503, 553 P.2d 799 (1976); People v. Parsons, 645 P.2d 850 (Colo. 1982).

Rule 41. Mandate

(a) Contents. The clerk of the court will issue the mandate with a copy of the appellate court judgment.

(b) When Issued. Unless the court grants or removes a stay, or otherwise changes the time by order, the mandate will issue as follows:

(1) In the Court of Appeals. Except as provided in subsections (A) and (B), the court of appeals mandate will issue no earlier than 42 days after entry of the judgment.

(A) If the court extends the time to file a petition for rehearing but no petition is filed within the extended period, the mandate will issue following the last day of the extended period for filing the petition for rehearing or after the day specified by this rule, whichever occurs later. The mandate will issue no earlier than 28 days after the court denies the petition for rehearing.

(B) In workers' compensation and unemployment insurance cases, the mandate will issue no earlier than 28 days after entry of the judgment, or 14 days after the court denies a timely petition for rehearing, whichever occurs later.

(2) In the Supreme Court. The supreme court mandate will issue no earlier than 14 days after entry of the judgment. If a petition for rehearing is denied, or if the court extends the time to file a petition for rehearing but no petition is filed within the extended period, the mandate will issue no earlier than 2 days after entry of the order denying the petition or the extended deadline for filing a petition. The supreme court must issue the mandate immediately when a copy of a United States Supreme Court order denying a petition for writ of certiorari is filed.

(c) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for rehearing or motion for stay of mandate stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Writ of Certiorari in the Colorado Supreme Court. The timely filing of a petition for writ of certiorari pursuant to C.A.R. 52 stays the court of appeals mandate until disposition of the petition.

(3) Pending Petition for Writ of Certiorari in the United States Supreme Court.

(A) A party may move to stay the appellate mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The court, or a judge or justice thereof, may stay issuance of the mandate until the petition for writ of certiorari is filed, or if review is timely sought, until the petition is ruled on, or, if review is granted, until final disposition of the case by the United States Supreme Court. A stay pending the filing of a petition for writ of certiorari must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the clerk of the appellate court, in writing, within the period of the stay, in which case the stay continues until disposition of the petition.

(C) The court may require a bond or other security as a condition of granting or continuing a stay of the mandate.

(d) Effective Date. The mandate is effective when issued.

(e) Recall of Mandate. The court of appeals may recall its mandate, and the supreme court may recall any appellate mandate as it deems appropriate. Upon recall of a mandate, re-issuance of the mandate may be stayed pursuant to subsection (c) of this rule.

Source: Entire rule amended and adopted November 20, 1998, effective January 1, 1999; entire rule amended and adopted and committee comment added and adopted December 14, 2000, effective January 1, 2001; committee comment corrected and effective January 4, 2001; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule and comment amended, effective April 7, 2016.

COMMENTS

2001

[1] The purpose of this amendment is to clarify that the Court of Appeals can extend the stay of the issuance of the mandate when an extension of time to file a petition for rehearing is timely filed. The rule change addresses the specific problem that arises when, after an extension has been granted, no petition for rehearing is filed. Practitioners had been concerned that, without having filed a petition for rehearing, any petition for certiorari filed beyond the time specified in the rule for stay of the issuance of the mandate would be untimely.

2016

[2] The amendments to this Rule are mainly structural, not substantive, and were made to provide better organization. They were modeled, in part, on F.R.A.P. 41. The title of the Rule changed to ''Mandate,'' because the revisions created a more comprehensive rule. The Rule now contains separate subsections explaining when a mandate issues (subsection (b)); when a mandate may be stayed (subsection (c)); when a mandate becomes effective (subsection (d)); and when an appellate court may recall a mandate (subsection (e)).

[3] Rule 41.1 has been deleted, and its substance has been relocated to new subsections (c) and (e) of Rule 41.

ANNOTATION

Annotator's note. The following annotations include cases decided under prior versions of this rule.

Intent is to establish finality of judgment. The mandate provided for in this rule intended to establish the finality of the judgment upon

which the parties can rely. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971); Hrabczuk v. John Lucas Landscaping, 888 P.2d 367 (Colo. App. 1994).

Direct attack upon the judgment after the mandate has issued is not contemplated by the appellate rules. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971). See Hrabczuk v. John Lucas Landscaping, 888 P.2d 367 (Colo. App. 1994).

Lower court without jurisdiction until date mandate may issue. The date when the mandate may issue under this rule must be held to be the earliest date upon which the district court can acquire jurisidction. Until this occurs the lower court is without jurisdiction for any purpose. Norris v. Kelsey, 60 Colo. 297, 152 P. 1167 (1915); People v. Jones, 631 P.2d 1132 (Colo. 1981).

Directions in remand "for consideration of the request for attorney fees" set out in order are controlling over language contained in mandate form regarding attorney fees issued by the clerk's office of the court. Hrabczuk v. John Lucas Landscaping, 888 P.2d 367 (Colo. App. 1994).

Applied in People v. Martinez, 186 Colo. 388, 527 P.2d 534 (1974).

Rule 41.1. Stay or Recall of Mandate

Deleted and relocated to Rule 41, effective April 7, 2016.

ANNOTATION

Division exceeded its authority when it initially stayed and later withdrew the mandate because the court's authority to stay or withdraw a mandate expired when the supreme court denied the defendant's writ of certiorari. People v. Bonilla-Garcia, 51 P.3d 1035 (Colo. App. 2001).

An intermediate appellate court has the inherent power to stay its mandate following the denial of certiorari by the supreme court upon a showing of "exceptional circumstances". A supervening change in governing law that calls into question the correctness of the court's decision satisfies the "exceptional circumstances" criteria. People v. McAfee, 160 P.3d 277 (Colo. App. 2007).

Applied in Wiggins v. People, 199 Colo. 341, 608 P.2d 348 (1980).

Rule 42. Voluntary Dismissal

The appellate court must dismiss an appeal or other appellate proceeding if the parties file a signed dismissal agreement specifying how costs will be paid and pay any fees that are due. The appellate court may dismiss an appeal or other appellate proceeding on the appellant's or petitioner's motion on terms agreed upon by the parties or fixed by the court. No mandate or other process may issue without a court order.

Source: Entire rule amended and effective January 6, 2005; entire rule amended and comment deleted, effective April 7, 2016.

Rule 43. Substitution of Parties

(a) Death of a Party.

(1) After Notice of Appeal is Filed. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or any party. A death certificate or other official proof of death must be filed with the motion. A party's motion must be served on the representative in accordance with C.R.C.P. 25. If the decedent has no representative, any party may suggest the death on the record, and the court may then direct appropriate proceedings.

(2) Before Notice of Appeal is Filed — Potential Appellant. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if the decedent has no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with section (a)(1) of this rule.

(3) Before Notice of Appeal is Filed — Potential Appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the underlying

proceeding, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with section (a)(1) of this rule.

(b) Substitution for Reasons Other Than Death. If substitution of a party is required for any reason other than death, the party seeking substitution must file a motion stating the grounds for substitution.

(c) Public Officers; Identification; Substitution.

(1) Identification of Party. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

(2) Automatic Substitution of Officeholder. When a public officer who is a party to an appeal or other proceedings in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution must be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. The court may enter an order of substitution at any time, but failure to enter an order does not affect the substitution.

Source: Entire rule amended and effective June 23, 2014; entire rule amended and effective June 9, 2016.

Rule 44. Cases Involving a Constitutional Question When the State of Colorado is Not a Party

If a party questions the constitutionality of any Colorado statute in an appellate proceeding in which the state, its agency, officer, or employee is not a party in an official capacity, the questioning party must notify the clerk of the supreme court in writing immediately upon the filing of the proceeding or as soon as the question is raised in the appellate court. The clerk must then certify that fact to the Attorney General.

Source: Entire rule amended and comment added effective June 9, 2016.

COMMENT

2016

The substance of prior subsections (b) and (c) has been relocated to C.A.R. 44.1.

Rule 44.1. Cases Involving Public Utilities Laws or the Public Utilities Commission When the Commission is Not a Party

(a) Challenge to Public Utilities Law or Act of Public Utilities Commission. If a party questions the validity, interpretation, or application of any section of the Public Utilities Law of the State of Colorado or of any rule, regulation, order, certificate, or permit issued by the Public Utilities Commission in a proceeding in which the Commission is not a party, the questioning party must notify the clerk of the appellate court in writing immediately upon the filing of the proceeding or as soon as the question is raised in the appellate court. The clerk must then certify that fact to the Secretary of the Public Utilities Commission.

(b) Other Proceedings Impacting the Public Utilities Commission. In an appellate proceeding involving a municipally owned utility in which the court's decision may impact the powers and duties of the Public Utilities Commission or the interpretation of the Public Utilities Law of the State of Colorado, the clerk of the appellate court must notify the Secretary of the Public Utilities Commission of the pendency of the proceeding and invite the Commission to intervene or to enter an appearance as amicus curiae.

Source: Rule and comment adopted and effective June 9, 2016.

COMMENT

2016

This new rule contains the substance of prior C.A.R. 44(b) and (c), pertaining to cases involving Public Utilities Law or proceedings impacting the Public Utilities Commission when the Commission is not a party.

Rule 45. Duties of Clerk of Appellate Court

(a) General Provisions.

(1) Qualifications. The clerk of the appellate court must take any oath required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) When Court is Open. The appellate courts are always open for filing any document, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays, as defined in C.A.R. 26(a), but the chief justice may order that the clerk's office be open or closed during specified hours on other days.

(b) Records.

(1) The Docket. The clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the appellate court. The clerk must record all documents filed with the clerk and all process, orders, and judgments.

(2) Calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals and other proceedings entitled to preference by law.

(3) Other Records. The clerk must keep other records as required by the court.

(c) Service of Orders and Judgments. The clerk must serve all orders and judgments on each party and note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of Records and Documents. The clerk has custody of the court's records and documents. Unless the court orders otherwise, the clerk must not permit an original record or document to be taken from the clerk's custody. Upon disposition of the case, the clerk must return original documents containing the record on appeal or review to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other document that has been filed.

Source: Entire rule amended and effective June 23, 2014; entire rule amended and effective June 9, 2016.

Rule 46. Review of Workers' Compensation Decisions of the Industrial Claim Appeals Panel by the Court of Appeals

Repealed, effective January 26, 1995.

Rule 46.1. Time for Petitioning

Repealed, effective January 26, 1995.

Rule 46.2. Review on Certiorari to the Court of Appeals — How Sought

Repealed, effective January 26, 1995.

Rule 46.3. The Petition for Certiorari

Repealed, effective January 26, 1995.

Rule 46.4. Order Granting or Denying Certiorari

Repealed, effective January 26, 1995.

Rule 46.5. Briefs — In General

Repealed, effective January 26, 1995.

Rule 46.6. Oral Argument

Repealed, effective January 26, 1995.

Rule 46.7. Further Review

Repealed, effective January 26, 1995.

Rules 47 and 48. No Colorado Rules

JURISDICTION ON WRIT OF CERTIORARI

Rule 49. Considerations Governing Review on Certiorari

Review in the supreme court on a writ of certiorari as provided in section 13-4-108, C.R.S., and section 13-6-310, C.R.S., is a matter of sound judicial discretion and will be granted only when there are special and important reasons. The following, while neither controlling nor fully measuring the supreme court's discretion, indicate the character of reasons that will be considered:

(a) the district court on appeal from the county court has decided a question of substance not yet determined by the supreme court;

(b) the court of appeals, or district court on appeal from the county court, has decided a question of substance in a way probably not in accord with applicable decisions of the supreme court;

(c) a division of the court of appeals has rendered a decision in conflict with the decision of another division of said court; the same ground applies to judgments and decrees of district courts on appeal from the county court when a decision is in conflict with another district court on the same matters;

(d) the court of appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the supreme court's power of supervision.

Source: Entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982).

The common-law writ of certiorari serves to correct substantial errors of law not otherwise reviewable which are committed by an inferior tribunal. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Statutes creating appellate remedies take precedence over judicial rules of procedure. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Scope of constitutional rule-making power. The manner in which subject matter jurisdiction is exercised is properly within the scope of the supreme court's rule-making powers vested by § 2(1) of art. VI, Colo. Const. This procedure has been established and is set forth in C.A.R. 50 to 57. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Supreme court may not expand jurisdiction by rule. Supreme court jurisdiction, as initially spelled out in the Colorado constitution, may be expanded by statute. But there is no authority for the supreme court to expand its jurisdiction by rule of court. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Certiorari is proper remedy to protect substantial right. An original proceeding in the nature of certiorari under this rule, when directed to an endangered, fundamentally substantive and substantial right, is maintainable and recognized as a proper remedy. Potashnik v.

Pub. Serv. Co., 126 Colo. 98, 247 P.2d 137 (1952); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Where usual review does not afford adequate protection. The power of certiorari is exercisable where usual review on appeal would not afford adequate protection to substantive rights of the petitioners. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Certiorari may be granted to determine a policy. Where no well-defined policy has emerged on a subject, the court will grant certiorari in order to make such a determination. Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

The issuance of a writ of certiorari is always discretionary. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Review of interlocutory orders. The supreme court has the power under § 3 of art. VI, Colo. Const., to issue certiorari to review interlocutory orders of lower courts. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

The proper proceeding for relief from an interlocutory order is by certiorari. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Review of eminent domain interlocutory order. Within the period of stay of execution granted by a trial court, the owners of property being condemned, not having the right of review of an interlocutory order on appeal, may file original action by way of certiorari in the supreme court, alleging that otherwise they are without remedy whatsoever to protect their property from seizure under an order of a district court, which they contend is without lawful authority. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Pretrial proceedings reviewable. The denial of an asserted right in pretrial proceedings, not otherwise reviewable, may be determined by means of an original proceeding in certiorari in the supreme court. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari granted where judgment would render question moot. Application for an original writ of mandamus or certiorari in the supreme court is the only procedure by which to test the validity of a trial court's ruling where the question involved, if permitted to await final judgment, would become moot. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari to review joinder of claims was issued where all parties would be put to unnecessary delay and expense were it required that one or both of these tort claims be fully tried before determining whether the claims should have remained joined in the first instance. Should plaintiffs obtain a favorable judgment in both lawsuits, none of the parties will be in a position to raise the procedural question of separate trials posed by this original proceeding. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Amended answers ordered to be struck. In an original proceeding for relief as in certiorari, it was held that the district court should strike amended and amending answers which it allowed to be filed subsequent to the supreme court's remanding order which mentioned the specific pleadings out of which the trial court should ascertain the issues and on which it should conduct the trial. People ex rel. Henderson v. Greeley Nat'l Bank, 112 Colo. 274, 148 P.2d 580 (1944).

Review of superior court's reversal of county court. The supreme court may review by certiorari a superior court's reversal of a county court judgment. People v. Dee, 638 P.2d 749 (Colo. 1981).

The appellate review of county court judgments by the superior court is subject to ultimate review by the supreme court, since any party has the right to petition for a writ of certiorari. People v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971).

Certiorari dismissed where denial of charge of venue may be considered on appeal. Under applicable rules of civil procedure, where a motion for change of venue has been filed by defendants and said motion has been denied, the defendants can thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said motion. An original proceeding in the nature of a writ of certiorari to review the denial of a motion for change of venue by a district court will be dismissed. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Where conviction necessarily involves only a factual issue, certiorari to review such conviction will be dismissed as improvidently granted. Erickson v. City & County of Denver, 179 Colo. 412, 500 P.2d 1183 (1972).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Where a decision of a reviewing court could not result in further proceedings against the petitioner, he has no standing to prosecute appellate proceedings beyond the court where his acquittal occurred. Garcia v.

City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Moot question not reviewed. Where the question involved does not have that degree of public importance to justify review of a moot question, it is properly dismissed. People in Interest of P. L. V., 176 Colo. 342, 490 P.2d 685 (1971).

Appellate courts are bound by the jury's findings where there is sufficient competent evidence in the record to support the finding, where the jury makes the finding on conflicting evidence, and where the jury has been correctly instructed by the trial court. Vigil v. Pine, 176 Colo. 384, 490 P.2d 934 (1971).

Applied in McGregor v. People, 176 Colo. 309, 490 P.2d 287 (1971); Bd. of County Comm'rs v. Fifty-first Gen. Ass'y, 198 Colo. 302, 599 P.2d 887 (1979).

Rule 50. Certiorari to the Court of Appeals Before Judgment

(a) Considerations Governing. A petition for writ of certiorari from the supreme court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted upon a showing that:

(1) the case involves a matter of substance not yet determined by the supreme court of Colorado, or that the case if decided according to the relief sought on appeal involves the overruling of a previous decision of the supreme court; or

(2) the court of appeals is being asked to decide an important state question which has not been, but should be, determined by the supreme court; or

(3) the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court.

(b) By Whom Sought. The petition for a writ of certiorari may be filed by either party or by stipulation of the parties. The court of appeals on its own motion may request transfer to the supreme court, or the supreme court may on its own motion require transfer of the case to it.

(c) Applicability. This rule does not permit certiorari review in cases pending in the district court on appeal from the county court before judgment is entered in the district court.

Source: Entire rule amended and effective June 23, 2014; entire rule amended and effective June 7, 2018, effective July 1, 2018.

Cross references: For general considerations governing review of certiorari, see C.A.R. 49; for certification and transfer of cases, see §§ 13-4-109 and 13-4-110, C.R.S.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For comment, ''In the Interest of R.C., Minor Child: The Colorado Artificial Insemination by Donor Statute and the Non-Traditional Family'', see 67 Den. U.L. Rev. 79 (1990).

Procedure provides for appellate review. The procedure established in § 13-4-108 (2), C.R.S., and in C.A.R. 50 through C.A.R. 57, C.A.R., clearly provides for appellate review in the supreme court. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

And is constitutional. The changes brought about by pertinent statutes with respect to the jurisdiction of the supreme court and the court of appeals are within the authority of the general assembly. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Review similar to common-law certiorari. The form of certiorari review the supreme court will maintain over the court of appeals is quite similar to the common-law review by certiorari, and distinguishable from the limited ancillary type of certiorari in existence in past years under Rule 106(a)(4), C.R.C.P. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

The supreme court may retain and review an appeal of a declaratory order of the state personnel board that should have been filed with the court of appeals. The court's authority rests in its power under section (b) to review cases pending in the court of appeals prior to judgment and under C.A.R. 2 to suspend the rules of appellate procedure. Colo. Ass'n of Pub. Emp. v. Dept. of Hwys., 809 P.2d 988 (Colo. 1991).

Study of petition and record constitutes review. The study by the supreme court of the petition provided in the Colorado appellate rules and of the record on appeal to determine

whether to grant or deny the petition constitutes a review. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Applied in Ackmann v. Merchants Mtg. & Trust Corp., 645 P.2d 7 (Colo. 1982); Slack v. City of Colo. Springs, 655 P.2d 376 (Colo. 1982); Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 254(Colo. 1983); Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 257 (Colo. 1983); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983); In the Interest of R.C., 775 P.2d 27 (Colo. 1989); Romer v. Bd. of County Comm'rs, Weld County, 897 P.2d 779 (Colo. 1995); Fort Collins v. Colo. Oil & Gas Ass'n, 2016 CO 28, 369 P.3d 586.

Rule 51. Review on Certiorari — How Sought

(a) Filing and Record on Appeal. A party seeking review on certiorari must file, within the time limit provided in C.A.R. 52, a petition that complies with C.A.R. 25 and 32 with the clerk of the supreme court.

(1) Record from a District Court Judgment. For appeals from district courts reviewing final judgments and decrees of the county court or municipal court, the clerk of the district court must certify the complete record in the case and transmit the record to the clerk of the supreme court within fourteen days of the filing of the petition.

(2) Record from a Court of Appeals Judgment. For appeals from the court of appeals, no action is required by the clerk of the court of appeals to transmit the record.

(b) Petitioner's Docket Fee. Upon the filing of the petition or a motion for extension of time in which to file the petition pursuant to C.A.R. 26(b), petitioner must pay the docket fee of $225.00, of which $1.00 will be transferred to the state general fund as a tax levy pursuant to section 2-5-119, C.R.S. The case will then be placed on the certiorari docket.

(c) Respondent's Docket Fee. Upon respondent's initial filing, if any, respondent must pay the docket fee of $115.00.

Source: (a) amended and effective March 23, 2000; (b) and (d) amended and adopted February 27, 2003, effective March 3, 2003; entire rule amended and effective June 23, 2014; entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982).

Rule 51.1. Exhaustion of State Remedies Requirement in Criminal Cases

(a) Exhaustion of Remedies. In all appeals from criminal convictions or postconviction relief matters from or after July 1, 1974, a litigant is not required to petition for rehearing and certiorari following an adverse decision of the intermediate appellate court in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, the litigant will have exhausted all available state remedies when a claim has been presented to the intermediate appellate court and the supreme court, and relief has been denied or when relief has been denied in the intermediate appellate court and the time for petitioning for certiorari review has expired.

(b) Savings Clause. If a litigant's petition for federal habeas corpus is dismissed or denied for failure to exhaust state remedies based on a decision that this rule is ineffective, the litigant may file a motion to recall the mandate together with a writ of certiorari presenting any claim of error not previously presented in reliance on this rule. Any motion to recall the mandate must be filed within 49 days after entry of the federal court's dismissal or denial order.

Source: Entire rule added and effective May 18, 2006; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Section (a) does not require a litigant to raise a claim in the supreme court if he or she has already raised it in the court of appeals and been denied relief. Once a litigant raises a claim before the court of appeals, and relief is denied, ''all available state remedies'' are deemed unavailable. Al-Yousif v. Trani, 11 F. Supp. 3d 1032 (D. Colo. 2014), rev'd on other grounds, 779 F.3d 1173 (10th Cir. 2015).

Section (a) permits state prisoners to exhaust all available state remedies without seeking discretionary relief from the state supreme court, rendering state supreme court review ''unavailable'' for purposes of federal Antiterrorism and Effective Death Penalty Act of 1996 exhaustion. Ellis v. Raemisch, 872 F.3d 1064 (10th Cir. 2017).

Rule 52. Review on Certiorari — Time for Petitioning

(a) Petition for Rehearing Optional. Filing a petition for rehearing in the intermediate appellate court before seeking certiorari review in the supreme court is optional.

(b) Time to File.

(1) In General. Except as provided in subsections (2) and (3) of this rule, a petition for writ of certiorari must be filed within 42 days after entry of the judgment on appeal if no petition for rehearing is filed. If a petition for rehearing is filed, the petition for writ of certiorari must be filed within 28 days after the intermediate appellate court's denial of the petition for rehearing. No petition for issuance of a writ of certiorari may be submitted to the Supreme Court until the time for filing a petition for rehearing in the intermediate appellate court has expired.

(2) In Workers' Compensation and Unemployment Insurance Cases. A petition for writ of certiorari to review a judgment of the court of appeals in workers' compensation and unemployment insurance cases must be filed in the supreme court within 28 days after the issuance of the court of appeals opinion if no petition for rehearing is filed, or within 14 days after the denial of a petition for rehearing by the court of appeals.

(3) In Dependency or Neglect Cases. A petition for writ of certiorari to review a judgment of the court of appeals in dependency or neglect cases must be filed within 28 days after issuance of the court of appeals opinion if no petition for rehearing is filed, or within 14 days after the denial of a petition for rehearing by the court of appeals.

Source: (b) amended June 4, 1987, effective January 1, 1988; (a) amended and effective May 17, 1990; (b) amended July 11, 1991, effective July 1, 1991; (b) amended and adopted November 20, 1998, effective January 1, 1999; (b)(3) amended and effective February 7, 2008; (b)(3) amended and effective May 28, 2009; (a) and (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 7, 2018, effective July 1, 2018; (b)(1) corrected and effective June 7, 2019.

COMMENTS

C.A.R. 52 has been revised to recognize that petitions for rehearing of a district court's review of a county court judgment are permissible, and if a petition for rehearing is filed, the petition for writ of certiorari must be filed within 28 days after the district court's denial of the petition for rehearing.

C.A.R. 52(b)(3) is a new subsection and is consistent with the petition for writ of certiorari requirements set forth in C.A.R. 3.4(l).

ANNOTATION

Law reviews. For article ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law, 356 (1982). For article, ''Appeals of County Court, Municipal Court, and Magistrate Rulings'', see 47 Colo. Law. 32 (Oct. 2018).

When a petition for rehearing of a municipal court judgment is timely filed in the district court, the district court judgment will not become final for purposes of this rule until the district court denies the petition. City of Aurora v. Rhodes, 689 P.2d 603 (Colo. 1984).

When a petition for rehearing of a county court judgment is timely filed in the district court, the district court judgment does not become final for purposes of the 42-day period to file a petition for writ of certiorari under this rule until the district court denies the petition for rehearing. People v. Penn, 2016 CO 32, 379 P.3d 298.

If a party files a conditional cross-petition for certiorari of issues not reached unless the underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. Farmers Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991).

Health maintenance organization (HMO) could not seek certiorari where HMO was dismissed from suit on its motion for summary judgment, was not a party in the court of appeals, was not substantially aggrieved by the disposition of the case by the court of appeals, and did not file the prerequisite petition for rehearing. Colo. Permanente Medical Group v. Evans, 926 P.2d 1218 (Colo. 1996).

Applied in Honey v. Ranchers & Farmers Livestock Auction Co., 191 Colo. 503, 553 P.2d 799 (1976); Wiggins v. People, 199 Colo. 341, 608 P.2d 348 (1980); People v. Dee, 638 P.2d 749 (Colo. 1981); Byrd v. People, 58 P.3d 50 (Colo. 2002).

Rule 53. Petition for Writ of Certiorari and Cross-Petition for Writ of Certiorari

(a) The Petition. The petition for writ of certiorari must comply with C.A.R. 32 and must contain the following under appropriate headings and in the order here indicated:

(1) a table of contents, with page references;

(2) a table of authorities - cases (alphabetically arranged), statutes, and other authorities - with references to the pages of the petition or cross-petition where they are cited;

(3) an advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(4) a reference to the official or unofficial reports of the opinion, judgment, or decree from which review is sought;

(5) a concise statement of the grounds on which jurisdiction of the supreme court is invoked, showing:

(A) the date of the opinion, judgment, or decree sought to be reviewed and the time of its entry;

(B) the date of any order respecting a rehearing and the date and terms of any supreme court order granting an extension of time within which to petition for writ of certiorari;

(6) a reference to any pending cases in which the supreme court has granted certiorari review on the same legal issue on which review is sought;

(7) a concise statement of the case containing the matters material to consideration of the issues presented;

(8) A direct and concise argument explaining the reasons relied on for the issuance of the writ, whether the issues raised in the petition were preserved in the lower court, and the applicable standard of review; and

(9) an appendix containing:

(A) a copy of any opinion, judgment, or decree from which review is sought; and

(B) the text of any pertinent statute, rule, ordinance, or regulation not currently in effect or not generally available in electronic format.

(b) Cross-Petition. Any cross-petition must be filed and served within 14 days after service of the petition for writ of certiorari. A cross-petition must comply with C.A.R. 32 and must have the same contents, in the same order, as the petition.

(c) Opposition Brief.

(1) In General. An opposition brief is not required unless otherwise ordered by the court. Any opposition brief must comply with C.A.R. 53(a)(1)-(3).

(2) By the Respondent. The respondent must file and serve any opposition brief within 14 days after service of the petition. If a respondent files a cross-petition, any opposition brief and cross-petition may be combined.

(3) By the Petitioner. The petitioner must file any opposition brief within 14 days after service of the cross-petition.

(d) Reply Brief. A reply brief is not required unless otherwise ordered by the court. A petitioner or cross-petitioner must file and serve any reply brief within 7 days after service of an opposition brief. The reply brief must comply with C.A.R. 32.

(e) No Separate Brief. No separate brief may be appended to the petition, any cross-petition, the opposition brief, or the reply brief.

(f) Length of Petition, Cross-Petition, Opposition, and Reply Briefs.

(1) A petition, cross-petition, opposition brief, and combined cross-petition and opposition brief must contain no more than 3,800 words. A reply brief must contain no more than 3,150 words. Headings, footnotes, and quotations count toward the word limitation. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block do not count toward the word limit.

(2) A self-represented party who does not have access to a word-processing system must file a typewritten or legibly handwritten petition, cross-petition, opposition brief, or combined cross-petition and opposition brief containing no more than 12 double-spaced and single-sided pages, or a reply brief of no more than 10 double-spaced and single sided pages.

(3) A party may file a motion to exceed the word limitation explaining the reasons why additional words are necessary. The motion must be filed with the document for which the party seeks to expand the word limit. Motions to exceed the word limitation will be granted rarely and only upon a showing of exceptional need to exceed the word limitation.

(g) Amicus Briefs. An amicus curiae may file a brief in support of or in opposition to a petition, opposition, or cross-petition only by leave of court or at the court's request. Leave to file an amicus brief must be sought in accordance with C.A.R. 29(b) and may not be filed until after a petition for writ of certiorari has been filed. Amicus briefs must comply with the content and form requirements of C.A.R. 29(c). Except by the court's permission, an amicus brief must contain no more than 3,150 words. An amicus brief must be filed within 7 days after the filing of the petition, opposition, or cross-petition that the amicus brief supports. An amicus curiae that does not support either party must file its brief within 7 days after the filing of the petition or cross-petition in which the issue to which the amicus brief is directed was first raised.

(h) Filing and Service. Filing and service must be in the same manner as provided in C.A.R. 25.

Source: Entire rule repealed and readopted August 30, 1985, effective January 1, 1986; IP(a) and (b) to (d) amended and effective July 8, 1993; rule title amended and effective April 7, 1994; (a)(7) repealed, (e) amended, and (f) added April 4, 1996, effective July 1, 1996; entire rule amended and adopted February 24, 2005, effective July 1, 2005; (b), (c), and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule amended and effective June 23, 2014; entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005).

The petition for writ of certiorari is an application of right. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

If a party files a conditional cross-petition for certiorari of issues not reached unless the underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. Farmers Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991).

Issue held not to be fairly comprised within issues raised by petition for certiorari, as required by subsection (a)(3). Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900 (Colo. 1982).

Applied in County of Clearwater v. Petrash, 198 Colo. 231, 598 P.2d 138 (1979).

Rule 54. Order Granting or Denying Certiorari

(a) Grant of Writ. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk will issue an order to that effect, and will notify the lower court and counsel of record. The order will direct that the certified transcript of record on file be treated as though sent up in response to a formal writ. A formal writ will not issue unless specially directed.

(b) Denial of Writ. No mandate will issue upon the denial of a petition for writ of certiorari. Whenever the court denies a petition for writ of certiorari, the clerk will issue an order to that effect, and will notify the lower court and counsel of record. If, after granting the writ, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40. No petition for rehearing may be filed after the issuance of an order denying a petition for writ of certiorari.

Source: Entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982). For article, ''Amendments to Appellate Rules Concerning Type Size and Word Count'', see 34 Colo. Law. 27 (June 2005).

Review by certiorari constitutes appellate review under the Colorado constitution. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

The denial of a petition for certiorari is ''appellate review'' as that term is used in the Colorado constitution. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Rule 55. Stay Pending Review on Certiorari

Application to the supreme court for stay of execution of a decision of the court of appeals or the judgment of a district court on appeal from a county court will normally not be entertained until application for a stay has first been made to the court rendering the decision sought to be reviewed and that court has denied or failed to rule on a motion to stay the judgment on appeal. A motion for stay filed pursuant to this rule must comply with C.A.R. 8(a)(2).

Source: Entire rule amended and effective June 23, 2014; entire rule amended June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982).

Rule 56. Extension of Time

After appearance is made and a docket fee paid, the supreme court for good cause shown may upon motion extend the time prescribed by these rules for filing a petition for writ of certiorari or may permit the petition to be filed after the expiration of such time. Any initial motion for extension of time must include the date on which the court of appeals issued its opinion or the date on which the district court on appeal from the county court issued its order.

Source: Entire rule amended and effective June 7, 2018, effective July 1, 2018.

Comment: This change requires an appearance and payment of the docket fee under Rule 51(b) before counsel will be permitted to file a motion for the enlargement of time in which to file the writ of certiorari.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982).

Rule 57. Briefs — In General

Briefs of the petitioner and the respondent on the merits must comply with the content and length requirements of C.A.R. 28 and the form and service requirements of C.A.R. 25 and 32. Briefs must be filed within the time prescribed in C.A.R. 31; except that in workers' compensation cases the petitioner must serve and file the petitioner's opening brief within 14 days and the respondent must file the respondent's brief within 7 days after service of the petitioner's brief, and no other brief will be permitted. Incorporation by reference of briefs previously filed in the lower court is prohibited.

Source: Entire rule amended June 4, 1987, effective January 1, 1988; entire rule amended and effective July 8, 1993; entire rule amended and effective October 17, 2014; entire rule amended and effective June 7, 2018, effective July 1, 2018.

ANNOTATION

Law reviews. For article, ''A Summary of Colorado Supreme Court Internal Operating Procedures'', see 11 Colo. Law. 356 (1982).

Rule 58. Citation

These rules in Chapter 32 may be known as the Colorado Appellate Rules and shall be cited as ''C.A.R.'', followed by the number of the rule.

APPENDIX TO CHAPTER 32

The Colorado Appellate Rules

APPENDIX TO CHAPTER 32

FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

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CHAPTER 33

The Colorado Rules of Evidence

Adopted by the

SUPREME COURT OF COLORADO

October 23, 1979

Effective January 1, 1980

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CHAPTER 33

COLORADO RULES OF EVIDENCE

The Rules of Evidence are the product of six years of work by a select committee of the Colorado Bar Association, chaired by Professor Francis W. Jamison. The Rules parallel the Federal Rules of Evidence and the Uniform Rules of Evidence promulgated by the National Conference of Commissioners on Uniform State Laws. The drafting committee submitted the Proposed Rules to the Colorado Supreme Court and assisted in the presentation and complete review of the Rules at three public hearings.

ARTICLE I
GENERAL PROVISIONS

Law reviews: For a discussion of recent Tenth Circuit decisions dealing with evidence, see 66 Den. U. L. Rev. 767 (1989); for articles, ''Criminal Procedure'' and ''Evidence'', which discuss recent Tenth Circuit decisions dealing with questions of evidence, see 67 Den. U. L. Rev. 701 and 739 (1990); for article, ''Demonstrative Evidence: Coming of Age'', see 22 Colo. Law. 1191 (1993); for article, ''The Other Rules of Evidence'', see 24 Colo. Law. 2169 (1995).

Rule 101. Scope

These rules govern proceedings in all courts in the State of Colorado, to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
(Federal Rule Identical.)

ANNOTATION

Applied in People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. P.R.G., 729 P.2d 380 (Colo. App. 1986).

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of evidence, the form in which it was offered, the objection

made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Federal Rule Identical.)

Source: (a) amended and adopted June 20, 2002, effective July 1, 2002.

ANNOTATION

Law reviews. For article, ''Preserving Issues for Appeal'' discussing the requirement of an offer of proof, see 20 Colo. Law. 879 (1991). For article, ''Preservation of Error Through the Use of Motions In Limine'', see 24 Colo. Law. 781 (1995). For article, ''Offers of Proof'', see 31 Colo. Law. 85 (Jan. 2002). For article, ''C.R.E. 103(a) and Harmless Error'', see 33 Colo. Law. 91 (Nov. 2004). For article, ''There is Still a Chance: Raising Unpreserved Arguments on Appeal'', see 42 Colo. Law. 29 (June 2013).

Failure to object in the trial court on the grounds asserted on appeal is deemed to be a waiver of the objection. People v. Watson, 668 P.2d 965 (Colo. App. 1983); People v. Girtman, 695 P.2d 759 (Colo. App. 1984); People v. Browning, 809 P.2d 1086 (Colo. App. 1990); People v. Renfro, 117 P.3d 43 (Colo. App. 2004).

But a timely specific objection at trial preserves an evidentiary issue on appeal. Hancock v. State, 758 P.2d 1372 (Colo. 1988); Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997).

Ruling admitting evidence overturned only where prejudicial effect outweighs probative value. Only where the prejudicial effect of an evidentiary item outweighs its probative value will the trial court's evidentiary ruling admitting evidence be overturned as an abuse of discretion. People v. Abbott, 638 P.2d 781 (Colo. 1981).

A ruling that erroneously admits evidence requires reversal only when it affects a substantial right of the party against whom the ruling is made. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

In order to preserve for review an objection to the exclusion of evidence, a proper offer of proof must be made and must demonstrate that evidence is admissible as well as relevant to the issues in the case. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992); Vu v. Fouts, 924 P.2d 1129 (Colo. App. 1996).

Motion in limine may constitute "timely objection" for purposes of this rule if it contains specific objections to the admission of specific items of anticipated evidence. Uptain v. Huntington Lab, Inc., 723 P.2d 1322 (Colo. 1986).

An offer of proof to preserve for review an objection to the exclusion of evidence must demonstrate that evidence is admissible as well as relevant to the issues in the case. Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

Defendant could not predicate error on trial court's denial of admission of hearsay evidence; since defendant made no offer of proof, it was not apparent from the context what the substance of the testimony would have been, and defense counsel made no objection to the denial. People v. Hoover, 165 P.3d 784 (Colo. App. 2006).

Subsection (a)(2) is applied in Kedar v. Pub. Serv. Co., 709 P.2d 15 (Colo. App. 1985); Silva v. Wilcox, 223 P.3d 127 (Colo. App. 2009).

Evidentiary issues not brought to the attention of the trial court can only be considered under plain error standard. People v. Koon, 724 P.2d 1367 (Colo. App. 1986).

Generally, an offer of proof should not be refused, since the purpose of such offer is to inform the trial court of what counsel expects to prove by the excluded evidence and to ensure that an appellate court will be able to evaluate the scope and effect of the ruling to determine whether the exclusion constituted reversible error. People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

Reversible error where trial court admitted summaries of hospital records into evidence where original records were not made available to defendant prior to trial. Summary evidence constituted majority of prosecution's case and its admission without proper foundation was prejudicial error. It deprived defendant of an accurate opportunity to challenge the accuracy of the summaries and to cross-examine the witness who presented the evidence. People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

Doctors' diagnoses, recited and summarized in administrative law judge decision, concerned the nature and extent of plaintiff's

injuries, which were central issues in the case. Therefore their admission could not be considered harmless error. Leiting v. Mutha, 58 P.3d 1049 (Colo. App. 2002).

No reversible error where trial court refused to allow defendant to present an offer of proof as to matters that were clearly not relevant, the nature of the evidence to be elicited was clearly shown by the record, and there was overwhelming evidence of defendant's guilt. People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

No reversible error, where two letters were admitted into evidence over objection, but all substantive statements contained in letters had already been established at trial by properly admitted evidence. Bunnett v. Smallwood, 768 P.2d 736 (Colo. App. 1988), rev'd on other grounds, 793 P.2d 157 (Colo. 1990).

No reversible error where trial court refused to admit evidence on alleged negligent construction where no causal link between that construction and the creation of a fire hazard was established. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

No reversible error where administrative hearing officer did not allow certain opinion testimony at teacher's disciplinary hearing where record reflects that, despite ruling, petitioner was permitted to present a substantial amount of character evidence and hearing officer concluded that petitioner was a person of good character. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Appellate review of trial court's determination pursuant to § 13-25-129 regarding admissibility of child's hearsay statement should be based upon record made at in-limine hearing and may go beyond such record only if issue of harmless error or plain error is raised. People v. Bowers, 801 P.2d 511 (Colo. 1990).

Reversal of a verdict on the grounds that the prevailing party violated an in limine evidentiary order is warranted only where the alleged violation of such order is clear. Where counsel stated in opening arguments that certain evidence would be excluded but did not reveal the details of the excluded evidence, there was no clear violation of the in limine order excluding such evidence. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

Both the question whether claims should be bifurcated for trial and the issue whether otherwise competent evidence is relevant to the claim or defense presented are matters that rest within a trial court's sound discretion. A trial court's refusal to admit evidence will constitute grounds for reversal only if such refusal affects one of the party's substantial rights. Arnold v. Colo. State Hosp., 910 P.2d 104 (Colo. App. 1995).

Applied in Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); People v. Shannon, 683 P.2d 792 (Colo. 1984); People v. Viduya, 703 P.2d 1281 (Colo. 1985); People v. Wafai, 713 P.2d 1354 (Colo. App. 1985), aff'd, 750 P.2d 37 (Colo. 1988); People v. Lucero, 724 P.2d 1374 (Colo. App. 1986); Banek v. Thomas, 733 P.2d 1171 (Colo. 1986); People v. Roybal, 775 P.2d 67 (Colo. App. 1989); Pyles-Knutzen v. Bd. of County Comm'rs, 781 P.2d 164 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989); People v. Bowers, 801 P.2d 511 (Colo. 1990); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993); People v. Seacrist, 874 P.2d 438 (Colo. App. 1993); Itin v. Bertrand T. Ungar, P.C., 17 P.3d 129 (Colo. 2000).

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivisions (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For comment, ''Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties'', see 79 U. Colo. L. Rev. 587 (2008).

The prosecution should be required to establish the foundational requirements for the admission of a co-conspirator's statement prior to any offer of the statement into evidence before the jury. People v. Montoya, 753 P.2d 729 (Colo. 1988).

A court's ruling on the admissibility of a co-conspirator's statement should normally be made during the presentation of the prosecution's case in chief, before the challenged statement is actually heard by the jury. People v. Montoya, 753 P.2d 729 (Colo. 1988).

There is no per se rule against conducting a child competency hearing in front of the jury, but the better practice is to excuse the jury. The defendant was not prejudiced by holding the hearing in front of the jury. People v. Wittrein, 221 P.3d 1076 (Colo. 2009).

Judge, not jury, determines admissibility of evidence. The trial judge, rather than a jury, is the proper judicial functionary to determine the admissibility of evidence. People v. Sanchez, 180 Colo. 119, 503 P.2d 619 (1972).

The preponderance of evidence standard is the traditional standard applicable to the resolution of most preliminary questions of admissibility. People v. Montoya, 753 P.2d 729 (Colo. 1988); People v. Garner, 806 P.2d 366 (Colo. 1991); People v. Groves, 854 P.2d 1310 (Colo. App. 1992).

Whether inculpatory statements contained in a police officer's written statement were made and were made voluntarily is a preliminary matter to be decided by the judge under section (a). When evidence indicates that defendant signed a blank statement that was later filled in by the police officer, the court must first determine whether the defendant made the statements. People v. Gay, 24 P.3d 624 (Colo. App. 2000).

Even if the evidence is ruled inadmissible, the court has no authority to dismiss criminal charges solely upon the basis of its evidentiary ruling. People v. Montoya, 753 P.2d 729 (Colo. 1988).

The trial court determines the qualification of witnesses and has discretion to admit expert testimony. Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986); People v. Williams, 790 P.2d 796 (Colo. 1990).

Credibility of witnesses is for jury to determine, which may accept or reject all or part of a witness's testimony. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); People v. Garner, 187 Colo. 294, 530 P.2d 496 (1975).

It is the function of a jury to assess the credibility of witnesses. People v. Saavedra, 184 Colo. 90, 518 P.2d 283 (1974).

The credibility of the witnesses is a matter for the jury's determination. People v. Hodge, 186 Colo. 189, 526 P.2d 309 (1974); Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986).

It is axiomatic that the jury is the sole judge of the credibility of the witnesses. People v. Barker, 189 Colo. 148, 538 P.2d 109 (1975).

Weight to be given witnesses' testimony a matter for the jury's determination. Where a prima facie case is properly made, the jury is the trier of fact and the judge of the credibility of the witnesses and of the weight to be given their testimony. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972); Duncan v. People, 178 Colo. 314, 497 P.2d 1029 (1972).

Where there is no error in the court's initial ruling on the qualifications of a witness, his credibility and the weight to be given to his testimony is a jury question. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

The credibility of the witnesses and the weight to be given to their testimony is a matter for the jury's determination. Salas v. People, 181 Colo. 321, 509 P.2d 586 (1973); People v. O'Donnell, 184 Colo. 434, 521 P.2d 771 (1974); People v. Dunham, 2016 COA 73, 381 P.3d 415.

It was within the province of the trial court to weigh the testimony of witnesses, including expert witnesses, in determining the factual question of whether the defendant was or was not hypnotized. People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Where evidence is conflicting, it is function of the jury to determine truth. Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971).

It is the function of a jury to resolve conflicts in the evidence. People v. Saavedra, 184 Colo. 90, 518 P.2d 283 (1974).

It is the jury's function to weigh disputed evidence and to resolve the conflicts. People v. Jiminez, 187 Colo. 97, 528 P.2d 913 (1974).

Jury determines whether irreconcilable testimony requires corroboration. Where two versions are clearly irreconcilable, it is for the jury, not the judge, to determine whether the testimony of a witness requires corroboration. Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971).

Error for court to strike blatantly inconsistent testimony. Where testimony is so blatantly inconsistent as to be unworthy of belief, it would be error for the trial court to strike the testimony on the ground that there are inconsis-

tencies in the testimony, because the weight to be given the testimony, even though inconsistent, is for the jury. People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973).

Policy behind section (b) is to allow some flexibility in the order of proof, in order to avoid undue delay and confusion. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980).

In determining admissibility of other-crime evidence, trial court is required to consider all evidence in the case pursuant to subsection (a) of this rule. People v. Garner, 806 P.2d 366 (Colo. 1991); People v. Groves, 845 P.2d 1310 (Colo. App. 1992).

Trial court erred in not admitting, as conditionally relevant evidence pursuant to section (b) of this rule, testimony of a wife as to admissions made by the wife's spouse about the fraudulent nature of his personal injury claim against his employer even though there was an issue about whether the admission was actually made by the spouse or based on the wife's dream. The proper analysis by the court in determining the admissibility of the wife's testimony should have been whether the jury could reasonably find by a preponderance of the evidence that the conditional fact, i.e. that the spouse made such statement, has been established. Burlington N. R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

C.R.E. 602, requiring personal knowledge of a witness, is a specialized application of section (b) of this rule regarding conditionally relevant evidence. In a personal injury case by a husband against his employer, the question of whether the husband's spouse had personal knowledge as to the husband's admissions regarding the fraudulent nature of his claim was for the jury to determine in accordance with section (b) this rule. Burlington N. R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

Although the court precludes the admission of character evidence for the purpose of proving an act in conformance with such character, similar crime evidence is admissible for purposes of proving motive, opportunity, absence of mistake, or accident. People v. Groves, 854 P.2d 1310 (Colo. App. 1992).

Prior to admission of the evidence permitted by section (b) of this rule, the court must be satisfied by a preponderance of the evidence that: (1) The evidence relates to a material fact; (2) the evidence is logically relevant and tends to make the existence of the material fact more or less probable than it would be without the evidence; (3) its logical relevance is independent of the prohibited inference that the defendant was a bad character; and (4) its probative value outweighs the danger of unfair prejudice. People v. Spoto, 795 P.2d 1314 (Colo. 1990); People v. Garner, 806 P.2d 366 (Colo. 1991); People v. Groves, 854 P.2d 1310 (Colo. App. 1992); People v. Duncan, 33 P.3d 1180 (Colo. App. 2001).

Court's refusal to permit defendant to call prosecutor as witness not abuse of discretion where expected testimony related only to alleged discovery violations and not defendant's guilt or innocence. People v. Perryman, 859 P.2d 263 (Colo. App. 1993).

In absence of defendant's testimony the trial court must determine if there was a Miranda violation by weighing the credibility of witnesses. It is not a constitutional requirement that inconsistencies be resolved in the defendant's favor. People v. Turtura, 921 P.2d 40 (Colo. 1996).

Defendant's incriminating statements were obtained in violation of his Miranda rights, and trial court's order to suppress the statements was appropriate. A reasonable person in defendant's circumstances would have felt deprived of his or her freedom of action in a manner similar to a formal arrest. Therefore, defendant was in custody and subject to interrogation without being advised of his Miranda rights. People v. Holt, 233 P.3d 1194 (Colo. 2010).

Testing performed by Colorado bureau of investigation on listening device found in bar restroom did not alter the "character" of device and render it inadmissible in criminal eavesdropping prosecution but was simply a circumstance for jury to consider in weighing the evidence. People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Trial court did not abuse its discretion by excluding testimony of defendant's sister because there were not sufficient guarantees of trustworthiness. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Applied in Hendershott v. People, 653 P.2d 385 (Colo. 1982); People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Federal Rule Identical.)

ANNOTATION

Evidence properly admissible for one purpose does not become inadmissible because it would be inadmissible if offered only for another purpose. Spencer v. People, 163 Colo. 182, 429 P.2d 266 (1967); Florey v. District Court, 713 P.2d 840 (Colo. 1985).

Completeness rule. Where the admissible portion of a statement would be unfair or misleading without including the entire statement, the adverse party may introduce the other part of the statement. People v. Melillo, 976 P.2d 353 (Colo. App. 1998).

But both the rule of completeness and the concept of ''opening the door'' are subject to the considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. People v. Melillo, 25 P.3d 769 (Colo. 2001).

Judge should repeat limited-purpose instruction in written instructions in order to safeguard against potential misuse of other-crime evidence by the jury. People v. Garner, 806 P.2d 366 (Colo. 1991).

Trial court's failure to provide guidance to the jury as to the purpose of the evidence at the time it came in or at the close of the trial was abuse of discretion. People v. Welsh, 80 P.3d 296 (Colo. 2003).

Trial court did not abuse its discretion in finding that the probative value of the prosecution's psychiatrist's opinion, based in part on defendant's criminal history, was not substantially outweighed by the dangers of unfair prejudice. Defendant's criminal record was central to psychiatrist's antisocial personality disorder diagnosis. Furthermore, the parties had agreed that the court would instruct the jury to consider this evidence only as it related to defendant's insanity defense. Finally there were no particular facts to diminish the probative value of the evidence. People v. Gonzales-Quevedo, 203 P.3d 609 (Colo. App. 2008).

Applied in O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986).

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For note, ''Curative Admissibility: Fighting Fire With Fire'', see 23 Colo. Law. 2321 (1994).

The purpose of this rule is to avoid creating a misleading impression by taking evidence out of context or otherwise creating a distorted picture by the selective introduction of evidence. People v. Medina, 72 P.3d 405 (Colo. App. 2003); People v. Knight, 167 P.3d 141 (Colo. App. 2006).

Completeness rule. Where the admissible portion of a statement would be unfair or misleading without including the entire statement, the adverse party may introduce the other part of the statement. People v. Melillo, 976 P.2d 353 (Colo. App. 1998); People v. Medina, 72 P.3d 405 (Colo. App. 2003).

But both the rule of completeness and the concept of ''opening the door'' are subject to the considerations of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. People v. Melillo, 25 P.3d 769 (Colo. 2001).

Rule of completeness is substantially applicable to oral testimony as well as writings and recorded statements. People v. Short, 2018 COA 47, 425 P.3d 1208.

Evidence offered under the rule of completeness is subject to the requirements of CRE 401 and 403. The court did not err in refusing to admit the evidence under the rule of completeness when the remainder of the recording contained evidence improper for the jury to consider. People v. Wilson, 2012 COA 163M, 411 P.3d 11, rev'd on other grounds, 2015 CO 54M, 351 P.3d 1126.

Phone calls recorded when defendant was alone in an interview room during a police interview are not part of the interview, and admitting them as hearsay evidence is not necessary to provide a complete and accurate picture of the admitted police interview. People v. Manyik, 2016 COA 42, 383 P.3d 77.

Defendant's otherwise inadmissible self-serving hearsay is admissible under the rule of completeness to qualify, explain, or place into context the evidence proffered by the prosecution. People v. Short, 2018 COA 47, 425 P.3d 1208 (holding contrary to People v. Davis, 218 P.3d 718 (Colo. App. 2008)).

Defendant's exculpatory statement to the police, admissible under the rule of completeness, is not subject to impeachment. If the

prosecution wants to admit part of a statement, it ought to, in fairness, ''pay the costs'' of admitting it in its relevant entirety. People v. Short, 2018 COA 47, 425 P.3d 1208.

Applied in People v. Wilson, 841 P.2d 337 (Colo. App. 1992); People in Interest of A.W., 982 P.2d 842 (Colo. 1999); People v. Knight, 167 P.3d 141 (Colo. App. 2006); People v. Murray, 2018 COA 102, __ P.3d __.

ARTICLE II
JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule is identical to Rule 201 F.R.E. and generally codifies prior Colorado case law. *See* Nicholls v. Barrick, 27 Colo. 432, 62 P. 202 (1900) [courts take judicial notice of those matters which may be designated as ''common knowledge'']; Finnerty v. Cook, 118 Colo. 310, 195 P.2d 973 (1948) [judicial notice of facts which are ''universally known'']; Israel v. Wood, 93 Colo. 500, 27 P.2d 1024 (1933) [courts take judicial notice of matters of common knowledge in the community where they sit]; Bieser v. Stoddard, 73 Colo. 554, 216 P. 707 (1923) [well recognized natural and physical laws are judicially known and may not be put in issue by denial of their inevitable effect]; Winterberg v. Thomas, 126 Colo. 60, 246 P.2d 1058 (1952) [appellate courts will not hesitate to take judicial notice of the unquestioned laws of mathematics]. However, the mandatory nature of subsection (d) is a departure from existing practice.

In this rule judicial notice is limited to adjunctive facts which are those facts that can be readily determined by resort to accurate sources, such as a calendar date, Sierra Mining Company v. Lucero, 118 Colo. 180, 194 P.2d 302 (1948); term of public office, People, ex rel. Flanders v. Neary, 113 Colo. 12, 154 P.2d 48 (1944); or statistical charts, Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977).

ANNOTATION

Law reviews. For note, ''Rule 201: The Use of Hearsay In Establishing Facts Sufficient for Judicial Notice'', see 22 Colo. Law. 2535 (1993). For article, ''The Google Knows Many Things: Judicial Notice in the Internet Era'', see 39 Colo. Law. 19 (Nov. 2010).

This rule is a codification of existing case law. Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Colo. 1983).

This rule does not broaden the scope of judicial notice. Larsen v. Archdiocese of Denver, 631 P.2d 1163 (Colo. App. 1981).

This rule has traditionally been used cautiously in keeping with its purpose to bypass the usual fact-finding process only when the facts are of such common knowledge that they cannot reasonably be disputed. Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Colo. 1983).

The court may take judicial notice of facts not subject to reasonable dispute because they are capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned. A court may take judicial notice of the contents of court records in a related proceeding. People v. Sa'ra, 117 P.3d 51 (Colo. App. 2004).

The occurrence of legal proceedings or other court actions are proper facts for judicial notice. People v. Sena, 2016 COA 161, 395 P.3d 1148.

Court may take notice without hearing. Under sections (c) and (f), the court may take judicial notice while the case is under advisement without first giving the parties an opportunity to be heard. People ex rel. Danielson v. Amity Mut. Irrigation Co., 668 P.2d 1368 (Colo. 1983).

Scientific propositions accepted as valid in the appropriate scientific community may be judicially noticed by an appellate court, acting on its own initiative. Legouffe v. Prestige Homes, Inc., 634 P.2d 1010 (Colo. App. 1981), rev'd on other grounds, 658 P.2d 850 (Colo. 1983).

Classification of defendant's past offense is a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged. Massey v. People, 649 P.2d 1070 (Colo. 1982).

Conditions presenting risk not an adjudicative fact. Whether certain conditions in a negligence action present more than an ordinary risk of harm depends upon the circumstances of each case, and is not an adjudicative fact. Larsen v. Archdiocese of Denver, 631 P.2d 1163 (Colo. App. 1981).

Meaning of terms within context of constitution not subject to notice. In making its final legal conclusion about the meaning of terms within the context of the constitution, the court should be free to accept or reject several relevant "legislative facts", such as the dictionary definitions of these terms, the use of these words in other cases, and the probable intent of the drafters of the constitution as indicated by any historical facts. These items, therefore, are not subject to the judicial notice rule. Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982).

For a court to be required to take judicial notice under this rule, it must, of necessity, be supplied with specific information that is the subject of the request. Otherwise, it is discretionary whether a court takes judicial notice. Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986); Martinez v. Reg'l Transp. Dist., 832 P.2d 1060 (Colo. App. 1992).

Administrative law judge was not required to take judicial notice of the fact that doctor almost always testified for the defendant, based on a summary of court decisions in which same doctor had been a witness, even if court records were subject to judicial notice, unless the tribunal has been supplied with the specific facts, records, or documents that are the subject of the request. Martinez v. Reg'l Transp. Dist., 832 P.2d 1060 (Colo. App. 1992).

Rules published in the code of Colorado regulations are a fit subject for judicial notice. Westfall v. Town of Hugo, 851 P.2d 299 (Colo. App. 1993).

Pleadings, minutes, testimony, and verdict of a case in which defendant's friend was tried and acquitted is not a matter subject to judicial notice pursuant to this rule as it would require the trial court to second guess the fact finder in the other case as to its reasons for finding the person not guilty. People v. Phillips, 732 P.2d 1226 (Colo. App. 1986).

Judicial notice of municipal court order was proper. The fact that the court issuing the order was a municipal court was a matter of general knowledge within the district court's jurisdiction and it was capable of accurate confirmation through sources known to the district court. People v. Merklin, 80 P.3d 921 (Colo. App. 2003).

Rule regarding fact judicially noticed applies only to adjudicative facts and therefore the classification of a criminal defendant's offense which is a question of law, did not require instruction pursuant to this rule. People v. Hampton, 857 P.2d 441 (Colo. App. 1992), aff'd, 876 P.2d 1236 (Colo. 1994).

The resolution of a factual matter at issue in a prior judicial proceeding does not become an indisputable fact within the meaning of this rule merely as a result of being reflected in a court record, unlike the occurrence of the legal proceeding or other court action itself. The trial court erred in taking judicial notice that defendant failed to appear in court as required by a condition of his bond. Doyle v. People, 2015 CO 10, 343 P.3d 961.

Because the jury was instructed that the judicially noticed fact was not subject to reasonable dispute and had already been accepted as true by the court, the error was not harmless, notwithstanding the proper admission into evidence of a court record reflecting the court's earlier finding to that effect. Doyle v. People, 2015 CO 10, 343 P.3d 961.

Trial court erred in taking judicial notice of presentence report prepared by the probation department in determining whether defendant was previously convicted of a felony. People v. Cooper, 104 P.3d 307 (Colo. App. 2004).

The court did not err by taking judicial notice of defendant's probation status after determining the status from the state computer system. Since § 13-1-119 and Crim. P. 55 expressly approve of records kept and maintained in a state computer system, the court may

take judicial notice of the court records contained in the system. People v. Linares-Guzman, 195 P.3d 1130 (Colo. App. 2008).

Magistrate in kinship adoption proceeding erred in taking judicial notice of guardian ad litem's report in mother's dissolution proceeding because mother did not have the opportunity to cross-examine guardian ad litem in the kinship proceeding. A court may not take judicial notice of facts on the issue the parties are litigating. However, a court may take judicial notice of its own records and adopt factual findings from a previous case involving the same parties and the same issues. In re C.A.B.L., 221 P.3d 433 (Colo. App. 2009).

Court did not err in not taking judicial notice of the dismissal of a previous sexual assault case when the defendant failed to comply with paragraph (d) of this rule and there was uncontroverted testimony that the case was dismissed. People v. Marsh, 396 P.3d 1 (Colo. App. 2011), aff'd, 2017 CO 10M, 389 P.3d 100.

A court can take judicial notice of a court's register of actions for procedural effect. People in Interest of I.S., 2017 COA 155, 415 P.3d 869.

Applied in Lovato v. Johnson, 617 P.2d 1203 (Colo. 1980); In re House Bill 91S-1005, 814 P.2d 875 (Colo. 1991).

ARTICLE III
PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMITTEE COMMENT

This rule is essentially identical to the Federal rule, thus achieving a desirable degree of uniformity and simplicity. The rule gives all of the proper traditional benefits of a presumption, but places no new burdens upon the opposing party. *See* House Report, p.7; Senate Report, p. 9; Joint Explanatory Statement of the Committee of Conference; *also* 1 Jones, *Evidence* § 3.6 (6th ed.); McCormick, *Evidence,* § 354 (2nd ed. 1972). *Contra, see* Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958).

ANNOTATION

Law reviews. For note, "Res Ipsa Loquitur — The Effect of Comparative Negligence", see 53 U. Colo. L. Rev. 777 (1982). For article, "Rule 301: Overcoming Presumptions", see 27 Colo. Law. 55 (Jan. 1998).

Doctrine of res ipsa loquitur no longer creates a presumption of negligence which shifts the burden of disproving the presumed fact of negligence to the opponent of the presumption. The doctrine only shifts the burden of going forward with evidence to rebut the presumed fact of negligence. Hartford Fire Ins. Co. v. Pub. Serv. Co., 676 P.2d 25 (Colo. App. 1983).

If a plaintiff makes a prima facie showing of negligence under the res ipsa loquitur doctrine, only the burden of production, and not the burden of proof, shifts to the defendant. If the defendant then satisfies the burden of production, there is no longer a presumption of negligence; however, the jury may consider an inference of negligence alongside the other evidence. Chapman v. Harner, 2014 CO 78, 339 P.3d 519 (overruling Weiss v. Axler, 328 P.2d 88 (1958), and its progeny)).

There is a presumption that adherence to the applicable standard of care adopted by a profession constitutes due care for those practicing that profession. The presumption, however, is a rebuttable one, and the burden in on the one challenging the standard of care to rebut the presumption by competent evidence. United Blood Servs. v. Quintana, 827 P.2d 509 (Colo. 1992).

Plaintiff was not required to bear the burden of going forward with evidence to rebut the presumed fact that compliance with industry standards establishes "accepted good engineering practices" for purposes of tort liability since the fact that a defendant utility company complied with such practices is not dispositive of whether the utility was negligent in the activities which resulted in decedent's electrocution and since it is almost impossible for a plaintiff to present evidence to establish that

compliance with industry standards was not, under the facts of a particular case, ''accepted good engineering practice,'' that would rebut that presumption. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Trial court committed reversible error in giving jury instruction, because there was no statutory or common law justification to support the rebuttable presumption contained in the instruction. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Applied in Montgomery Elevator Co. v. Gordon, 619 P.2d 66 (Colo. 1980); 1st Charter Lease Co. v. McAL, Inc., 679 P.2d 114 (Colo. App. 1984); People v. Gallegos, 692 P.2d 1074 (Colo. 1984).

Rule 302. (No Colorado Rule Codified)

ARTICLE IV
RELEVANCY AND ITS LIMITS

Law reviews: For article, ''Stretching Relevancy'', see 22 Colo. Law. 1177 (1993).

Rule 401. Definition of "Relevant Evidence"

''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''The Admissibility of Hypnotically Refreshed Testimony in Criminal Cases'', see 12 Colo. Law. 600 (1983). For article, ''Discovery and Admissibility of Police Internal Investigation Reports'', see 12 Colo. Law. 1745 (1983). For casenote, ''People v. Quintana: How 'Probative' Is This Colorado Decision Excluding Evidence of Post-Arrest Silence?'', see 56 U. Colo. L. Rev. 157 (1984). For article, ''Mythological Rules of Evidence'', see 16 Colo. Law. 1218 (1987). For article, ''Hypnotically Refreshed Testimony in Trials — A New Approach'', see 18 Colo. Law. 632 (1988). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002). For article, ''The Admissibility of Evidence of the Pre-Trial Exercise of Constitutional Rights'', see 37 Colo. Law. 81 (July 2008).

There is no qualitative difference between direct and circumstantial evidence. People in Interest of M.S.H., 656 P.2d 1294 (Colo. 1983).

Test for determining relevancy of real evidence is that such evidence must only be connected in some manner with either the perpetrator, the victim, or the crime. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. Carlson, 677 P.2d 390 (Colo. App. 1983).

As a general rule, facts which logically tend to prove or disprove the fact in issue or which afford a reasonable inference or shed light upon the matter contested are relevant. However, facts collateral to or bearing so remotely upon the issue that they afford only conjectural inference should not be admitted in evidence. People v. Botham, 629 P.2d 589 (Colo. 1981); People v. More, 668 P.2d 968 (Colo. App. 1983).

If evidence is relevant and material, its admission is not error merely because the evidence is cumulative. People v. Salas, 902 P.2d 398 (Colo. App. 1994).

An objection to the relevance of evidence does not include an objection that the evidence, if admissible, is unduly prejudicial under C.R.E. 403 because of the substantial difference in analysis trial courts perform under C.R.E. 403 and this rule. Am. Family Mut. Ins. Co. v. DeWitt, 216 P.3d 60 (Colo. App. 2008), aff'd, 218 P.3d 318 (Colo. 2009).

Nexus required for relevancy. Without a nexus between the deceased's prior violent acts and the actions of the defendant, the occurrence of these prior violent acts would be of no consequence in the determination of the guilt or innocence of the defendant. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (Colo. 1980).

Establishment of fact through use of negative allowed. Evidence is not irrelevant simply because it tends to establish a fact through the use of a negative. People v. Bueno, 626 P.2d 1167 (Colo. App. 1981).

When chain of custody necessary. Only where no single witness can establish the connection of evidence with the perpetrator, victim, or crime is an unbroken chain of custody of a specific item of evidence necessary in order to demonstrate relevancy. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather

than the admissibility of evidence. People v. Gomez, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); People v. Moltrer, 893 P.2d 1331 (Colo. App. 1994).

Relevance of silence upon arrest. Evidence of a defendant's failure to make a statement to the arresting officers may be so ambiguous and lacking in probative value as to be inadmissible as substantive evidence. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Silence generally is thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Silence has probative value and may be admissible. People v. Quintana, 665 P.2d 605 (Colo. 1983).

Defendant's non-responsiveness at crime scene and at hospital not properly admitted since defendant's defense of dissociative state did not rely on defendant's state of mind at hospital or crime scene and was therefore irrelevant to whether defendant was sane at the moment she shot the victim, and danger of unfair prejudice and likelihood of misleading the jury far outweighed any possible probative value that testimony regarding the defendant's silence might have had. People v. Welsh, 80 P.3d 296 (Colo. 2003).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. People v. Anderson, 637 P.2d 354 (Colo. 1981).

While voice-print analysis testimony may be relevant, it is not sufficiently reliable to be admissible. People v. Drake, 748 P.2d 1237 (Colo. 1988).

Hypnotically refreshed testimony is inadmissible. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982); People v. Rex, 689 P.2d 669 (Colo. App. 1984).

A jury's ability to observe a witness' demeanor and analyze a witness' ability to perceive, remember, and articulate is so hampered by the hypnotic process that the probative value of such evidence cannot overcome its flaws. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

From time of hypnosis forward. Testimony of a witness who has been questioned under hypnosis is per se inadmissible as to his recollections from the time of the hypnotic session forward. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

Recorded pre-hypnosis recollections admissible. However, the witness is not incompetent to testify to pre-hypnosis recollections that have previously been unequivocally disclosed and recorded by tape recording, video tape, or by written statement. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

Evidence gained from a hypnotic trance should be excluded. People v. Diaz, 644 P.2d 71 (Colo. App. 1981).

Evidence gained in hypnotic state held properly excluded. People in Interest of M.S.H., 656 P.2d 1294 (Colo. 1983).

Evidence relating to legal conclusions, and not to facts, properly excluded. Where the proffered evidence is relevant to the legal conclusion that the plaintiffs would like the courts to adopt, but not to the facts in issue, the evidence is properly excluded on relevancy grounds. Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982).

In a wrongful death action, evidence of the surviving spouse's remarriage is irrelevant in that the damages in this type of action are calculated at the time of the death, and remarriage is highly speculative as proof in mitigation of damages. Barnhill v. Pub. Serv. Co., 649 P.2d 716 (Colo. App. 1982), aff'd, 690 P.2d 1248 (Colo. 1984); Ford v. Bd. of County Comm'rs, 667 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

Document excluded as irrelevant. People v. Mascarenas, 666 P.2d 101 (Colo. 1983).

Decedent's ability to accumulate wealth and loss of earning capacity in a certain business are relevant in a wrongful death action when a material part of the heir's net pecuniary loss is based on the loss of increase in her anticipated inheritance and the estimates and opinions presented were sufficiently grounded in fact to be admissible and probative on the issue of the decedent's earning capacity. Ford v. Bd. of County Comm'rs, 677 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

Death threat evidence inadmissible because it failed to show defendant's consciousness of guilt. People v. Fernandez, 687 P.2d 502 (Colo. App. 1984).

Evidence of a defendant's gang affiliation, which tended to prove the existence of a motive for killing the victim, was relevant where proof of intent to kill was a necessary part of the prosecution's case. People v. Mendoza, 860 P.2d 1370 (Colo. App. 1993).

Gang affiliation of defendant was evidence of proof of intent to kill and was relevant. The danger of prejudice did not outweigh its probative value. People v. Mendoza, 876 P.2d 98 (Colo. App. 1994).

Evidence of gang affiliation admissible. There was evidence presented that defendant's gang affiliation motivated him to participate in the shooting. Thus, defendant's gang affiliation could have shown a motive to commit murder. People v. Clark, 2015 COA 44, 370 P.3d 197.

Descriptions of defendant's clothing, which might be interpreted to imply a gang

connection, held relevant and not unduly prejudicial where neither prosecutor nor witnesses used the word ''gang''. People v. Fernandez, 883 P.2d 491 (Colo. App. 1994).

Testimony that victim of sexual assault underwent counseling at the suggestion of the department of social services held relevant to the occurrence of the sexual assault. People v. Myers, 714 P.2d 513 (Colo. App. 1985).

Evidence of victim's rape fantasy and victim's statements regarding fantasy admissible under rape shield statute. The evidence and supporting statements should be admitted since the evidence and statements were material and relevant to the issue of consent. People v. Garcia, 179 P.3d 250 (Colo. App. 2007).

Evidence of defendant's prior sexual relationship with victim subject to "prior sexual contact with actor" exception to rape shield statute. The evidence should be admitted since it is material and relevant to the issue of consent and supported defendant's theory of the case. People v. Garcia, 179 P.3d 250 (Colo. App. 2007).

Evidence regarding poor health of theft victim's husband held relevant in light of the central issue of defendant's intention to permanently deprive victim of her money despite defendant's knowledge of the victim's circumstances. People v. Merchant, 983 P.2d 108 (Colo. App. 1999).

Evidence of prior bank foreclosure was probative of the interactions between borrower and the bank — it made it more probable that borrower had the requisite intent to commit theft. The foreclosure was therefore relevant under this rule. Further, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence, especially where the prior foreclosure was referenced only in passing and the details of that foreclosure were not revealed. Thus, the evidence was not barred by C.R.E. 403. People v. Trujillo, 2018 COA 12, 433 P.3d 78.

Evidence relating to conditions of release recommended by disposition committee of state hospital was relevant to issue of future dangerousness of defendant, an essential component of statutory test for eligibility for release, and, therefore, directly related to fact of consequence to determination of the action. Vialpando v. People, 727 P.2d 1090 (Colo. 1986).

Defense counsel characterized defendant who was alleged to have committed a sexual homicide as a "shy, quiet introvert, [an] immature child", therefore, pornographic pictures found in defendant's home were not admitted in error given that defendant was charged with crime involving mutilation of victim's genitalia and evidence of such photographs made it more likely that defendant had the knowledge requisite to perpetrate the mutilation. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

Exclusion of testimony concerning commission of a crime by someone other than the defendant was proper, where it concerned a crime similar in character but remote in time from the crime charged. People v. Thompson, 950 P.2d 608 (Colo. App. 1997).

Evidence directly connecting an alternate suspect to the crime with which defendant is charged is not required to render admissible evidence that an alternate suspect committed a similar offense where there is an issue as to the identity of the perpetrator and the defendant desires to present alternate suspect evidence that bears on the issue, rather than merely showing motive or opportunity. People v. Muniz, 190 P.3d 774 (Colo. App. 2008).

If a reasonable fact finder could find that the facts pertaining to the purported alternate suspect create a reasonable doubt as to the identity of the perpetrator, the evidence should be admitted. Accordingly, the district court abused its discretion in granting prosecution's motion in limine precluding defendant from presenting alternate suspect evidence. Because there was a reasonable probability that the exclusion of evidence prejudiced defendant, defendant's conviction must be reversed. People v. Muniz, 190 P.3d 774 (Colo. App. 2008).

The admissibility of alternate suspect evidence ultimately depends on the strength of the connection between the alternate suspect and the charged crime. To be admissible, alternate suspect evidence must be relevant under this rule, and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury, or by considerations of undue delay. People v. Elmarr, 2015 CO 53, 351 P.3d 431; People v. Folsom, 2017 COA 146M, 431 P.3d 652.

Evidence of an alternative suspect's prior sexual conduct with someone other than the victim has questionable relevance to an alternate suspect defense. People v. Salazar, 2012 CO 20, 272 P.3d 1067.

In a sexual assault trial, because evidence of a victim's virginity spans such a lengthy period of time, it includes remote, non-probative evidence of lack of sexual activity and thus is too broad and over-inclusive to be admissible in light of its prejudicial effect. Fletcher v. People, 179 P.3d 969 (Colo. 2007).

Exclusion of irrelevant testimony offered in connection with a motion for a continuance. Trial court did not abuse its discretion by denying a car dealer's motion for continuance in a car buyer's action against the dealer so as to secure the attendance of a witness whose testimony could not have affected the outcome of the trial and was irrelevant. Jackson v. Rocky

Mountain Datsun, Inc., 693 P.2d 391 (Colo. App. 1984).

Testimony by the personnel director concerning her personal knowledge of defendant's outbursts of temper, including one directed toward the corporate victim's president which resulted in defendant's firing, were admissible as tending to establish a motive for defendant to retaliate against the corporation with bomb threats which were the basis of the charge against defendant. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

Similar transaction evidence of whether the defendants engaged in a pattern or practice and a plan, scheme, or design in regard to the alleged fraud and violation of the Colorado Securities Act related to a material fact and the trial court erred in not allowing the plaintiffs to present such evidence where the probative value thereof was not substantially outweighed by the danger of unfair prejudice. Munson v. Boettcher & Co., Inc., 832 P.2d 967 (Colo. App. 1991).

Admission of three weapons and holster not error since evidence was given connecting one of the weapons and holster to the robbery charged and since all weapons were similar to weapon used in robbery. People v. Ridenour, 878 P. 2d 23 (Colo. App. 1994).

Defendant's statements regarding killing of other persons that defendant made during murder were linked in time and circumstance to that criminal episode, formed a part of that criminal episode, and were admissible as res gestae evidence of the crime. People v. Quintana, 882 P.2d 1366 (Colo. 1994).

Evidence of defendant's prior drug dealing was properly admitted as res gestae. Detective's testimony explained to jury why police had set up drug buy with defendant. People v. Gomez, 211 P.3d 53 (Colo. App. 2008).

Certain additional irrelevant information on a proferred document was prejudicial and could have been excised from the document, so its admission constituted error, albeit harmless error in the instance. Martin v. People, 738 P.2d 789 (Colo. 1987).

In a driver's license revocation hearing, the reason for erratic driving is irrelevant to the issue of whether an officer has reasonable grounds to stop the vehicle. Kollodge v. Charnes, 741 P.2d 1260 (Colo. App. 1987).

Evidence that defendant promised to pay plaintiff's medical bills after plaintiff slipped and fell on a puddle of water on the defendant's premises, and then reneged on the promise, is not admissible. A reasonable juror could not believe that the fact that the defendant made the promise and later reneged makes it more probable that the plaintiff had mental anguish caused by the defendant's negligence, or increases the degree of that anguish flowing from such negligence. Pennington v. Sears, Roebuck & Co., 878 P.2d 152 (Colo. App. 1994).

A proponent of evidence protected by the rape shield statute (§ 18-3-407) must still make an offer of proof as to the relevance of the evidence. People v. Melillo, 25 P.3d 769 (Colo. 2001).

Where probable cause to arrest or search is not at issue, it is improper to present to the jury evidence about obtaining an arrest or search warrant. Here, whether police had probable cause to arrest defendant was not at issue during the trial. The fact that the police believed they had enough evidence and that a judge found there was probable cause to arrest defendant had no rational tendency to prove that defendant committed the assault or that defendant was not justified in resisting the victim's use of force against him. Thus, admission of testimony concerning the arrest warrant was plain error. People v. Mullins, 104 P.3d 299 (Colo. App. 2004).

The trial court's admission of the circumstances of the arrest to show consciousness of guilt was in error because the evidence did not show that the defendant was in flight or concealing himself to avoid arrest. The error, however, was harmless since there was overwhelming proof of the defendant's guilt. People v. Summitt, 132 P.3d 320 (Colo. 2006).

Applied in Land v. Hill, 644 P.2d 43 (Colo. App. 1981); People v. Gallegos, 644 P.2d 920 (Colo. 1982); People v. District Court, 652 P.2d 582 (Colo. 1982); People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. McGhee, 677 P.2d 419 (Colo. App. 1983); People v. Hardy, 677 P.2d 429 (Colo. App. 1983); Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984); People v. McKeehan, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988); People v. Tippett, 733 P.2d 1183 (Colo. 1987); People v. Trefethen, 751 P.2d 657 (Colo. App. 1987); People v. Dunlap, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado. Evidence which is not relevant is not admissible.

ANNOTATION

Law reviews. For article, ''A Deposition Primer, Part II: At the Deposition'', see 11 Colo. Law. 1215 (1982). For article, ''The Admissibility of Hypnotically Refreshed Testimony in Criminal Cases'', see 12 Colo. Law, 600 (1983). For casenote, ''People v. Quintana: How 'Probative' Is This Colorado Decision Excluding Evidence of Post-Arrest Silence?'', see 56 U. Colo. L. Rev. 157 (1984). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002).

Admissibility of relevant evidence. If evidence is relevant, it is admissible, unless its prejudicial effect outweighs its probative value. People v. Ortega, 672 P.2d 215 (Colo. App. 1983).

Determination of relevance within trial court's discretion. The determination of whether proffered evidence is relevant is within the sound discretion of the trial court; and, if the evidence has probative value in determining the central issue in dispute, the trial court's decision will not be reversed unless it is shown that there was an abuse of discretion. People v. Lowe, 660 P.2d 1261 (Colo. 1983); People v. Schwartz, 678 P.2d 1000 (Colo. 1984); People v. McKeehan, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993).

Defendant made no showing that his theory had attained the degree of reliability which would warrant its admission at trial and the determination here of whether the tendered testimony was relevant and not speculative were matters within the discretion of the trial court. People v. Wilson, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed. 2d 87 (1984).

It is within the special province and competence of the trial court to determine the relevance of evidence at trial. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

A trial court abuses its discretion in excluding relevant evidence only if it makes a decision that is manifestly arbitrary, unreasonable, or unfair. People v. McCoy, 944 P.2d 577 (Colo. App. 1996); People v. Harris, 43 P.3d 221 (Colo. 2002).

Trial court's discretion to determine relevancy is broad. People v. Gutierrez, 1 P.3d 241 (Colo. App. 1999).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather than the admissibility of evidence. People v. Gomez, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); People v. Moltrer, 893 P.2d 1331 (Colo. App. 1994).

Evidence properly excluded where it has no direct connection with charged crime. While evidence may be relevant to some degree concerning the defendant's theory that other persons committed the crime, it is properly excluded where it has no direct connection with the crime of which the defendant is charged. People v. White, 632 P.2d 609 (Colo. App. 1981).

Admission or exclusion of evidence of an experiment rests largely in the discretion of the trial court. People v. McCombs, 629 P.2d 1088 (Colo. App. 1981).

Conditions under which an experiment is conducted are required to be substantially similar to those existing at the time of the occurrence; however, this requirement does not render an experiment inadmissible because it is based on a disputed reconstruction of that crime. People v. McCombs, 629 P.2d 1088 (Colo. App. 1981).

Admission of allegedly prejudicial photograph not error if probative. Where an allegedly prejudicial photograph is probative with respect to a trial's pivotal issue, its admission into evidence is not error. People v. Harris, 633 P.2d 1095 (Colo. App. 1981).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. People v. Anderson, 637 P.2d 354 (Colo. 1981).

Hypnotically refreshed testimony is inadmissible. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982); People v. Rex, 689 P.2d 669 (Colo. App. 1984).

A jury's ability to observe a witness' demeanor and analyze a witness' ability to perceive, remember, and articulate is so hampered by the hypnotic process that the probative value of such evidence cannot overcome its flaws. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

From time of hypnosis forward. Testimony of a witness who has been questioned under hypnosis is per se inadmissible as to his recollections from the time of the hypnotic session forward. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

Recorded pre-hypnosis recollections admissible. However, the witness is not incompetent to testify to pre-hypnosis recollections that have previously been unequivocally disclosed and recorded by tape recording, video tape, or by written statement. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).

Evidence gained from a hypnotic trance should be excluded. People v. Diaz, 644 P.2d 71 (Colo. App. 1981).

Evidence gained in hypnotic state held properly excluded. People in Interest of M.S.H., 656 P.2d 1294 (Colo. 1983).

Admissibility of identification testimony. People v. Gonzales, 631 P.2d 1170 (Colo. App. 1981).

Use of alias to prove prior convictions and for sentencing as an habitual criminal is relevant to the crime charged. People v. Talley, 677 P.2d 394 (Colo. App. 1983).

Evidence of use of aliases is admissible if proof of an alias is relevant to an issue before the court. People v. DeHerrera, 680 P.2d 848 (Colo. 1984).

The court did not abuse its discretion in denying the defendant's motion for a mistrial on the basis that the court allowed cumulative evidence of the defendant's flight to be admitted into evidence. Even though the prosecution elicited testimony during cross-examination that the defendant was living under an assumed name, without establishing the relevance of the evidence as instructed by the court, the court issued a curative instruction to counter any unfair prejudice to the defendant. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

Court did not err in failing to declare a mistrial sua sponte after expert witness gave opinion testimony as to the truth of child victim's allegation. A curative instruction is generally sufficient to overcome an evidentiary error and is insufficient only when the evidence is so prejudicial that, but for its exposure, the jury might not have found defendant guilty. People v. Anderson, 183 P.3d 649 (Colo. App. 2007).

To resolve an issue of relevancy, a court must determine whether proffered evidence relates to a fact that is of consequence to determination of action, whether evidence makes existence of a consequential fact more probable or less probable than it would be without such evidence, and whether probative value of evidence is substantially outweighed by danger of unfair prejudice. People v. Carlson, 712 P.2d 1018 (Colo. 1986).

Alleged murder victim's statements made shortly after alleged perpetrator had beaten or threatened to kill the victim are admissible in a prosecution of the alleged perpetrator for murdering the victim. People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).

Admission of statements by witnesses commenting on other witnesses' veracity not error where comments were elicited to explain police officers' investigative techniques and to rebut defense arguments. People v. Davis, 312 P.3d 193 (Colo. App. 2010), aff'd, 2013 CO 57, 310 P.3d 58 (Colo. 2013).

A law enforcement officer may testify about the officer's assessments of interviewee credibility when that testimony is offered to provide context for the officer's interrogation tactics. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Officer's testimony not improper commentary on defendant's credibility, but instead an explanation of officer's interview tactics that were brought into question by defendant's allegation that confession was coerced and a product of what defendant believed police wanted to hear. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Thermostat manufactured two years after the thermostat at issue that carried the same model number and functioned and operated the same way but that had a component part that was not crimped as was the one at issue was properly admitted into evidence against the manufacturer since it was admitted after the manufacturer's expert conceded in voir dire that the only significant difference was the absence of crimping, which, he testified, would not affect the high end of the temperature range. Simon v. Coppola, 876 P.2d 10 (Colo. App. 1993).

Log of the results of final inspections of thermostats of the same model as the one at issue that were manufactured from one year before the model at issue to three years after and that showed that, one year after, a lot of 200 thermostats had been rejected because the crimp was too big in the component part at issue was properly admitted into evidence against the manufacturer where the trial court concluded the log ''cut both ways'' because it showed not only that the manufacturer's quality control program had discovered the problem but also the potential for error in the manufacturing process. The court also concluded that the log would help the jury better understand the manufacturing process. Simon v. Coppola, 876 P.2d 10 (Colo. App. 1993).

Admission of three weapons and holster not error since evidence was given connecting one of the weapons and holster to the robbery charged and since all weapons were similar to weapon used in robbery. People v. Ridenour, 878 P. 2d 23 (Colo. App. 1994).

Photographs of child sexual assault victims at the ages when the alleged crimes or abuse started were relevant to illustrate the children's age at the time. There was no abuse of discretion in admitting the photographs even if there was no dispute regarding the ages of the alleged victims. People v. Herrera, 2012 COA 13, 272 P.3d 1158.

In sexual assault case, evidence of defendant's statements that "Mexicans were bred for sex" and Spanish-English dictionaries containing underlined words of a sexual and reproductive nature were relevant to issue of whether defendant knowingly caused submission of Mexican national victims. People v. Braley, 879 P.2d 410 (Colo. App. 1993).

Evidence that defendant refused to consent to search of apartment was relevant and not

unfairly prejudicial to impeach his testimony that he had not lived in the apartment for the last six days and did not know there were drugs in the apartment. Evidence of refusal to consent to search could give rise to the reasonable inference that the defendant had dominion and control over the apartment. People v. Chavez, 190 P.3d 760 (Colo. App. 2007).

Evidence irrelevant where no logical relation to contested issues at trial. In arson case, underlying reasons for insurance company's refusal of coverage had no logical relation to any motive defendant may have had prior to fire nor probative of any elements of the crime charged and was irrelevant. People v. Carlson, 677 P.2d 390 (Colo. App. 1983), aff'd, 712 P.2d 1018 (Colo. 1986).

Testimony that defendant had been discharged from his job after the incident was inadmissible, since such act had no relevance to any contested issue. People v. Jones, 743 P.2d 44 (Colo. App. 1987).

Evidence of theft defendant's civil suit against victims was properly excluded as irrelevant where no prosecution witnesses were named parties in civil suit, and suit referred to dispute with victims at time defendant was discharged from victim's employment, and thus could not contradict or negate defendant's state of mind at time of commission of thefts. People v. Stowers, 728 P.2d 356 (Colo. App. 1986).

Evidence that a mother refused voluntary drug testing for herself and her child and to stop breastfeeding pending a drug test at a caseworker's request prior to the filing of the dependency and neglect petition irrelevant. The evidence lacked probative value because her refusal in both instances could reasonably be attributed to a variety of innocent circumstances. People in Interest of M.H-K., 2018 COA 178, 433 P.3d 627.

When admission of irrelevant evidence constitutes abuse of discretion and reversible error. Admission of irrelevant evidence is not necessarily reversible error. But where such evidence contributes to conviction of defendant, it is reversible error and abuse of trial court's wide discretion in determining relevancy of evidence. People v. Carlson, 677 P.2d 390 (Colo. App. 1983), aff'd, 712 P.2d 1018 (Colo. 1986).

Evidence excluded as irrelevant. People v. Loscutoff, 661 P.2d 274 (Colo. 1983).

Although evidence of a defendant's compliance with applicable industry standards in a tort case is both relevant and admissible for purposes of determining whether the defendant either breached or satisfied the duty of care it owed to an injured plaintiff, such evidence is not conclusive on the issue of due care. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Electrical utility was not entitled to a jury instruction creating a rebuttable presumption that adherence to industry standards presumes compliance with ''accepted good engineering practice in the electric industry'', since whether the utility complied with accepted good engineering practices, or whether it exercised due care is best determined by the jury after it has examined the relevant evidence and been properly instructed concerning the effect of the utility's compliance with the industry's minimum standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Because property assessors are now constitutionally required to determine the actual or market value of property with an appraisal using the market approach, property tax assessments are relevant evidence of the value of real property. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Applied in People v. District Court, 652 P.2d 582 (Colo. 1982); People v. McGhee, 677 P.2d 419 (Colo. App. 1983); People v. Dunlap, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Admissibility of Governmental Studies to Prove Causation'', see 11 Colo. Law. 1822 (1982). For article, ''DNA: The Eyewitness of the Future'', see 18 Colo. Law. 1333 (1989). For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993). For article, ''Adverse Inferences Due to Invocation of the Fifth Amendment'', see 25 Colo. Law. 43 (March 1996). For article, ''Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704'', see 31 Colo. Law. 53 (March 2002). For article, ''Polygraph Exami-

nations: Admissibility and Privilege Issues'', see 31 Colo. Law. 69 (Nov. 2002). For article, ''C.R.E. 403: The Balancing Test'', see 33 Colo. Law. 41 (Feb. 2004). For article, ''The Admissibility of Evidence of the Pre-Trial Exercise of Constitutional Rights'', see 37 Colo. Law. 81 (July 2008). For comment, ''Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties'', see 79 U. Colo. L. Rev. 587 (2008). For article, ''The Expanding Use of the Res Gestae Doctrine'', see 38 Colo. Law. 35 (June 2009). For article, ''The Doctrine of Chances After People v. Jones'', see 43 Colo. Law. 57 (July 2014).

To show an abuse of discretion for excluding relevant evidence, appellant must establish that the trial court's decision was manifestly arbitrary, unreasonable, or unfair. People v. Gibbens, 905 P.2d 604 (Colo. 1995); Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000); People v. Perry, 68 P.3d 472 (Colo. App. 2002); People v. Ortiz, 155 P.3d 532 (Colo. App. 2006).

When reviewing a determination under this rule for abuse of discretion, the appellate court must afford the evidence the maximum probative value attributable by a reasonable fact-finder and the minimum unfair prejudice to be reasonably expected. Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000); People v. Ortiz, 155 P.3d 532 (Colo. App. 2006).

If evidence is relevant, it is admissible unless its probative value is outweighed by the countervailing factors of this rule. Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990); People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).

Probative value of the evidence was substantially outweighed by the danger of unfair prejudice, because: (1) it explained how defendant became a suspect, an important point because, absent this explanation, the jury would be left to speculate as to how defendant became a suspect and because defendant's defense was mistaken identity; and (2) it showed the thoroughness of the police investigation and analysis, which was important since defendant's counsel had challenged the reliability of DNA analysis, partly by suggesting that the investigator was biased. Additionally, witness only mentioned the DNA databases briefly, and did not testify as to how the defendant's DNA profile came to be in the second database. Finally, no evidence was presented as to how any individual's DNA profile might come to be in either DNA database, and no evidence was presented that defendant had previously engaged in any criminal activity. Under the circumstances, any inference of prejudice was speculative. People v. Harland, 251 P.3d 515 (Colo. App. 2010).

In performing the C.R.E. 403 balance on review, the proffered evidence should be given its maximal probative weight and its minimal prejudicial effect. People v. District Court of El Paso County, 869 P.2d 1281 (Colo. 1994); People v. Cousins, 181 P.3d 365 (Colo. App. 2007).

Colorado rules of evidence strongly favor the admission of evidence. The trial court has broad discretion in determining the admissibility of evidence, and the trial court's decision will only be reviewed for abuse of discretion. People v. Medina, 51 P.3d 1006 (Colo. App. 2001), aff'd on other grounds, 71 P.3d 973 (Colo. 2003).

''Unfair prejudice'' should be construed to mean the prejudice from the proponent's evidence. Unfairly prejudicial evidence which may never be presented unless the defendant pursues it on cross-examination is not a sufficient basis to exclude otherwise admissible testimony. People v. District Court of El Paso County, 869 P.2d 1281 (Colo. 1994).

Rule was designed to permit trial courts the discretion of excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

An objection to the relevance of evidence does not include an objection that the evidence, if admissible, is unduly prejudicial under this rule because of the substantial difference in analysis trial courts perform under C.R.E. 401 and this rule. Am. Family Mut. Ins. Co. v. DeWitt, 216 P.3d 60 (Colo. App. 2008), aff'd, 218 P.3d 318 (Colo. 2009).

Trial courts are accorded considerable discretion in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. People v. Clary, 950 P.2d 654 (Colo. App. 1997); Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000).

When the rules of evidence and Colo. RPC 3.4(b) overlap, the proper approach is for trial courts to balance the probative value of the evidence against the danger of unfair prejudice. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

In so doing, trial courts should not exclude testimony from improperly compensated witnesses unless they determine that the testimony's danger of unfair prejudice substantially outweighs its probative value. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

The trial court is best situated to decide on a case-by-case basis whether the testimony of a witness compensated under a contingent fee agreement so prejudices the fairness of the litigation that it requires exclusion of the improperly compensated witness's testimony.

Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Defendant entitled to present evidence creating doubt as to guilt. A defendant is entitled to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt. People v. Bueno, 626 P.2d 1167 (Colo. App. 1981).

Evidence of similar transactions. Subject to this rule and the general rules of admissibility, evidence of similar transactions, when offered by the defendant, is admissible as long as it is relevant to the guilt or innocence of the accused. People v. Bueno, 626 P.2d 1167 (Colo. App. 1981); People v. Flowers, 644 P.2d 916 (Colo. 1982), appeal dismissed, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed. 2d 41 (1982).

In eminent domain valuation hearing concerning street condemned by department of highways, trial court properly admitted evidence of sales occurring after date of valuation as comparable sales where sales were sufficiently comparable in character, close in time, and in location to be probative of the value of the street and where the risk that the commissioners would be prejudiced, confused, or misled was slight. State Dept. of Hwys. v. Town of Silverthorne, 707 P.2d 1017 (Colo. App. 1985), cert. dismissed, 736 P.2d 411 (Colo. 1987).

When applying the liberal standard under C.R.E. 702 for determining the admissibility of scientific evidence, the court must also apply its discretionary authority under this rule to ensure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. People v. Shreck, 22 P.3d 68 (Colo. 2001).

While C.R.E. 401 and this rule reflect liberal admission of evidence, this rule, in conjunction with C.R.E. 702, tempers broad admissibility by giving courts discretion to exclude expert testimony unless it passes more stringent standards of reliability and relevance. People v. Martinez, 74 P.3d 316 (Colo. 2003).

Issues concerning alleged deficiencies in the chain of custody go to the weight rather than the admissibility of evidence. People v. Gomez, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); People v. Moltrer, 893 P.2d 1331 (Colo. App. 1994).

Even though trial court did not consider whether evidence was unfairly prejudicial in ruling evidence was inadmissible, appellate court may consider whether it was unfairly prejudicial in determining whether trial court correctly determined the evidence was inadmissible. People v. Garcia, 179 P.3d 250 (Colo. App. 2007).

When evidentiary ruling overturned as abuse. Only where the prejudicial effect of an evidentiary item outweighs its probative value will the trial court's evidentiary ruling be overturned as an abuse of discretion. People v. Abbott, 638 P.2d 781 (Colo. 1981); People v. Durre, 713 P.2d 1344 (Colo. App. 1985); People v. Wells, 754 P.2d 420 (Colo. App. 1987), rev'd on other grounds, 776 P.2d 386 (Colo. 1989).

Admissibility of photographs into evidence in a homicide prosecution is a matter within the discretion of the trial judge, who must weigh their probative value against their potential inflammatory effect on the jury; the trial judge's determination will not be disturbed on review absent an abuse of discretion. People v. White, 199 Colo. 82, 606 P.2d 847 (1980); People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. Dillon, 633 P.2d 504 (Colo. App. 1981); People v. Unrein, 677 P.2d 951 (Colo. App. 1983); People v. Guffie, 749 P.2d 976 (Colo. App. 1987).

The admission of a photograph of the dead victim for purposes of identification is not error solely because the defendant has stipulated to identity or because identity has been established through other witnesses. People v. Viduya, 703 P.2d 1281 (Colo. 1985).

The trial court has broad discretion in determining the admissibility of photographs. People v. Crespin, 631 P.2d 1144 (Colo. App. 1981).

Specific finding that probative value outweighs prejudicial effect not required. In admitting photographs into evidence in a criminal trial, a trial court need not specifically find that their probative value outweighs their prejudicial effect, as the alleged prejudice of photographic evidence is equally susceptible to evaluation by an appellate court. People v. Harris, 633 P.2d 1095 (Colo. App. 1981).

Photographs are admissible to depict graphically anything a witness may have described in words, provided that the prejudicial effect of the photographs does not far outweigh their probative value. Photographs depicting the circumstances surrounding the victim's death, such as the appearance of the victim and the location and nature of the wounds, have probative value in a homicide case. People v. Kurts, 721 P.2d 1201 (Colo. App. 1986).

Photographs taken of nude child victim at morgue were properly admitted in vehicular homicide trial to show the nature and extent of victim's injuries, an issue plainly relevant to the jury's assessment of the recklessness of defendant's conduct. People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

Color photograph of murder victim at morgue, instead of black and white photograph, properly admitted to show trajectory of bullet through victim's head and because it was not particularly shocking or inflammatory in the context of a murder case. People v. Villalobos, 159 P.3d 624 (Colo. App. 2006).

Photographs of severed elk heads were admissible to identify elk shot by defendant. People v. Dobson, 847 P.2d 176 (Colo. App. 1992).

Photographs are not inadmissible solely because defendant has stipulated to matters sought to be proven thereby, or because such matters have been established through witnesses' testimony. People v. Dobson, 847 P.2d 176 (Colo. App. 1992).

Photographs of exhumed murder victim's body admissible as evidence explaining why it was difficult to determine the cause of death and why the coroner was unable to make conclusive findings. People v. Medina, 51 P.3d 1006 (Colo. App. 2001), aff'd on other grounds, 71 P.3d 973 (Colo. 2003).

Photographs of alleged child sexual assault victims showing the victims in apparent prayer at their first communion admissible to show victims at the age when the alleged abuse began. Although the photographs may have evoked sympathy in the jury, their admission was not so unfairly prejudicial to be an abuse of discretion. People v. Herrera, 2012 COA 13, 272 P.3d 1158.

"In life" photographs were relevant to establish victim was alive prior to shooting. People v. McClelland, 2015 COA 1, 350 P.3d 976.

But admission of "in life" photographs of victim unfairly prejudiced defendant because the visual depiction of the victim was a different image than that presented by eyewitness testimony. People v. McClelland, 2015 COA 1, 350 P.3d 976.

Videotape admissible where probative value outweighs unfair prejudice. People v. Avery, 736 P.2d 1233 (Colo. App. 1986); McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Trial court did not abuse its discretion by admitting a surveillance video that depicted a shooting. The recording, from an overhead camera, was not an ad hoc depiction of the consequences of a crime, nor was it a recreation; rather, the recording showed the crime as it was happening. People v. Valdez, 2017 COA 41, 405 P.3d 413.

Trial court did not abuse its discretion by declining to restrict the number of times jurors could watch surveillance videos that depicted a shooting. The videos, which were nontestimonial evidence, were played for jurors only after their request, and were played for the jury by a court employee. People v. Valdez, 2017 COA 41, 405 P.3d 413.

Probative value of videotape showing defendant smoking drugs outweighed the unfair prejudice. The videotape's probative value that contradicted defendant's claim that he was not living in the house at the time of the evidence seizure was more probative than the prejudice of defendant smoking drugs particularly since there was other evidence introduced at trial regarding defendant's drug use to which defendant did not object. People v. Warner, 251 P.3d 567 (Colo. App. 2010).

Because the defendant's state of mind at the time of the shooting was a disputed issue at trial, the admission of slow-motion recordings created a danger of unfair prejudice to the defendant that substantially outweighed their probative value. The real-time recording allowed the jury to judge the defendant's state of mind by viewing the shooting as it actually occurred, whereas slowing down the recording may have portrayed the defendant's actions as more premeditated than they actually were. People v. Tardif, 2017 COA 136, 433 P.3d 60.

Admission of victims' videotaped interview did not rise to the level of plain error where the victims and the official who had conducted the interview testified at trial and they were subject to cross-examination. People v. Burgess, 946 P.2d 565 (Colo. App. 1997).

Mannequin used by prosecution to demonstrate how the victim was tied was not admitted as substantive evidence but was used only demonstratively. Testimony regarding the accuracy of such evidence must be given by a person having personal knowledge of the scene depicted, may not be based on hearsay statements, and is subject to cross-examination. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

Admission of a demonstrative aid involves a four-part test. The demonstrative aid must (1) be authentic, meaning the proponent must demonstrate that the evidence is what it is claimed to be; (2) be relevant, meaning that it will assist the trier of fact in understanding other testimonial and documentary evidence; (3) be a fair and accurate representation of the evidence to which it relates; and (4) not be unduly prejudicial, meaning its probative value must not be substantially outweighed by its danger for unfair prejudice. People v. Palacios, 2018 COA 6M, 419 P.3d 1014.

Test applied in People v. Sandoval, 2018 COA 156, __ P.3d __.

Court did not err in admitting res gestae testimony regarding defendant's conduct regarding the concealment of his sexual assault victim's stillborn baby. Defendant's actions reflected efforts to conceal the birth and thus the crime. There was no abuse of discretion in admitting the evidence. People v. Curtis, 2014 COA 100, 350 P.3d 949.

Police officers did not "vouch for" truthfulness of child rape victim by relating her statements following the crime. Therefore, no prejudice to defendant resulted from court's admission of their testimony. People v. Williams, 899 P.2d 306 (Colo. App. 1995).

Trial court neither abused its discretion nor violated defendant's right to confrontation where defendant was prohibited from revealing to jury through cross-examination that witness was in custody in another state on unrelated charges where such testimony would have been cumulative and of little or no probative value and where defendant was otherwise provided with ample opportunity to impeach the witness' credibility by showing ulterior motive. People v. Griffin, 867 P.2d 27 (Colo. App. 1993).

Court did not abuse its discretion by excluding evidence of previous miscarriage as unduly prejudicial. The court had well founded concerns that evidence of a miscarriage could make the victim appear promiscuous and divert the jury's attention. As well, the exclusion did not prevent or hamper the defendant from presenting a theory of the case. People v. Underwood, 53 P.3d 765 (Colo. App. 2002).

Trial court's ruling not disturbed unless discretion abused. Unless an abuse of discretion is shown, the trial court's ruling on the admissibility of photographs into evidence will not be disturbed on review. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. Young, 710 P.2d 1140 (Colo. App. 1985); Williamsen v. People, 735 P.2d 176 (Colo. 1987); People v. Vazquez, 768 P.2d 721 (Colo. App. 1988), cert. denied, 787 P.2d 174 (Colo. 1990); People v. Taylor, 804 P.2d 196 (Colo. App. 1990); People v. Fasy, 813 P.2d 797 (Colo. App. 1991); Campbell v. People, 814 P.2d 1 (Colo. 1991); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993).

Only if a trial court abuses its discretion in excluding evidence, and such exclusion affects a party's substantial rights, will such exclusion provide the basis for a reversal of the court's judgment. Exclusion of evidence affects a substantial right of a party only it can be said with fair assurance that the error influenced the outcome of the case or impaired the basic fairness of the trial itself. Williams v. Cont'l Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

In exercising such discretion, a trial court must consider the probative value of the proposed evidence, the nature of the offered evidence, and the other evidence admitted during trial. Williams v. Cont'l Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

Photographs are not rendered inadmissible merely because they reveal shocking details of a crime. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

For evidence of experiment to be admissible it must aid rather than confuse the jury in its resolution of the issues, and it must tend directly to establish or disprove a material issue in the case. People v. McCombs, 629 P.2d 1088 (Colo. App. 1981).

Trial court properly excluded evidence when it determined that the excluded testimony could confuse the issues, mislead the jury, and open the door to cross-examination concerning collateral issues. People v. Watkins, 83 P.3d 1182 (Colo. App. 2003).

The admission or exclusion of evidence of an experiment rests largely in the discretion of the trial court. An experiment is not rendered inadmissible solely because it is based on a disputed reconstruction of the crime. People v. Agado, 964 P.2d 565 (Colo. App. 1998).

Witness may be required to demonstrate trigger pull on gun before jury if the probative value of such evidence outweighs any prejudicial effect. Any prejudice flowing from defendant's demonstration of trigger pull was ameliorated by his explanation at trial and the cast on his hand that was visible to the jury. People v. Agado, 964 P.2d 565 (Colo. App. 1998).

Evidence of routine practice. The trial court has the discretion to exclude evidence of a routine practice if its probative value is substantially outweighed by the danger of unfair prejudice. Bloskas v. Murray, 646 P.2d 907 (Colo. 1982).

The trial court is vested with broad discretion in determining relevancy. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

The testimony of a severely injured plaintiff and his guardian in a declaratory judgment action to determine the issue of coverage under an insurance policy would be prejudicial to the defendant and would constitute an effort to evoke sympathy. Accordingly, the trial court was well within its discretion in finding such testimony of minimal probative value with respect to the issues involved in the case. Williams v. Chrysler Ins. Co., 928 P.2d 1375 (Colo. App. 1996).

Trial court erred in excluding expert testimony as to heat of fire where it was directly related to determining plaintiff's pain and suffering damages as a result of the accident. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Evidence that defendant left restaurant upon seeing witness was not irrelevant or prejudicial. People v. Trujillo, 686 P.2d 1364 (Colo. App. 1984).

Evidence of a defendant's flight may be relevant to show consciousness of guilt but only if it can be shown the defendant was aware he or she was being sought. People v. Perry, 68 P.3d 472 (Colo. App. 2002).

Prejudice of prior criminality outweighed by probative value. Defendant's activities at a halfway house were probative of his guilt or innocence despite the prejudicial aspects of his

residence at the halfway house. People v. Clark, 705 P.2d 1017 (Colo. App. 1985).

The probative value of Pennsylvania sexual assault was not outweighed by the danger of unfair prejudice. It had legitimate probative force since the Pennsylvania sexual assault was similar in important respects to the charged offense. People v. Everett, 250 P.3d 649 (Colo. App. 2010).

The probative value of no conclusion DNA evidence results is substantially outweighed by the risk of unfair prejudice and misleading the jury when there is no evidence of the results' statistical significance. People v. Marks, 2015 COA 173, 374 P.3d 518.

Trial court erred in admitting photos of large quantities of marijuana in defendant's apartment because the potential for unfair prejudice substantially outweighed the probative value of the evidence. People v. Wakefield, 2018 COA 37, 428 P.3d 639.

Evidence of plaintiff's status as an undocumented immigrant was clearly relevant to the issue of damages for lost future earnings, but the admissibility of such evidence would depend on whether plaintiff had violated the immigration laws or an employment-related rule and was unlikely to remain in the United States during the period of lost future wages. Silva v. Wilcox, 223 P.3d 127 (Colo. App. 2009).

Since stipulation by defendant would carry same probative weight as that of proffered evidence, its only remaining effect was to present irrelevant and prejudicial evidence. In this instance, its admission was harmless error. Martin v. People, 738 P.2d 789 (Colo. 1987).

Trial court may require the acceptance of a stipulation of fact made by the defendant if the people's case is not weakened by such stipulation and if the probative value of the offered evidence is substantially outweighed by the danger of unfair prejudice. People v. McGregor, 757 P.2d 1082 (Colo. App. 1987).

Trial court did not abuse its discretion in admitting community corrections tracking records even though defendant's proffered stipulation carried equal probative force. The court acted to remove any unfair prejudice by requiring the prosecution to avoid any inference that defendant was in custody. People v. St. James, 75 P.3d 1122 (Colo. App. 2002).

Probative value of conditions of release recommended by disposition committee of state hospital was not substantially outweighed by unfair prejudice, confusion of issues, or misleading jury, or any of the other factors in this rule. Vialpando v. People, 727 P.2d 1090 (Colo. 1986).

Because defendant was willing to stipulate to the mental state element of the offense which the prosecution was required to prove, there was no material fact in dispute and the probative value of introducing evidence of defendant's prior misdemeanor conviction resulting from an altercation would be minimal weighed against the danger of unfair prejudice. People v. Silva, 987 P.2d 909 (Colo. App. 1999).

Death threat evidence inadmissible because it failed to show defendant's consciousness of guilt. People v. Fernandez, 687 P.2d 502 (Colo. App. 1984).

Evidence of a safety code or regulation in effect at the time of alleged negligence may be admissible in some circumstances, however, codes and regulations enacted after alleged negligence may result from research conducted, information obtained, impracticalities eliminated or mitigated, or even a consensus formed, after the alleged negligence; therefore, such codes and regulations do not ordinarily give a similar indication of the duty of care years before their enactment. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

Where evidence presented at trial did not support plaintiff's offer of proof that compliance with a regulation enacted after the alleged negligence occurred would have led to the discovery of a leak before an explosion, evidence concerning the regulation was not admissible to establish the standard of care prior to the enactment of the regulation. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

Cumulative evidence. The admission or rejection of cumulative evidence is within the trial court's discretion and its ruling will not be overturned unless an abuse of discretion clearly appears. People v. Unrein, 677 P.2d 951 (Colo. App. 1983).

Cumulative evidence may be excluded by the trial court. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984); People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992); People v. Salas, 902 P.2d 398 (Colo. App. 1994).

There was no threat of a needless presentation of cumulative evidence where testimony was the only evidence presented as to heat of the fire which was directly related to determining plaintiff's pain and suffering damages as a result of the accident. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Where evidence to which defendant objected consisted of previous testimony that had already been admitted at trial and no one else had the information that the witness possessed, except defendant, the evidence itself was not cumulative. People v. Balkey, 53 P.3d 788 (Colo. App. 2002).

Since the testimony had already been once received, its repetition to the jury during its deliberations was not ''needless'' within the meaning of the rule. People v. Balkey, 53 P.3d 788 (Colo. App. 2002).

It was not an abuse of discretion for the trial court to exclude written reports of the property's fair market value where two experts were examined at trial concerning their opinion of the property's fair market value, the factors they considered, and the methods they employed and the reports merely reiterated their testimony. Nat'l Canada Corp. v. Dikeou, 868 P.2d 1131 (Colo. App. 1993).

It was not an abuse of discretion for the trial court to exclude victim's inconsistent statements concerning use of marijuana prior to assault where such evidence would have been cumulative of other testimony impeaching the victim and such evidence was potentially prejudicial to both parties. People v. Delgado, 890 P.2d 141 (Colo. App. 1994).

Testimony of several prosecution witnesses providing similar testimony did not undermine the fairness of the trial or cast serious doubt on the reliability of the verdict where the trial court instructed jurors that they were to determine the weight and credit to be given to the victims' out-of-court statements and that the number of witnesses testifying on a particular issue was irrelevant in weighing the strength of the evidence. People v. Burgess, 946 P.2d 565 (Colo. App. 1997).

The test to apply in determining whether an accused may offer evidence that another committed the crime for which the defendant is being tried is that the defendant must first offer proof directly connecting the third person with the crime before evidence of that person's opportunity or motive to commit the crime becomes admissible. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977); People v. Schwartz, 678 P.2d 1000 (Colo. 1984).

In the context of child abuse prosecution, the fact that the victim was in custody of the third person during the time when the injury could have been inflicted is sufficient direct and circumstantial evidence to satisfy the test. People v. Schwartz, 678 P.2d 1000 (Colo. 1984).

If a prior act indicates no aspect of intent that cannot be discerned from the act in the crime charged, there is no valid purpose for admission of the prior act evidence to prove intent, and its probative value is outweighed by its prejudicial effect. People v. Hansen, 708 P.2d 468 (Colo. App. 1985).

Evidence of refusal to take a blood or breath test is admissible in evidence at a revocation of license proceeding or at a trial for driving under the influence or while ability impaired, and the effect of § 42-4-1202 (3)(e) is to allow admission of such evidence in every case without a determination of relevance on a case-by-case basis. Cox v. People, 735 P.2d 153 (Colo. 1987).

Probative value of battered woman opinion evidence was not outweighed by unfair prejudicial effect. The opinion evidence admitted was relevant to the issue of the victim's credibility, and the expert did not testify regarding the specific relationship between the defendant and the victim. People v. Johnson, 74 P.3d 349 (Colo. App. 2002).

Evidence of incest victim psychology held admissible and probative value not outweighed by prejudicial effect. People v. Koon, 724 P.2d 1367 (Colo. App. 1986).

Evidence protected by the rape shield statute (§ 18-3-407) falls under a presumption that a victim's or witness' sexual conduct is irrelevant unless the proponent of the evidence shows that it is relevant to a material issue in the case. People v. Melillo, 25 P.3d 769 (Colo. 2001).

In a sexual assault trial, because evidence of a victim's virginity spans such a lengthy period of time, it includes remote, non-probative evidence of lack of sexual activity and thus is too broad and over-inclusive to be admissible in light of its prejudicial effect. Fletcher v. People, 179 P.3d 969 (Colo. 2007).

A trial court may consider the policy concerns underlying the rape shield statute when weighing the relevance of evidence of a victim's or witness' sexual conduct against its potentially prejudicial effect. People v. Melillo, 25 P.3d 769 (Colo. 2001).

Trial court did not abuse its discretion by admitting into evidence tape recorded conversation involving father accused of incest against his son, the boy, and the boy's mother where the question of whether either the mother's or father's influence over the child may have accounted for the child's vacillations and recantations in making the allegations was a central issue. People v. Gibbens, 905 P.2d 604 (Colo. 1995).

Court did not abuse its discretion in admitting evidence of defendant's other sex assaults. The evidence was relevant to show defendant's intent and motive. People v. Orozco, 210 P.3d 472 (Colo. App. 2009).

Evidence of an alternative suspect's prior sexual conduct with someone other than the victim has questionable relevance to an alternate suspect defense. Even if the evidence is relevant, the probative value of the evidence is substantially outweighed by the danger of confusing the issues and misleading the jury. People v. Salazar, 2012 CO 20, 272 P.3d 1067.

The admissibility of alternate suspect evidence ultimately depends on the strength of the connection between the alternate suspect and the charged crime. To be admissible, alternate suspect evidence must be relevant under C.R.E. 401, and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury, or by considerations of undue delay. People v. Elmarr, 2015 CO 53, 351 P.3d 431; People v. Folsom, 2017 COA 146M, 431 P.3d 652.

Prohibition of alternate suspect evidence deprived defendant of a fair trial. Evidence proffered by defendant established a non-speculative connection between the alternate suspect and the charged crime. Because the evidence identifying the defendant as the criminal was far from overwhelming, the trial court's error was not harmless beyond a reasonable doubt. People v. Folsom, 2017 COA 146M, 431 P.3d 652.

Evidence of consensual sexual contact with one other than the victim, which took place in the same place and at about the same time as alleged sexual assault on child, held relevant and not unduly prejudicial. People v. Tauer, 847 P.2d 259 (Colo. App. 1993).

Probative value of evidence in sexual assault case did not substantially outweigh danger of unfair prejudice where evidence consisted of defendant's statements that ''Mexicans were bred for sex'' and Spanish-English dictionaries containing underlined words of a sexual and reproductive nature. People v. Braley, 879 P.2d 410 (Colo. 1993).

Admitting evidence of victim's rape fantasy and evidence of defendant and victim's prior sexual relationship not unfairly prejudicial. The probative value of the evidence outweighs the prejudice the victim may suffer as a result. People v. Garcia, 179 P.3d 250 (Colo. App. 2007).

Prejudice of threat outweighed by probative value. A letter from defendant to a fellow prisoner, containing an admission of a fact relevant to proof of his guilt of the crime charged and containing a threat against the fellow prisoner, is admissible to show a consciousness of guilt despite the prejudicial aspects of the included threat. People v. Lowe, 660 P.2d 1261 (Colo. 1983).

Defendant's statement to polygraph examiner was admissible because it was relevant to ultimate issue in case and prejudicial impact was minimal. People v. Robinson, 713 P.2d 1333 (Colo. App. 1985).

The admission of cumulative hearsay statements of child victim of sexual assault proper where truthfulness of child victim was at issue and statements were, therefore, relevant to material issues in the case. People v. Morrison, 985 P.2d 1 (Colo. App. 1999), aff'd on other grounds, 19 P.3d 675 (Colo. 2000).

Trial court erred in precluding defendant from inquiring into, and if necessary, presenting evidence of, a romantic relationship between alleged victim and a friend. Evidence of alleged victim's romantic and sexual relationship with friend was relevant to a material issue in the case, namely, victim's motive to lie. Trial court's exclusion of the motive evidence infringed upon defendant's constitutional right to confront witnesses. People v. Owens, 183 P.3d 568 (Colo. App. 2007).

The probative value of a prior conversation between the victim and the defendant in the same setting as the alleged assault is not substantially outweighed by any danger of unfair prejudice that may result from the admission of the conversation, which is, arguably, not even evidence of defendant's bad character. People v. Gardner, 919 P.2d 850 (Colo. App. 1995).

Damage to defendant's case not grounds for exclusion. The trial court should not exclude proffered evidence as unfairly prejudicial simply because it damages the defendant's case. All effective evidence is prejudicial in the sense of being damaging or detrimental to the party against whom it is offered. People v. District Court, 785 P.2d 141 (Colo. 1990); People v. Howard-Walker, 2017 COA 81M, __ P.3d __.

Where the evidence is admissible under § 13-25-129, defendant must show some basis for refusing the evidence beyond conclusory statements that the evidence was prejudicial and cumulative. People v. Fasy, 813 P.2d 797 (Colo. App. 1991).

Only prejudice which suggests a decision made on an improper basis, such as the jury's bias, sympathy, anger, or shock, requires the exclusion of evidence under this rule. Evidence should not be excluded simply because it damages the defendant's case. People v. Salas, 902 P.2d 398 (Colo. App. 1994).

The danger of prejudice presented by the evidence of the defendant's gang membership did not outweigh its probative value where the evidence was not offered to prove that the defendant was more likely to kill because he was a gang member; rather it was offered to show that, because of his membership in a particular gang, defendant was more likely to murder this particular victim after deliberation. People v. Mendoza, 860 P.2d 1370 (Colo. App. 1993).

The prejudice to the defendant, if any, because of the prosecutor's statements during closing arguments that the "Bloods and Crips do not get along peaceably" was not so substantial as to warrant a mistrial where the nature of the relationship between the two gangs was germane to the prosecutor's theory of the case and sufficient evidence illustrating the relationship had been introduced at trial to support the prosecutor's statements. People v. Mendoza, 860 P.2d 1370 (Colo. App. 1993).

No evidence of prosecutorial misconduct where prosecutor properly advised witness not to mention defendant's criminal history and prosecutor did not elicit the inadmissible evidence from the witness. People v. Reed, 2013 COA 113, 338 P.3d 364.

Prejudicial proffered evidence outweighed by probative value. Proffered evidence which calls for exclusion as unfairly prejudicial is given a more specialized meaning of an undue

tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution or horror. People v. District Court, 785 P.2d 141 (Colo. 1990); Holley v. Huang, 284 P.3d 81 (Colo. App. 2011).

The fact that a witness is a member of a gang which is loyal to the defendant's gang is probative of bias and is admissible so long as it does not unduly prejudice the defendant. People v. Trujillo, 749 P.2d 441 (Colo. App. 1987).

The fact that the defendant's expert witness had a "substantial connection" with the defendant's insurer is probative of bias, and admission of evidence of such connection was within the trial court's discretion. Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000).

Polygraph evidence inadmissible. Evidence of polygraph test results and testimony of polygraph examiners is per se inadmissible in a criminal trial. People v. Anderson, 637 P.2d 354 (Colo. 1981).

Descriptions of defendant's clothing, which might be interpreted to imply a gang connection, held relevant and not unduly prejudicial where neither prosecutor nor witnesses used the word ''gang''. People v. Fernandez, 883 P.2d 491 (Colo. App. 1994).

The trial court did not abuse its discretion in admitting into evidence portions of a videotaped statement defendant made to the police in which he denied an accusation that he told others that he intended to kill the victim and acknowledged that he had had three prior lovers who had died and that the victim was aware of that, where there was substantial evidence that the defendant had manifested an intent to kill the victim, the defendant made no admission of guilt regarding the deaths of his former lovers, the comments were not mentioned or highlighted by either the court or the prosecution, and no reference was made to them during the examination of witnesses or during the prosecution's opening or closing statements. People v. Seigler, 832 P.2d 980 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

Trial court did not abuse discretion in not admitting "other acts" evidence when admission of evidence would have consumed a great deal of trial time and would have had slight probative value. Hock v. N. Y. Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Where a witness was temporarily unable to testify in court and the probative value of her relevant testimony was reduced by the delay in time between the witness's observations and the criminal act, the discrepancies between the witness's and victim's descriptions of the vehicle involved, and the witness's admission that she could not see clearly because she was not wearing her glasses, the trial court did not abuse its discretion in ruling that the minimal probative value of the witness's testimony was outweighed by the delay of a continuance or relocation of the trial to the witness's home. People v. Webster, 987 P.2d 836 (Colo. App. 1998).

No abuse of discretion in admitting evidence of defendant's deferred judgment for burglary. People v. Nuanez, 973 P.2d 1260 (Colo. 1999).

Evidence of defendant's prior domestic violence conviction was properly admitted. The conviction was relevant for impeachment purposes and was not prejudicial since it was a single, isolated, brief statement that was not a significant part of the prosecution's cross-examination or closing argument. People v. Sommers, 200 P.3d 1089 (Colo. App. 2008).

Testimony about defendant's probation status not sufficiently prejudicial to warrant a new trial where any prejudice could have been remedied by a curative instruction or by striking the improper statement but defense counsel refused the remedies. Also the court had instructed the jury to base its verdict only on the evidence submitted at trial and not consider answers given by witnesses before a sustained objection. People v. Reed, 2013 COA 113, 338 P.3d 364.

No abuse of discretion in admitting police officers' testimony about prior contact with defendant and defendant's area restriction. Testimony was part of the res gestae of the offense because it gave the jury an understanding of why defendant was stopped and thus formed a natural and integral part of an account of the crime. Likewise, testimony about an outstanding misdemeanor arrest warrant was relevant because it described the chain of events preceding defendant's arrest and explained why he was taken into custody. The officers did not testify about the nature of the prior contact or the nature of the area restriction; thus, this testimony was neither unduly inflammatory nor likely to prevent the jury from making a rational decision. Although this testimony may have been damaging to defendant, it did not amount to unfair prejudice. People v. Asberry, 172 P.3d 927 (Colo. App. 2007).

Evidence of defendant's prior drug dealing was properly admitted as res gestae. Detective's testimony explained to jury why police had set up drug buy with defendant. People v. Gomez, 211 P.3d 53 (Colo. App. 2008).

Evidence of defendant's prior unlawful sexual act was improperly admitted because the conduct of the prior act, in that particular case, was significantly more serious than the offense with which he was currently charged. People v. Brown, 2014 COA 130M, 342 P.3d 564.

Admission of witness's testimony about defendant's threats related to his drug use weeks before defendant murdered witness's friend was harmless. The court admitted the

evidence as res gestae evidence, not character evidence. The evidence was harmless because it did not substantially influence the verdict or affect the fairness of the trial. Also the court properly admitted other extensive undisputed evidence about defendant's drug use and addiction that was more prejudicial to defendant than witness's testimony. People v. Reed, 2013 COA 113, 338 P.3d 364.

No abuse of discretion for admitting false identification evidence when court found false ID card was relevant to issues of defendant's flight, consciousness of guilt, fluency in English, and expertise with law enforcement. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

Evidence impugning moral character excluded. Evidence excluded as violating standard principles of evidence by needlessly impugning moral character. People v. Loscutoff, 661 P.2d 274 (Colo. 1983).

The trial court has broad discretion to preclude inquiries that have no probative force or are irrelevant or have little bearing on the witness's credibility but would substantially impugn his character. People v. Bustos, 725 P.2d 1174 (Colo. App. 1986).

Evidence regarding defendant's gang affiliation properly admitted. Defendant's gang affiliation could have shown a motive to commit the crime. People v. Moya, 899 P.2d 212 (Colo. App. 1994).

Evidence of gang affiliation admissible. There was evidence presented that defendant's gang affiliation motivated him to participate in the shooting. Thus, defendant's gang affiliation could have shown a motive to commit murder. People v. Clark, 2015 COA 44, 370 P.3d 197.

Evidence of a defendant's gang involvement was limited to testimony of his statement to police that he had been involved in gang activities and that statement was offered in support of the prosecution's theory that the shooting was motivated by gang rivalry, therefore the trial court did not abuse its discretion in ruling that the testimony was not unfairly prejudicial. People v. Webster, 987 P.2d 836 (Colo. App. 1998).

Evidence of defendant's jealousy and accusatory behavior was admissible as res gestae evidence because challenged testimony was part and parcel of the criminal episode for which defendant was charged. Trial court did not abuse its discretion by denying defendant's motion for a mistrial. People v. Jaramillo, 183 P.3d 665 (Colo. App. 2008).

Evidence of threats against a witness properly admitted. The evidence could show consciousness of guilt and, by inference, that the defendant committed the crime charged. People v. Eggert, 923 P.2d 230 (Colo. App. 1995).

Evidence of a witness's fear of retaliation is admissible to explain the witness's change in statement or reluctance to testify. People v. Villalobos, 159 P.3d 624 (Colo. App. 2006).

Evidence regarding poor health of theft victim's husband held relevant in light of the central issue of defendant's intention to permanently deprive victim of her money despite defendant's knowledge of the victim's circumstances. People v. Merchant, 983 P.2d 108 (Colo. App. 1999).

Evidence of prior bank foreclosure was probative of the interactions between borrower and the bank — it made it more probable that borrower had the requisite intent to commit theft. It was therefore relevant under C.R.E. 401. Further, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence, especially where the prior foreclosure was referenced only in passing and the details of that foreclosure were not revealed. Thus, the evidence was not barred by this rule. People v. Trujillo, 2018 COA 12, 433 P.3d 78.

Statement of defendant that her multiple personality disorder had been cured by the time of the murder properly admitted. Statement had probative value, given the prosecution's theory that defendant had covered up her involvement in the crime, and defendant's description of her mental state at the time of the offense made it more probable that she had intentionally caused the death of the victim. People v. Hall, 60 P.3d 728 (Colo. App. 2002).

Evidence that defendant refused to consent to search of apartment was relevant and not unfairly prejudicial to impeach his testimony that he had not lived in the apartment for the last six days and did not know there were drugs in the apartment. Evidence of refusal to consent to search could give rise to the reasonable inference that defendant had dominion and control over the apartment. People v. Chavez, 190 P.3d 760 (Colo. App. 2007).

A person's refusal to consent to a search may not be used by the prosecution — either through the introduction of evidence or by explicit comment — to imply the person's guilt of a crime. People v. Pollard, 2013 COA 31M, 307 P.3d 1124.

Defendant's nonresponsiveness at crime scene and at hospital not properly admitted since defendant's defense of dissociative state did not rely on defendant's state of mind at hospital or crime scene and was therefore irrelevant to whether defendant was sane at the moment she shot the victim, and danger of unfair prejudice and likelihood of misleading the jury far outweighed any possible probative value that testimony regarding the defendant's silence might have had. People v. Welsh, 80 P.3d 296 (Colo. 2003).

Video animation was properly admitted in shaken baby syndrome prosecution because it related to expert's opinion regarding the manner

in which shaken baby syndrome injuries occur and it was included because trial court specifically rejected defendant's claim that the video was extremely violent and therefore unfairly prejudicial. People v. Cauley, 32 P.3d 602 (Colo. App. 2001).

Evidence concerning possible penalties faced by witness for his part in burglary excluded. Court did not err in excluding evidence concerning possible penalties faced by informer which defendant argued was relevant to show informer had motive to shift blame for crime to defendant. People v. Pinkey, 761 P.2d 228 (Colo. App. 1988).

Documents excluded as irrelevant. People v. Walker, 666 P.2d 113 (Colo. 1983).

Expert testimony permitted. People v. Gordon, 738 P.2d 404 (Colo. App. 1987).

Propounding questions with no reasonable basis in fact for the interrogation. Defense counsel may not properly propound to a witness questions which can cause a doubt in the jury's mind as to the witness' credibility when there is no reasonable basis in fact for that interrogation. Under this rule and § 18-3-407, the defendant held not to have established entitlement to elicit the name of the male whom the child sexual assault victim allegedly had intercourse with days before the date of the sexual assault. People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

Polygraph evidence inadmissable. If the defendant's statements made to the polygraph technician are edited to remove all reference to the polygraph examination, they will not be characterized by the unfair prejudice required to make evidence excludable. People v. District Court, 785 P.2d 141 (Colo. 1990).

Evidence of a defendant's offer or willingness to take a polygraph examination is per se inadmissible as evidence of consciousness of innocence. People v. Muniz, 190 P.3d 774 (Colo. App. 2008).

In determining the admissibility of expert testimony on the reliability of eyewitness testimony, the court should issue written findings of fact applying both the helpfulness standard of C.R.E. 702 and the discretion granted under this rule. Campbell v. People, 814 P.2d 1 (Colo. 1991).

Trial court erred in excluding expert testimony on reliability of eyewitness identification where eyewitness identification of defendant was the only substantial element of the prosecution's case, eyewitnesses expressed high confidence in their identification of defendant, and proffered expert testimony would have shown a poor relationship between the confidence of eyewitnesses, in general, and the reliability of such witnesses' testimony. People v. Campbell, 847 P.2d 228 (Colo. App. 1992).

Trial court properly excluded expert testimony. The study was not conducted in conformance with any standard or procedure that would ensure its reliability. As well, there was no evidence the participants were a representative sampling that would yield reliable statistical analysis. People v. Hogan, 114 P.3d 42 (Colo. App. 2004).

Although admission of DNA evidence was the subject of conflicting testimony, where there was expert testimony to support the court's ruling, it was within the trial court's discretion to allow admission of the evidence. People v. Lindsey, 868 P.2d 1085 (Colo. App. 1993).

Admission of DNA evidence derived from multiplex DNA testing systems that met the standard for admission of scientific evidence under C.R.E. 702 was proper under this rule. People v. Shreck, 22 P.3d 68 (Colo. 2001).

Trial court did not abuse its discretion in admitting photographs taken at the autopsy. People v. Moya, 899 P.2d 212 (Colo. App. 1994).

If a contract is deemed ambiguous, court may admit extrinsic or parol evidence to assist in ascertaining intent of parties. Cheyenne Mtn. Sch. D. v. Thompson, 861 P.2d 711 (Colo. 1993).

Three-part test under equivalent federal rule applied in People v. Campbell, 847 P.2d 228 (Colo. App. 1992).

Statements that were not unduly inflammatory nor likely to prevent jury from making a rational decision will not be found unduly prejudicial. People v. Quintana, 882 P.2d 1366 (Colo. 1994).

Testimony that detective recognized the defendant on a surveillance videotape was not so unfairly prejudicial as to mandate its exclusion. People v. Robinson, 908 P.2d 1152 (Colo. App. 1995), aff'd on other grounds, 927 P.2d 381 (Colo. 1996).

Introduction of dog-tracking evidence proper where testimony of dog handler establishes sufficient foundation and there is corroborating evidence of defendant's guilt. People v. Brooks, 950 P.2d 649 (Colo. App. 1997), aff'd, 975 P.2d 1105 (Colo. 1999).

Elements of a proper foundation for dog tracking evidence listed in Brooks v. People, 975 P.2d 1105 (Colo. 1999).

Prosecutor's use of expert testimony regarding drug courier profiles as substantive evidence of defendant's guilt was improper, and, although a reasonable jury could have convicted on other evidence, the admissible evidence did not overwhelmingly establish defendant's guilt, and there is a significant probability that the erroneously admitted testimony substantially influenced the jury's verdict, and thus was not harmless. Salcedo v. People, 999 P.2d 833 (Colo. 2000).

Court did not err in admitting drug courier profile testimony from police officer be-

cause it was testimony regarding how illegal drugs were transported, not specific personal characteristics of drug couriers themselves. The testimony aided the jury's understanding of an activity with which they were not likely to be familiar. People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008).

In eminent domain proceeding, commission did not abuse its discretion in admitting evidence regarding city's opposition to landowner's planned unit development (PUD) application for limited purposes. Commission did not abuse its discretion in admitting evidence of city's involvement as background on the issuance of the application, the steps necessary to obtain it, and the timeliness of the process. Moreover, the commission minimized any prejudicial effects of such evidence by excluding testimony regarding city's motives in opposing PUD application. City of Englewood v. Denver Waste Transfer, L.L.C., 55 P.3d 191 (Colo. App. 2002).

Because expert testifying in shaken-impact syndrome case never purported to know what minimum force would be required to cause a subdural hematoma and because testimony was properly qualified by other statements of the same expert, a single improper inference by prosecution referring to ''the force it takes to make a baby's brain bleed'' in opening statement of prosecution was not sufficient to render the trial fundamentally unfair and, therefore, did not rise to the level of plain error. People v. Dunaway, 88 P.3d 619 (Colo. 2004).

Trial court did not abuse discretion by allowing expert testimony to show the basis of the physician's opinion when it was undisputed that massive, violent force causes subdural hematoma and when physician's testimony related to situations that involve massive, violent force to help the jury understand the facts of the shaken-impact syndrome case before it. People v. Martinez, 74 P.3d 316 (Colo. 2003).

Trial court did not abuse discretion by declining to conduct an in camera review of records of the investigation of detective's alleged moonlighting during on-duty hours to determine whether defendant could use such records to impeach the detective's credibility or allow the defense to admit other evidence of the moonlighting investigation. People v. Knight, 167 P.3d 141 (Colo. App. 2006).

When a witness describes an item of real evidence, testimony as to its description and out-of-court identification may be admitted. People v. Hogan, 114 P.3d 42 (Colo. App. 2004).

Court may properly allow testimony concerning defendant's pre-advisement silence without causing prejudice if defendant testified and the evidence of defendant's pre-advisement silence was elicited in the cross-examination of defendant for credibility purposes. People v. Taylor, 159 P.3d 730 (Colo. App. 2006).

Identification of inanimate object is not a crucial element of proof, therefore, the same constitutional protections for identifying suspects do not apply to procedures used in identifying inanimate objects. As a result, any inadequacy in the procedure followed and the failure to use other procedures reasonably available are arguments that can be made to the jury. People v. Hogan, 114 P.3d 42 (Colo. App. 2004).

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial, argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. Liggett v. People, 135 P.3d 725 (Colo. 2006); People v. Koper, 2018 COA 137, __ P.3d __.

Evidence of an alias is admissible when it is relevant to an issue of identification or an attempt to avoid detection. In this case, the alias evidence was relevant to the issue of identification, ownership of the car, and, inferentially, the possession of the marihuana. Since its legitimate probative value outweighed the danger of unfair prejudice, the alias evidence was properly admitted. People v. Valencia, 169 P.3d 212 (Colo. App. 2007).

Defense counsel may open the door to the admission of evidence through questions concerning the method of interrogation by detectives and the motives of witnesses to change their testimony by raising those issues in an opening statement. People v. Davis, 312 P.3d 193 (Colo. App. 2010), aff'd on other grounds, 2013 CO 57, 310 P.3d 58 (Colo. 2013).

Evidence of patient's past cocaine use admissible in medical malpractice case. The probative value of the evidence relating to the cause of the patient's cardiac arrest and the failure of resuscitation efforts outweighed the risk of unfair prejudice. Kelly v. Haralampopoulos by Haralampopoulos, 2014 CO 46, 327 P.3d 255.

Evidence of other medical providers' fault in medical negligence case properly excluded because of possible jury confusion. Danko v. Conyers, 2018 COA 14, 432 P.3d 958.

Admissibility of a nonparty's invocation of fifth amendment privilege and concomitant drawings of adverse inferences should be considered by courts on a case-by-case basis to assure that any inference is reliable, relevant, and fairly advanced. McGillis Inv. Co., LLP v. First Inter. Fin. Utah, 2015 COA 116, 370 P.3d 295.

Trial court did not abuse its discretion in sustaining witness's invocation of his fifth

amendment right because stopping the trial to have a different judge hold an ex parte hearing would cause undue delay. Based on the question by defense counsel that led to the invocation of the fifth amendment, it was possible that the witness's response could have incriminated him in two possible crimes. The probative value of the response was low considering the evidence already elicited from the witness. An ex parte hearing on the witness's fifth amendment right had already been held, and defense counsel did not raise the line of inquiry posed at trial during that hearing. So, there was no abuse of discretion in ruling the evidence inadmissible. People v. Clark, 2015 COA 44, 370 P.3d 197.

Court's admission of sex toys and pornography that were not identified by the victims or found in a location described by the victims was in error. But the error does not require reversal since there was no reasonable probability that the evidence contributed to the conviction. People v. Relaford, 2016 COA 99, 409 P.3d 490.

Applied in People v. Cole, 654 P.2d 830 (Colo. 1982); People v. Perez, 656 P.2d 44 (Colo. App. 1982); People v. McGhee, 677 P.2d 419 (Colo. App. 1983); People v. Hogan, 703 P.2d 634 (Colo. App. 1985); People v. Randall, 711 P.2d 689 (Colo. 1985); I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986); People v. Wafai, 713 P.2d 1354 (Colo. App. 1985), aff'd, 750 P.2d 37 (Colo. 1988); Lamont v. Union Pacific R.R.Co., 714 P.2d 1341 (Colo. App. 1986); Uptain v. Huntington Lab, Inc., 723 P.2d 1322 (Colo. 1986); People v. Auldridge, 724 P.2d 87 (Colo. App. 1986); People v. Alexander, 724 P.2d 1304 (Colo. 1986); People v. Abeyta, 728 P.2d 327 (Colo. App. 1986); People v. Collins, 730 P.2d 293 (Colo. 1986); People v. Turner, 730 P.2d 333 (Colo. App. 1986); People v. Montgomery, 743 P.2d 439 (Colo. App. 1987); People v. Huckleberry, 768 P.2d 1235 (Colo. App. 1989); People v. Franklin, 782 P.2d 1202 (Colo. App. 1989); People v. Martin, 791 P.2d 1159 (Colo. App. 1989); Koehn v. R.D. Werner Co., Inc., 809 P.2d 1045 (Colo. App. 1990); Martin v. Principal Cas. Ins. Co., 835 P.2d 505 (Colo. App. 1991), rev'd sub nom Budget Rent-A-Car Corp. v. Martin, 855 P.2d 1377 (Colo. 1993); People v. Dunlap, 975 P.2d 723 (Colo. 1999), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999); George v. Welch, 997 P.2d 1248 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 675 (Colo. 2000); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); People v. Hogan, 114 P.3d 42 (Colo. App. 2004); People v. Gonzales-Quevedo, 203 P.3d 609 (Colo. App. 2008); People v. Ortega, 2015 COA 38, 370 P.3d 181; People v. Mendenhall, 2015 COA 107M, 363 P.3d 758.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** In a criminal case, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of alleged victim.** In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Federal Rule Identical.)

Source: (a) amended and adopted June 20, 2002, effective July 1, 2002; (a)(1), (a)(2), and (b) amended and effective September 27, 2007.

COMMITTEE COMMENT

See also § 16-10-301, C.R.S. (Volume 8, 1978 Repl. Vol.), adopted by 1975 Legislature, setting for statute on standards and methods of proof relating to evidence of similar transactions in cases involving charges of unlawful sexual behavior.

ANNOTATION

I. General Consideration.
II. Character Evidence.
III. Other Crimes, Wrongs, or Acts.

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence'', see 58 U. Colo. L. Rev. 1 (1986-87). For article, ''How Should We Treat Character Evidence Offered to Prove Conduct?'', see 58 U. Colo. L. Rev. 279 (1987). For casenote, ''People v. Spoto: Teasing the Defense on Prior Bad Acts Evidence'', see 63 U. Colo. L. Rev. 783 (1992). For article, ''The Use of Rule 404(a) Character Evidence In Civil Cases'', see 23 Colo. Law. 1801 (1994). For article, ''Other Bad Act Evidence: How to Avoid the Slings and Arrows'', see 26 Colo. Law. 43 (April 1997). For comment, ''Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties'', see 79 U. Colo. L. Rev. 587 (2008). For article, ''The Expanding Use of the Res Gestae Doctrine'', see 38 Colo. Law. 35 (June 2009). For article, ''The Doctrine of Chances After People v. Jones'', see 43 Colo. Law. 57 (July 2014).

Rule applies in administrative proceedings as well as in criminal and civil cases. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Rule gives an accused the right to introduce character evidence without prior character attack; accordingly, administrative hearing officer erred in not permitting defendant to present character evidence on grounds of irrelevancy. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Documents excluded as irrelevant. People v. Walker, 666 P.2d 113 (Colo. 1983).

Applied in People v. Alward, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984); People v. Jones, 675 P.2d 9 (Colo. 1984); People v. Lucero, 677 P.2d 370 (Colo. App. 1983), cert. dismissed, 706 P.2d 1283 (Colo. 1985); People v. Marin, 686 P.2d 1351 (Colo. App. 1983); People v. Delsordo, 2014 COA 174, 411 P.3d 864.

II. CHARACTER EVIDENCE.

Prior acts of violence are not generally admissible to establish self-defense, unless the defendant had knowledge of the prior acts of violence at the time of the incident. People v. Jones, 635 P.2d 904 (Colo. App. 1981); People v. Lucero, 714 P.2d 498 (Colo. App. 1985).

In the absence of a claim of self-defense, district court's exclusion of evidence of alleged violent and abusive acts by the murder victim was proper. People v. Smith, 848 P.2d 365 (Colo. 1993).

Evidence may show character trait of aggression of victim. When the purpose of the evidence is to show a pertinent character trait of the victim from which it may be inferred that he was the initial aggressor, that trait may be shown by specific instances of past conduct. People v. Jones, 635 P.2d 904 (Colo. App. 1981).

Weight to be accorded evidence of good character in criminal proceeding. People v. White, 632 P.2d 609 (Colo. App. 1981).

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith. People v. Hansen, 708 P.2d 468 (Colo. App. 1985).

Specific instances of conduct introduced to counter evidence of good reputation or character must be relevant instances of conduct, that is, conduct related to the character trait put in issue. People v. Pratt, 759 P.2d 676 (Colo. 1988); People v. Kreiter, 782 P.2d 803 (Colo. 1989).

When prosecution seeks to admit any evidence that suggests defendant is a person of bad character, it must explain why the logical relevance of that evidence does not depend on the inference that defendant acted in conformity with his or her bad character. Court properly admitted defendant's journal entries since they were relevant to establish defendant's mental state and rebut defendant's claims that he or she acted accidently or in self-defense. Although the evidence had the potential of unfair prejudice, there was no abuse of dis-

cretion by the court. People v. Griffin, 224 P.3d 292 (Colo. App. 2009).

No plain error for failing to provide a limiting instruction when instruction was not required to be given either by statute or by timely request. People v. Griffin, 224 P.3d 292 (Colo. App. 2009).

Erroneous rulings regarding introduction of character evidence sufficient to reverse conviction where defendant refrained from presenting defense based on such rulings. People v. Kreiter, 782 P.2d 803 (Colo. 1989).

When impeachment is based upon rumor, the impeaching party has the burden of showing that acts forming the basis of rumor actually occurred. People v. Pratt, 759 P.2d 676 (Colo. 1988).

Evidence in the form of reputation or opinion concerning a witness' character for truthfulness may be introduced to support the credibility of the person when the witness' character for truthfulness has been attacked; however, such testimony must be based on opinion held generally in a broad community. People v. Ayala, 919 P.2d 830 (Colo. App. 1995).

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial, argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. Liggett v. People, 135 P.3d 725 (Colo. 2006).

Reputation is distinguished from rumor in that it must be established over a period of time. People v. Ayala, 919 P.2d 830 (Colo. App. 1995).

Reputation and rumor distinguished. People v. Erickson, 883 P.2d 511 (Colo. App. 1994).

Court's failure to require a showing of the basis and relevance of specific instances of misconduct was error where the risk of prejudice of jury was great. Where prosecutor cross-examined character witness concerning alleged tying of nursing home patients to chairs, there was risk of prejudice sufficient to require advance determination by the court that such incidents likely had occurred and were in fact improper. People v. Pratt, 759 P.2d 676 (Colo. 1988).

Admission of evidence that victim was an excellent worker and top employee, when defendant did not present any evidence going to the victim's trait of character, was reversible error. People v. Jones, 743 P.2d 44 (Colo. App. 1987).

Testimony that a person is a "cautious driver" is character evidence under this rule and not habit evidence under C.R.E. 406. People v. T.R., 860 P.2d 559 (Colo. App. 1993).

Trial court erred in ruling that evidence was inadmissible pursuant to C.R.E. 608 when it was admissible pursuant to section (a)(1) of this rule. People v. Miller, 862 P.2d 1010 (Colo. App. 1993).

Testimony regarding victim's character may be relevant where self-defense is raised as a defense. People v. Erickson, 883 P.2d 511 (Colo. App. 1994).

But where theory of defense was that homicide was committed in self-defense against a homosexual assault and the victim's alleged homosexuality itself would not prove an element of self-defense, evidence of the victim's homosexuality could only be introduced via reputation or opinion evidence, not via a specific instance of conduct. People v. Miller, 981 P.2d 654 (Colo. App. 1998).

Opinion or reputation testimony was clearly relevant to establish a person's reputation in the community for peacefulness, and the trial court correctly permitted a witness to testify about such reputation. People v. Ibarra, 849 P.2d 33 (Colo. 1993).

The trial court did not commit plain error in allowing the prosecution to elicit testimony during its case-in-chief showing the victim's character for peacefulness. Defense counsel raised self-defense as an affirmative defense during opening statements, and elicited testimony to support the affirmative defense during cross examination of a prosecution witness. People v. Baca, 852 P.2d 1302 (Colo. App. 1992).

Trial court appropriately admitted prosecution testimony of episode of anger on part of defendant to rebut character trait of peacefulness set forth by defendant. People v. Garcia, 964 P.2d 619 (Colo. App. 1998), rev'd on other grounds, 997 P.2d 1 (Colo. 2000).

Statement of defendant that her multiple personality disorder had been cured by the time of the murder was properly admitted even if defendant had not raised issue of diminished mental capacity. Statement was relevant to prosecution's theory that defendant had given a number of false and inconsistent statements to law enforcement officials after the murder and her purpose in mentioning the personality disorder was to explain why her statements had been inconsistent. People v. Hall, 60 P.3d 728 (Colo. App. 2002).

Trial court did not abuse its discretion in excluding character witness testimony because defendant admitted to using a false social security number he knew was not his own, and any evidence pertaining to his character for truthfulness was irrelevant in that respect. People v. Montes-Rodriguez, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

Similarly, trial court did not abuse its discretion in excluding evidence regarding

whether or not defendant knew whose social security number he used. Because defendant admitted to using a social security number that was not his own, the evidence was irrelevant. People v. Montes-Rodriguez, 219 P.3d 340 (Colo. App. 2009), rev'd on other grounds, 241 P.3d 924 (Colo. 2010).

A criminal defendant who testifies in his own defense at trial does not automatically have the right to present evidence of his character for truthfulness under this rule. The rule is intended to permit admissibility of pertinent traits and truthfulness is a pertinent trait only if it is involved in the offense charged. People v. Miller, 890 P.2d 84 (Colo. 1995).

Administrative hearing officer's error in not allowing certain opinion testimony at teacher's disciplinary hearing did not affect any substantial right of petitioner where record reflects that, despite ruling, petitioner was permitted to present a substantial amount of character evidence and hearing officer concluded that petitioner was a person of good character. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Although the defendant "opened the door" to questioning about why he or she was in Kansas, the prosecution could have elicited testimony that defendant gave a reason other than "family" as he or she testified to in court. The defendant's statement that he or she came to Kansas about drugs was not relevant to the case and injected defendant's bad character into the case and should have been inadmissable. People v. Rincon, 140 P.3d 976 (Colo. App. 2005).

Evidence of defendant's cocaine use was not offered to show defendant's bad character or any propensity to act in accordance with any bad character but was properly admitted to show that his voluntary intoxication was the most likely explanation for his mental state on the date of the crime and not the medication alleged in his involuntary intoxication defense. People v. Herdman, 2012 COA 89, 310 P.3d 170.

Applied in Settle v. Basinger, 2013 COA 18, 411 P.3d 717.

III. OTHER CRIMES, WRONGS, OR ACTS.

Law reviews. For article, "Rule 404(b): Evidence of Other Crimes, Wrongs or Acts", see 23 Colo. Law. 355 (1994). For article, "Admissibility of 'Other Acts' Evidence Under C.R.E. 404(b)", see 32 Colo. Law. 87 (July 2003).

Rule accords trial courts great discretion in admitting evidence of other acts, and that discretion is abused only if a ruling is manifestly arbitrary, unreasonable, or unfair. People v. Cousins, 181 P.3d 365 (Colo. App. 2007).

Evidence of prior criminality casts damning innuendo likely to beget prejudice in the minds of juries. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

Therefore, prior criminal record generally inadmissible. As a general rule, subject to some exceptions, a prior criminal record of a defendant is inadmissible, and the introduction of such a record is reversible error. Serratore v. People, 178 Colo. 341, 497 P.2d 1018 (1972).

Evidence of other crimes tending to prove res gestae of offense charged admissible. Where evidence of other crimes tends to prove the res gestae, these "other crimes" are not wholly independent of the offense charged, and it is not error to admit such evidence without giving a jury instruction in reference to the limited purpose for which the evidence of other crimes can be used. White v. People, 177 Colo. 386, 494 P.2d 585 (1972); People v. Czemerynski, 786 P.2d 1100 (Colo. 1990); People v. Fears, 962 P.2d 272 (Colo. App. 1997); People v. Lucas, 992 P.2d 619 (Colo. App. 1999); Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001); People v. Merklin, 80 P.3d 921 (Colo. App. 2003).

Although prior robbery and the murder with which defendant was charged were somewhat remote in time, they were inextricably intertwined because the victim of the murder had been a witness to the robbery, and evidence of the robbery gave context to the murder. People v. Fears, 962 P.2d 272 (Colo. App. 1997).

Evidence of illegal drug paraphernalia was relevant to the question of defendant's knowledge of the nature of the drugs recovered from his apartment and their illegality without a prescription. Such evidence also gave the jury a more complete picture of the circumstances under which the drugs were found. People v. Valdez, 56 P.3d 1148 (Colo. App. 2002).

Evidence of federal drug violation could properly be considered "part and parcel of the criminal episode" that became the basis for defendant's state prosecution. The prior drug transaction was closely interwoven with the facts of defendant's arrest and served to provide a context in which the jury could both understand the circumstances of the arrest and the validity of the charges. People v. Skufca, 141 P.3d 876 (Colo. App. 2005), rev'd on other grounds, 176 P.3d 83 (Colo. 2008).

Evidence of defendant's other dealings with marijuana and weapons helped explain the events surrounding the crimes and the context in which the charged crimes occurred. People v. Cisneros, 2014 COA 49, 356 P.3d 877.

Evidence of flight is admissible as res gestae evidence and is not subject to the requirements of section (b). People v. Gee, 2015 COA 151, 371 P.3d 714.

Evidence of other crimes is admissible to prove res gestae when such evidence is inex-

tricably intertwined with the crime charged. People v. Workman, 885 P.2d 298 (Colo. App. 1994); People v. Thomeczek, 284 P.3d 110 (Colo. App. 2011).

Such as where other activity part and parcel of entire criminal transaction. Where evidence that the defendant smoked marijuana cigarettes was elicited to show knowledge on the part of the defendant with regard to the possession of marijuana and was not adduced to show ''another crime'', nor to show that the defendant was evil and capable of committing crimes, and the activity was part and parcel of the entire criminal transaction entered into by the defendant, a limiting instruction was not necessary and the testimony was properly admitted. Dickerson v. People, 179 Colo. 146, 499 P.2d 1196 (1972).

Evidence of argument between defendant and his girlfriend on night before fatal shooting was part and parcel of entire event and, therefore, properly admitted as res gestae of offense charged. People v. Agado, 964 P.2d 565 (Colo. App. 1998).

Evidence presented at trial established that conduct was so closely connected to the main criminal transaction that evidence of it was necessary to complete the story of the crime. Without that evidence, the murder might not be properly understood as the jury would have no basis upon which it could determine the reasons behind defendant's conduct. People v. Gladney, 250 P.3d 762 (Colo. App. 2010).

Res gestae evidence need not meet the procedural requirements of evidence introduced pursuant to section (b). Before admitting res gestae evidence, however, the trial court must find that its probative value is not substantially outweighed by the danger of unfair prejudice. People v. Agado, 964 P.2d 565 (Colo. App. 1998); People v. Thomeczek, 284 P.3d 110 (Colo. App. 2011).

Evidence of wholly independent offense to prove accused guilty of offense charged inadmissible. Evidence is not admissible which shows, or tends to show, that an accused has committed a crime wholly independent of the offense for which he is on trial, for no person shall be convicted of an offense by proving that he is guilty of another. Kostal v. People, 144 Colo. 505, 357 P.2d 70 (1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961); Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971); White v. People, 177 Colo. 386, 494 P.2d 585 (1972); People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974); People v. Geller, 189 Colo. 338, 540 P.2d 334 (1975).

In a criminal trial to a jury, evidence of a defendant's criminal activity, which is unrelated to the offense charged, is inadmissible, and when reference is made in the presence of the jury to such criminal activity, a mistrial is normally required. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

The general rule is that evidence is not admissible which shows or tends to show that the accused has committed a crime wholly independent of the offense for which he is on trial. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

As a general rule, evidence of other criminal acts is inadmissible because of its prejudicial effect. People v. Mason, 643 P.2d 745 (Colo. 1982).

Evidence that is not contemporaneous with the crime charged and does not illustrate its character is not part of the res gestae, and evidence that the defendant urged his wife not to testify with respect to the murder that defendant had allegedly committed two years earlier that implicated him in the separate crime of witness tampering was therefore not admissible as res gestae. However, such evidence was admissible to show the defendant's consciousness of guilt. People v. Medina, 51 P.3d 1006 (Colo. App. 2001), aff'd on other grounds, 71 P.3d 973 (Colo. 2003).

Because guilt of one crime cannot be presumed by commission of another crime. It is not proper to raise a presumption of guilt on the ground that having committed one crime the depravity it exhibits makes it likely the defendant would commit another. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972); White v. People, 177 Colo. 386, 494 P.2d 585 (1972).

To be admissible, similar transaction evidence must meet three tests: (1) Is there a valid purpose for which the evidence is offered? (2) Is the evidence relevant to a material issue in the case? (3) Does the probative value of the evidence of the prior act, considering the other evidence which is relevant to the issue, outweigh the prejudice to the defendant which would result from its admission? People v. Casper, 631 P.2d 1134 (Colo. App. 1981); People v. Crespin, 631 P.2d 1144 (Colo. App. 1981); People v. Quintana, 682 P.2d 1226 (Colo. App. 1984); People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

Test for admissibility is applied in Coll. v. Scanlan, 695 P.2d 314 (Colo. App. 1985); People v. Hansen, 708 P.2d 468 (Colo. App. 1985); Jacobs v. Com. Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986); People v. Adrian, 744 P.2d 768 (Colo. App. 1987), aff'd, 770 P.2d 1243 (Colo. 1989); People v. Duncan, 754 P.2d 796 (Colo. App. 1988); People v. Czemerynski, 786 P.2d 1100 (Colo. 1990).

To be admissible, the prior act evidence must relate to a material fact, be logically relevant, and be independent of the intermediate inference of bad character and its probative value must outweigh the danger of unfair prejudice. People v. Wallen, 996 P.2d 182 (Colo. App. 1999); People v. Masters, 33 P.3d 1191

(Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); People v. Casias, 2012 COA 117, 312 P.3d 208.

Prerequisites and factors to be considered by the trial court in determining whether to admit evidence of similar transactions under statute relating to sexual assault on a child are listed in State v. Janes, 942 P.2d 1331 (Colo. App. 1997).

Evidence of prior similar transactions is admissible when used to prove identity and motive and to rebut a defense of fabrication by a victim. Evidence introduced under the requirements of section (b) of this rule and § 16-10-301 that fails to satisfy these requirements may be disregarded as harmless error if the error is not one of constitutional dimension and the defendant fails to show a reasonable probability that the inadmissible detail contributed to his or her conviction. People v. Whitlock, 2014 COA 162, 412 P.3d 667.

Trial court committed reversible error in admitting evidence of a prior criminal incident where the incident was too remote in time to constitute res gestae evidence, knowledge of the prior incident was not necessary to enable the jury to understand testimony concerning the incident at issue, and the probative value of the references to the prior incident was significantly outweighed by the danger of unfair prejudice. People v. Frost, 5 P.3d 317 (Colo. App. 1999).

Trial court erred in admitting evidence of a prior act because it failed to meet the second and third prong of the People v. Spoto analysis. The prior act evidence did not show a tendency that can be separated from the prohibited inference that defendant acted a certain way in the past and therefore acted that way in this case and offered little probative value that was substantially outweighed by the danger of unfair prejudice. Yusem v. People, 210 P.3d 458 (Colo. 2009).

Evidence of other crimes is admissible to show guilt of crime charged. If evidence which is competent, material, and relevant to the issue of defendant's guilt of the crime for which he is on trial is not admitted for the purpose of showing the defendant's guilt of other crimes, but rather because it is relevant to show the defendant's guilt of the crime for which he is being tried, then it is not error to admit such evidence. Tanksley v. People, 171 Colo. 77, 464 P.2d 862 (1970).

Evidence of defendant's gang affiliation admissible as res gestae. In murder trial, it would not be possible to tell the story of the events without referring to the relationship among the actors who were all gang members. People v. Martinez, 24 P.3d 629 (Colo. App. 2000).

Trial court erred in admitting portions of gang expert's testimony and portions of a witness's testimony concerning the operations of a gang in which defendant was allegedly a member. The evidence was inadmissible as res gestae evidence and as prior act evidence. People v. Trujillo, 2014 COA 72, 338 P.3d 1039.

Evidence that defendant's body showed signs of drug use, that defendant possessed police scanners commonly associated with drug distribution, and that defendant possessed a notebook that was the same type used by drug dealers to document sales admissible as res gestae. People v. Griffiths, 251 P.3d 462 (Colo. App. 2010).

Evidence of other crimes, wrongs, or acts is inadmissible if the logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue. People v. Spoto, 795 P.2d 1314 (Colo. 1990).

Admission of transcripts of defendant's internet chats with minor girls and photographs of minor girls engaged in sex acts found on defendant's computer was proper as proof of intent and motive. The evidence was highly probative of defendant's intent and motive by showing his sexual interest in preteen and young teenage girls and was relevant to refute defendant's defense that he was interested in a sexual relationship with the mother and not the daughter. People v. Douglas, 2012 COA 57, 296 P.3d 234.

Drawings and writings that were nothing more than evidence of defendant's violent nature simply authorized the inference that defendant had a bad character and killed the victim because of his bad character and thus were erroneously admitted as opposed to defendant's admissible drawings that paired sex with violence, represented rehearsal fantasy, evinced a hatred of women, or reflected specific aspects of the crime and thus revealed defendant's motive, preparation, plan, opportunity, or guilty knowledge; however, based on the totality of the circumstances, the jury was not substantially influenced by the inadmissible drawings and writings. Masters v. People, 59 P.3d 979 (Colo. 2002).

Existence of bench warrant was not relevant and admissible as "history of arrest evidence", because the purpose of history of arrest evidence is to show the existence or absence of consciousness of guilt, and, without evidence that defendant knew that the prior warrant existed, mere evidence that a prior warrant existed would not have been relevant to that issue. People v. Perry, 68 P.3d 472 (Colo. App. 2002).

Evidence of similar offenses admissible to show intent, motive, plan, scheme, or design. Evidence of similar offenses is admissible for certain purposes only, such as for the purpose of

showing plan, scheme, design, intent, guilty knowledge, motive, or identity. Kostal v. People, 144 Colo. 505, 357 P.2d 70 (1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961); Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971); Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972); People v. Dago, 179 Colo. 1, 497 P.2d 1261 (1972); People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972); People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974); People v. Czemerynski, 786 P.2d 1100 (Colo. 1990); People v. Bolton, 859 P.2d 311 (Colo. App. 1993); People v. Copeland, 976 P.2d 334 (Colo. App. 1998), aff'd on other grounds, 2 P.3d 1283 (Colo. 2000); People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

The exceptions to the rule that the evidence of a defendant's criminal activity, unrelated to the offense charged, is inadmissible are limited to well defined and special situations where proof of other similar offenses will show the defendant's intent, motive, plan, scheme, or design with respect to the crime charged. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973). But see People v. Salas, 2017 COA 63, 405 P.3d 416.

The exception to the rule, that evidence tending to prove the defendant guilty of a crime other than of the offense charged is not admissible, is applicable when the evidence is of a similar transaction and goes to the proof of intent, motive, plan, scheme, or design, and especially is this true where the other transactions are so connected in point of time with the offense under trial and so similar in character that a plan or scheme can be imputed as to all of them. People v. Moen, 186 Colo. 196, 526 P.2d 654 (1974).

Evidence of defendant's prior use of crack cocaine was properly admitted to prove motive and identity. People v. Dean, 2012 COA 106, 292 P.3d 1066, aff'd, 2016 CO 14, 366 P.3d 593.

Evidence of other crimes properly admitted to show absence of mistake and common plan or scheme. People v. Cook, 2014 COA 33, 342 P.3d 539.

Common plan evidence should only be admitted when the uncharged misconduct and the present crime have a nexus that shows that a defendant had a continuing plan to engage in certain criminal activity. The prosecution did not present any evidence that when the defendant engaged in the first drug deal (uncharged misconduct) he had a plan to engage in the second drug deal (charged misconduct) three months later. The court abused its discretion in admitting the evidence and the error was not harmless. People v. Williams, 2016 COA 48, __ P.3d __.

Court was justified in admitting evidence of a single prior incident since it was logically relevant under the doctrine of chances. Based on the relative similarity of the Pennsylvania sexual assault and the relative infrequency of two women separated by great geographical distance describing similar incidents was sufficient to admit the evidence. People v. Everett, 250 P.3d 649 (Colo. App. 2010).

Admission of prior act evidence when defendant had been acquitted of the prior act does not violate due process or double jeopardy. Kinney v. People, 187 P.3d 548 (Colo. 2008).

Informing jury of defendant's acquittal of a prior act is up to the discretion of the trial court on a case-by-case basis as long as the information's probative value substantially outweighs its prejudicial effect. Kinney v. People, 187 P.3d 548 (Colo. 2008).

An acquittal instruction is appropriate when the testimony or evidence presented at trial about the prior act indicates that the jury has likely learned or concluded that the defendant was tried for the prior act and may be speculating as to the defendant's guilt or innocence in that prior trial. Kinney v. People, 187 P.3d 548 (Colo. 2008).

Appellate court will review trial court's decision for an abuse of discretion. Kinney v. People, 187 P.3d 548 (Colo. 2008).

Trial court did not err by admitting evidence of other transactions when such evidence was determined to be relevant to prove intent, identity, motive, preparation or plan, and modus operandi and jury was instructed that evidence was to be used solely for those purposes. People v. Cook, 22 P.3d 947 (Colo. App. 2000).

Trial court did not abuse discretion in admitting evidence of prior incident of sexual assault on a child where incident had occurred eight years earlier, the evidence was introduced only to prove identity, and the jury was instructed that identity was the only purpose for which the evidence could be considered. People v. Apodaca, 58 P.3d 1126 (Colo. App. 2002).

Generally, evidence of prior acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. People v. Gardner, 919 P.2d 850 (Colo. App. 1995).

However, such evidence may be admissible for proof of, among other things, motive and intent. People v. Gardner, 919 P.2d 850 (Colo. App. 1995).

Evidence is subject to exclusion under section (b) only if it is offered to prove the defendant acted in conformity with a character trait. Prosecution clearly did not offer the evidence for that purpose. People v. Harland, 251 P.3d 515 (Colo. App. 2010).

Evidence with reference to another transaction than that charged is admissible only as bearing upon the question of whether or not the defendant had a plan or design to produce a

result of which the act charged was a part, and the jury can consider such evidence for no other purpose, for the defendant cannot be tried for or convicted of any offense not charged. Mays v. People, 177 Colo. 92, 493 P.2d 4 (1972).

Criteria used to determine admissibility of evidence of prior conduct to prove intent are (1) whether the defendant's intent is a material issue in dispute; (2) whether the prior conduct involved the same intent as in the charged offense; and (3) whether the probative value of the evidence outweighs its prejudicial effect. People v. Spoto, 772 P.2d 631 (Colo. App. 1988); Munson v. Boettcher & Co., 832 P.2d 967 (Colo. App. 1991); People v. Close, 867 P.2d 82 (Colo. App. 1993); People v. Underwood, 53 P.3d 765 (Colo. App. 2002).

Court properly admitted evidence of similar transactions in murder prosecution involving defendant's previous conduct of firing a handgun where such evidence was offered for the limited purpose of proving intent. People v. Willner, 879 P.2d 19 (Colo. 1994).

Proof of motive which is relevant and material not excluded. While evidence of offenses other than the one for which the defendant is on trial is not admissible, proof of motive will not be excluded merely because it may be prejudicial to the defendant, as long as it is relevant and material. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

Defendant's drawings and narratives of acts of violence that were similar to the manner in which the victim was killed were sufficiently similar so as to be logically relevant to defendant's motive, intent, and plan to commit the crime, and it was not error to introduce such evidence because intent was a material element required to be proven by the prosecution. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002).

Evidence of prior threats and acts of violence toward women admissible to establish motive for alleged attack on a woman. Evidence showed defendant's anger toward and hatred of women and could provide a basis for a jury finding that defendant used violence and threats of violence against women when they frustrated his desires in order to force them to comply with his wishes. People v. Cousins, 181 P.3d 365 (Colo. App. 2007).

Evidence admissible to show ill will. Ill will between the victim and the defendant is one purpose for which evidence of other crimes may be admissible. People v. Botham, 629 P.2d 589 (Colo. 1981); People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).

A prior attack by the defendant on the victim is admissible as evidence of intent, in that it is probative of malice and ill will toward the victim. People v. Curtis, 657 P.2d 990 (Colo. App. 1982).

Testimony related to activity allegedly occurring shortly before the time of the alleged crime, which was probative of ill will between the victim and defendant and relevant to the status of their relationship, is admissible. People v. St. John, 668 P.2d 988 (Colo. App. 1983).

Evidence of argument with passenger in defendant's own vehicle just prior to altercation with the victim, a driver of another vehicle, admissible. The evidence was used to show that defendant's angry state of mind persisted up to and included the time of the shooting and was permissible for jury to hear. People v. Rudnick, 878 P.2d 16 (Colo. App. 1993).

Evidence about defendant's emotional state after his friend left him at a convenience store three days prior to the charged offenses provided context for the jury and a more complete understanding of events leading up to the offenses at the friend's apartment. People v. Abu-Nantambu-El, 2017 COA 154, __ P.3d __.

Evidence that the night before the defendant shot the victim, he struck her and pulled her hair, was relevant to disproving defendant's claim that the shooting was an accident by showing the defendant's indifference to the victim's welfare and trial court's limiting instruction was sufficient to restrict the jury's consideration of evidence to that purpose. People v. Covington, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

To resolve an issue of admissibility of prior acts, a court must determine whether the proffered evidence relates to a fact that is of consequence to determination of the action, whether evidence makes existence of a consequential fact more probable or less probable than it would be without such evidence, whether the logical relevance is independent of the prohibited intermediate inference that the defendant has bad character and probably acted in conformity with such bad character, and whether probative value of evidence is substantially outweighed by danger of unfair prejudice. People v. Spoto, 795 P.2d 1314 (Colo. 1990); People v. Garner, 806 P.2d 366 (Colo. 1991); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); People v. Martinez, 32 P.3d 520 (Colo. App. 2001); People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); People v. Cousins, 181 P.3d 365 (Colo. App. 2007).

Test applied in Hock v. New York Life Ins. Co., 876 P.2d 1242 (Colo. 1994); People v. Harris, 892 P.2d 378 (Colo. App. 1994); Winkler v. Rocky Mtn Conference, 923 P.2d 152 (Colo. App. 1995); People v. Marquantte, 923 P.2d 180 (Colo. App. 1995); People v. Shepard, 989 P.2d 183 (Colo. App. 1999); People v. Martinez, 32 P.3d 520 (Colo. App. 2001); People v. Masters, 33 P.3d 1191 (Colo.

App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); People v. Rath, 44 P.3d 1033 (Colo. 2002); People v. Harrison, 53 P.3d 1103 (Colo. App. 2002); People v. Taylor, 131 P.3d 1158 (Colo. App. 2005); People v. Baker, 178 P.3d 1225 (Colo. App. 2007); Yusem v. People, 210 P.3d 458 (Colo. 2009); People v. Glasser, 293 P.3d 68 (Colo. App. 2011); People v. Conyac, 2014 COA 8M, 361 P.3d 1005; People v. Trujillo, 2014 COA 72, 338 P.3d 1039; People v. Harris, 2015 COA 53, 370 P.3d 231; People v. Bondsteel, 2015 COA 165, __ P.3d __; People v. Williams, 2016 COA 48, __ P.3d __; People v. Fortson, 2018 COA 46M, 421 P.3d 1236.

This test must be applied to issues of admissibility of prior acts, notwithstanding the language of § 16-10-301. The statute is permissive and contains no language that erodes the test. Thus, even when evidence of prior similar transactions is introduced in prosecutions specifically mentioned in the statute, an analysis under section (b) of this rule is still necessary. People v. Martinez, 36 P.3d 154 (Colo. App. 2001).

Spoto does not demand absence of an inference that a defendant has bad character and acts in conformity with such behavior; it only requires proof that evidence of bad character is logically relevant independent of such inference. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

Evidence of defendant's possession and ownership of several knives was probative independent of an intermediate inference regarding the defendant's character. In trial where defendant allegedly stabbed victim, defendant's possession and ownership of the knives made it more probable that defendant had a knife when victim was stabbed and that defendant inflicted the wounds. Therefore, an inference about the defendant's character was not the only possible relevance of the knives, and the trial court did not abuse its discretion by admitting them as evidence. People v. Cordova, 293 P.3d 114 (Colo. App. 2011).

Reversible error to admit defendant's statement about prior accusations of misconduct absent compliance with the requirements of Spoto and Garner. Defendant's statement alone is not sufficient to justify admission of the evidence. People v. Novitskiy, 81 P.3d 1070 (Colo. App. 2003).

A defendant is on notice of the permissible purposes for which evidence of the defendant's prior bad acts is being offered under section (b) when the prosecutor states, at the hearing on the prosecution's motion to introduce similar transaction evidence, that the evidence was being offered to establish identity, guilty knowledge, intent, design, and motive. The defendant may not later claim that the prosecutor failed to articulate a ''precise evidential hypothesis by which a material fact can be permissibly inferred from the prior misconduct independent of the inference prohibited by [this rule]''. People v. Harding, 983 P.2d 29 (Colo. App. 1998), 17 P.3d 183 (Colo. App. 2000).

Testimony about prior incidents of other, similar alleged misconduct by church counselor with other counselees was not manifestly erroneous and thus was not improperly admitted in a civil action. DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1994).

The rule is not limited in application only to evidence of other crimes but permits evidence of other wrongs or acts, provided the evidence is offered for the proof of a material issue and substantive and procedural prerequisites are met. People v. Campbell, 706 P.2d 431 (Colo. App. 1985); People v. Jackson, 748 P.2d 1326 (Colo. App. 1987); Douglas v. People, 969 P.2d 1201 (Colo. 1998).

The rule is not limited in application only to prior uncharged acts of the accused; the use of the word ''person'' in section (b) of this rule includes individuals other than the accused. People v. Harris, 892 P.2d 378 (Colo. App. 1994).

Evidence does not become inadmissible under this rule or under the ''rape shield'' statute, § 18-3-407, simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct. Where evidence of a person's prior acts is probative for reasons other than its tendency to show the person's propensity to perform similar acts at another time, the evidence is generally admissible. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Evidence of prior similar transactions is admissible in cases of sexual assault on a child if such evidence is offered to show a common plan, scheme, design, identity, modus operendi, motive, guilty knowledge, or intent. People v. Adrian, 744 P.2d 768 (Colo. App. 1987), aff'd, 770 P.2d 1243 (Colo. 1989); People v. Bolton, 859 P.2d 311 (Colo. App. 1993); People v. Leonard, 872 P.2d 1325 (Colo. App. 1993); People v. Snyder, 874 P.2d 1076 (Colo. 1994); People v. Williams, 899 P.2d 306 (Colo. App. 1995); People v. Underwood, 53 P.3d 765 (Colo. App. 2002).

Evidence of a prior similar transaction was admissible in a case of sexual assault where the evidence related to the defendant made it more probable that the defendant was implementing a common plan to force an older woman with disabilities to submit to intercourse by force or violence. People v. Shores, 2016 COA 129, 412 P.3d 894.

Evidence that defendant had sexually assaulted other female members of his family at his house was properly admitted as prior act evidence. People v. Heredia-Cobos, 2017 COA 130, 415 P.3d 860.

Prosecutor improperly referenced and elicited evidence of other uncharged acts of sexual assault and sexual misconduct for propensity purposes, and did so without first seeking to admit the evidence, presenting an offer of proof, or obtaining a ruling. The misconduct undermined the fundamental fairness of the trial and cast serious doubt on the reliability of the judgment of conviction, warranting reversal. People v. Fortson, 2018 COA 46M, 421 P.3d 1236.

A prior act does not need to be similar in every respect to be admissible. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

To refute the defense of recent fabrication, evidence of prior similar transactions is admissible in cases of sexual assault on a child. People v. Duncan, 33 P.3d 1180 (Colo. App. 2001).

Evidence of similar transactions in an incest case are admissible where there is sufficient and substantial similarity between the transactions and offense charged even though there were differences in the type of sexual activity. The evidence is also admissible on the issue of motive, and the trial court was not required to define motive for the jury. People v. Leonard, 872 P.2d 1325 (Colo. App. 1993).

When such prior similar transaction evidence is admitted, the court must require the prosecution to elect a specific act on which the jury is asked to convict or, in the alternative, provide the jury with a unanimity instruction. Woertman v. People, 804 P.2d 188 (Colo. 1991).

Evidence of prior criminal transactions is inadmissible where defendant was acquitted of similar act. The doctrine of collateral estoppel prevents the introduction of evidence of similar transactions for which a defendant has been acquitted. People v. Arrington, 682 P.2d 490 (Colo. App. 1983).

Evidence of other offenses is admissible where offenses are part of single transaction and an integral part of the total picture surrounding the offense with which the defendant is charged. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974); People v. Wells, 691 P.2d 361 (Colo. App. 1984); Litwinsky v. Zavaras, 132 F. Supp. 2d 1316 (D. Colo. 2001).

Or to establish chain of circumstances. Where evidence is not introduced to show a transaction as independent criminal activity, but is used as one circumstance in a chain of circumstances to establish the defendants' complicity, it is admissible. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Evidence of prior acts may be admissible to rebut self-defense and defense of property defenses. Douglas v. People, 969 P.2d 1201 (Colo. 1998).

Evidence of separate motor vehicle theft was relevant when thefts were similar, and when following a crash of the separate motor vehicle, defendant possessed identification stolen at the time of first theft and falsely identified himself to police as the person whose identification he had stolen. People v. Shepard, 989 P.2d 183 (Colo. App. 1999).

Defendant's prior act was admissible to prove absence of accident. Where the prior act at issue was a violent one committed against the same child one week before the incident of physical abuse for which the defendant was on trial and where the basis for the evidence was to disprove defendant's defense of accident, the trial court did not err in admitting prior acts of the defendant as similar transaction evidence. People v. Fulton, 754 P.2d 398 (Colo. App. 1987).

In an action based on allegations of trespass and deceptive trade practices, trial court did not abuse its discretion in admitting the following evidence of prior similar acts to demonstrate absence of mistake or accident: (1) Testimony regarding a dispute over access to a subdivision owned by defendants; (2) a letter to defendants concerning another access dispute; and (3) testimony regarding prior real estate litigation in which defendants were accused of selling property without proper title. Walter v. Hall, 940 P.2d 991 (Colo. App. 1996), aff'd on other grounds, 969 P.2d 224 (Colo. 1998).

Exception recognized to show continuing scheme. A limited and well-defined exception is recognized where a similar act tends to establish the defendant's criminal culpability for the crime charged by showing that it was part of a continuing scheme and, hence, not the result of a mistake. People v. Mason, 643 P.2d 745 (Colo. 1982).

Evidence of defendant's prior acts properly admitted to show there was no mistake of fact. People v. Rowe, 2012 COA 90, 318 P.3d 57.

Failure to instruct jury on limited purpose for which evidence of similar transactions was admitted was not plain error. People v. Tidwell, 706 P.2d 438 (Colo. App. 1985); People v. Lucero, 724 P.2d 1374 (Colo. App. 1986).

While it is the better practice to issue a limiting instruction to the jury contemporaneously with the introduction of similar transactions evidence, when such an instruction is not requested, the failure to give one is not reversible error so long as the trial court properly applied the balancing test required to resolve the issue of admissibility. People v. Pineda, 40 P.3d 60 (Colo. App. 2001).

Judge should repeat limited-purpose instruction in written instructions in order to safeguard against potential misuse of other-

crime evidence by the jury. People v. Garner, 806 P.2d 366 (Colo. 1991).

Evidence of other crimes, wrongs, or acts applies in civil cases if evidence relevant. While section (b) is more frequently applied in criminal prosecutions, it also applies in civil cases if the evidence is relevant to the issues. Coll. v. Scanlan, 695 P.2d 314 (Colo. App. 1985).

Evidence of a failure by a company to comply with a safety code or regulation at one point in time to support an allegation that the company failed to comply with safety regulations at another time does not satisfy any of the exceptions enumerated for admission of evidence of other crimes, wrongs, or acts. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

Evidence implicating defendant in another criminal case is admissible for purposes of identification. Hollis v. People, 630 P.2d 68 (Colo. 1981); People v. White, 680 P.2d 1318 (Colo. App. 1984).

Modus operandi. Where a witness testifies as to a second crime by the defendant, a crime for which the defendant is not being tried, the testimony is not prejudicial where it aids in the identification of the defendant, shows the same modus operandi, and where the judge gives a proper limiting instruction as to its use. People v. Dago, 179 Colo. 1, 497 P.2d 1261 (1972).

There is no error in the admission of evidence of another incident which, in addition to being closely proximate in time, involves features markedly similar to the offense charged. This evidence establishes a modus operandi that is highly probative of the issue of identity. People v. Madonna, 651 P.2d 378 (Colo. 1982).

To establish modus operandi as exception for the admission of another transaction, there must be a dissimilarity from the methods generally used in such offenses, and there must be a distinctive factor in the methods used. People v. Crespin, 631 P.2d 1144 (Colo. App. 1981).

Evidence of other crimes committed by the defendant is admissible where it is of similar crimes committed within the same geographical area within a few days, where similar methods were used, where the defendant himself introduced testimony pertaining to the transactions, and where the court followed proper procedures for the admission of such evidence. Stanmore v. People, 146 Colo. 445, 362 P.2d 1042 (1961), cert. denied, 368 U.S. 993, 82 S. Ct. 611, 7 L. Ed. 2d 529 (1962).

Modus operandi evidence of uncharged misconduct should be admitted only to prove the identity of the perpetrator. Defendant admitted that he was the one in the apartment with the informant, so there was no identity issue. The court erred in admitting the modus operandi evidence and the error was not harmless. People v. Williams, 2016 COA 48, __ P.3d __.

It is error to admit evidence of numerous crimes that are wholly dissimilar in character and committed hundreds of miles away from the scene of the crime charged and where it is admitted over the defendant's objections. Kostal v. People, 144 Colo. 505, 357 P.2d 70 (1960), cert. denied, 365 U.S. 804, 81 S. Ct. 471, 5 L. Ed. 462 (1961).

Evidence inadmissible even if elicited from defendant. Prejudicial evidence concerning other unrelated crimes elicited from the defendant on cross-examination does not make it admissible. Edmisten v. People, 176 Colo. 262, 490 P.2d 58 (1971).

Evidence of prior crime must be clear and convincing. The commission of the prior crime and the defendant's identity as the perpetrator of the crime must be shown by clear and convincing evidence. People v. Botham, 629 P.2d 589 (Colo. 1981).

Criteria used to determine admissibility of evidence of similar transactions in claims alleging fraud and violations of the Colorado Securities Act are: (1) Whether the proffered evidence relates to a material fact; (2) whether the evidence is logically relevant; (3) whether the logical relevance is independent of the intermediate inference that the defendants have bad character; and (4) whether the probative value is substantially outweighed by danger of unfair prejudice. Munson v. Boettcher & Co., Inc., 832 P.2d 967 (Colo. App. 1991); Abdelsamed v. New York Life Ins. Co., 857 P.2d 421 (Colo. App. 1992); People v. Rivera, 56 P.3d 1155 (Colo. App. 2002).

However, the trial court may properly admit similar transaction evidence under another evidentiary theory without complying with the procedural safeguards required by section (b). Thus, in a securities fraud case, evidence of a prior fraud conviction was admissible to show defendant's knowledge of prior misconduct that should have been disclosed to the victim. People v. Campbell, 58 P.3d 1148 (Colo. App. 2002).

Trial judge allowed substantial discretion when deciding admissibility of prior criminal activity. Because the trial judge must weigh the degree to which the charged criminal activity and an alleged prior criminal activity are similar, the bearing of the other transaction on the issues presented at the trial of the offense charged, and the degree to which the jury would be prejudiced by the other transaction, the trial judge is allowed substantial discretion when he decides regarding the admissibility of such evidence. People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974); People v. Hogan, 703 P.2d 634 (Colo. App. 1985).

Substantial discretion is accorded trial court to determine whether evidence of a similar transaction is relevant to a material issue and whether its relevance outweighs its prejudice.

People v. Crespin, 631 P.2d 1144 (Colo. App. 1981); Douglas v. People, 969 P.2d 1201 (Colo. 1998); People v. Rath, 44 P.3d 1033 (Colo. 2002).

Trial court's admission of evidence of other acts will be disturbed only when it is demonstrated that the trial court abused its discretion. Douglas v. People, 969 P.2d 1201 (Colo. 1998); People v. Harrison, 58 P.3d 1103 (Colo. App. 2002).

Trial court properly may base its preponderance of evidence determination solely on the parties' offers of proof. People v. Moore, 117 P.3d 1 (Colo. App. 2004).

Court need not conduct hearing where sufficient foundation established. A court's refusal to conduct an in camera hearing is proper where a sufficient foundation is established prior to the admission of evidence of other crimes. Mays v. People, 177 Colo. 92, 493 P.2d 4 (1972).

Although conditions should first be met. Where the trial court allows admission of evidence of other conduct of the defendant, there are four rather stringent conditions which should be met: (1) The prosecutor should advise the trial court of the purpose for which he offers the evidence; (2) if the court admits such evidence, it should then instruct the jury as to the limited purpose for which the evidence is being received and for which the jury may consider it; (3) the general charge should contain a renewal of the instruction on the limited purpose of such evidence; (4) the offer of the prosecutor and the instructions of the court should be in carefully couched terms — they should refer to ''other transactions'', ''other acts'', or ''other conduct'', and should eschew such designations as ''similar offenses'', ''other offenses'', ''similar crimes'', and so forth. Stull v. People, 140 Colo. 278, 344 P.2d 455 (1960); Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Including requiring prosecution to announce intention to offer evidence, and limiting instruction. Recognizing that evidence of past crimes has inhering in it damning innuendo likely to beget prejudice in the minds of the jurors, the best method requires that the prosecution announce its intention to offer evidence of other crimes for a limited purpose before it is introduced, and moreover, the trial court should issue a limiting instruction to the jury contemporaneously with the offering of such evidence, even though the defendant may not formally request such an instruction. People v. Scheidt, 182 Colo. 374, 513 P.2d 446 (1973).

Section (b) does not require pretrial notice as a prerequisite for admitting other bad act evidence. Even so, there may be circumstances in which such notice, even though not required by section (b), might be necessary to avoid prejudicial surprise to a defendant. People v. Warren, 55 P.3d 809 (Colo. App. 2002).

Trial court must give cautionary instructions limiting the purpose of evidence of similar offenses. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

Where evidence of other criminal activity tends to show scheme, plan, intent, or design, the evidence will be admitted for that limited purpose, and in such cases, the trial judge is required to instruct the jury on the limited purpose for which the evidence of other criminal acts is admitted. People v. Geller, 189 Colo. 338, 540 P.2d 334 (1975).

Where evidence of other crimes is admitted under one of the exceptions listed in section (b) of this rule, the trial court is required to give cautionary instructions limiting the purpose of the evidence. People v. Beasley, 43 Colo. App. 488, 608 P.2d 835 (1979); People v. Rivers, 727 P.2d 394 (Colo. App. 1986); People v. Leonard, 872 P.2d 1325 (Colo. App. 1993).

The court must instruct the jury as to the limited purpose for which evidence of prior similar transactions is admitted and for which the jury may consider it. People v. Adrian, 744 P.2d 768 (Colo. App. 1987), aff'd, 770 P.2d 1243 (Colo. 1989).

Court's failure to give limiting instruction when admitting evidence of defendant's other bad acts was not error, where defense did not request the instruction during defendant's cross-examination. People v. Marion, 941 P.2d 287 (Colo. App. 1996).

Court's omission from the initial limiting instruction of the explicit purpose for which the bad act evidence was admitted was not error. Court rectified any potential prejudice to defendant by later informing the jury of the purpose. In addition, the court's written instruction reminded the jury that certain evidence had been admitted for a limited purpose. People v. Warren, 55 P.3d 809 (Colo. App. 2002).

Evidence of similar wrongs or acts are admissible to prove intent and motive. Evidence of insurance company's ongoing pattern of purposeful delays in paying benefits and economic motives in causing delay in the case at hand was properly admitted. Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990).

Testimony by the personnel director of her personal knowledge of defendant's outbursts of temper, including one directed toward the corporate victim's president which resulted in defendant's firing, were admissible as tending to establish a motive for defendant to retaliate against the corporation with bomb threats which were the basis of the charge against defendant. People v. Reaud, 821 P.2d 870 (Colo. App. 1991).

Testimony of undercover officer relating to alleged similar meetings between the officer and defendant accused of distribution and sale and possession of a controlled substance, without any indication of criminal activity, does

not create an inference of other criminal acts and, therefore, was admissible to show the officer's ability to identify the defendant. People v. Tyler, 854 P.2d 1366 (Colo. App. 1993).

Reference to a "court appointed counselor" and a "court appointed therapist" by prosecution witnesses in sexual assault trial is not ''other crime'' evidence subject to the requirements of section (b). Trial court allowed the prosecution and other witnesses to refer to defendant's probation officer as a ''court appointed counselor'' and his offense-specific treatment provider as a ''court appointed therapist''. Because evidence of defendant's divorce was presented at trial, the court properly concluded that the jury could infer that defendant was in court-ordered counseling and therapy as part of the divorce proceedings and not as a condition of probation for a prior sexual assault conviction. People v. Mintz, 165 P.3d 829 (Colo. App. 2007).

Similar transaction evidence of whether the defendants engaged in a pattern or practice and a plan, scheme, or design in regard to the alleged fraud and violation of the Colorado Securities Act related to a material fact and the trial court erred in not allowing the plaintiffs to present such evidence where the probative value thereof was not substantially outweighed by the danger of unfair prejudice. Munson v. Boettcher & Co., Inc., 832 P.2d 967 (Colo. App. 1991).

Application of the doctrine of chances is inappropriate where a previous incident was not similar enough to the current case to make the objective statistical inference, since similarity is crucial when the theory of logical relevance is the doctrine of chances, and where there was only one prior incident. People v. Spoto, 795 P.2d 1314 (Colo. 1990).

Evidence of other acts need not satisfy the doctrine of chances to also satisfy the second and third prongs of the four-part admissibility test articulated in People v. Spoto test. While the doctrine of chances provides one avenue by which other acts evidence can fulfill two components of that analysis, trial courts have no obligation to apply the doctrine of chances when applying People v. Spoto. People v. Jones, 2013 CO 59, 311 P.3d 274.

Evidence of similar incidents of forging and impersonating victim relevant to establish context in which the fraudulent forgeries and impersonations occurred. People v. Tyer, 796 P.2d 15 (Colo. App. 1990).

Evidence of prior escape attempts and willingness to use force against law enforcement officers was admissible in trial for murder of deputy during escape attempt. People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).

However, trial court's failure to give limiting instruction held not plain error. Although the better practice is for trial court to issue a contemporaneous limiting instruction sua sponte, the failure to do so held not to be plain error. People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Reversal not required because trial court fails to sua sponte instruct a jury on the limited purposes for which a jury could consider evidence admitted under section (b). People v. Bondsteel, 2015 COA 165, __ P.3d __.

No reversible error where cautionary instructions given. When evidence relating to other prior incidents of a similar nature between the defendant and the prosecuting witness is admitted and the court gives an oral cautionary instruction to the jury on the limited relevance of similar act testimony at the conclusion of the prosecuting witness's testimony and a similar written instruction when the case is submitted to the jury, there is no reversible error. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

Witness's inadvertent reference to earlier trial on same charges, promptly followed by corrective instructions from the court, held not prejudicial. People v. Fears, 962 P.2d 272 (Colo. App. 1997).

Failure to give instruction on petty offense harmless error. Where evidence of a petty offense by a defendant is introduced during a trial for a felony, the trial judge should instruct the jury as to its limited purpose, but his failure to do so is harmless error, considering the nature of the petty offense as compared with the gravity of the felony charge against the defendant. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

No plain error for admission of prior criminal history. The testimony in this case referred to a criminal matter remote in time and to a criminal case without confirmation that the case resulted in a conviction, therefore, there was no plain error. People v. McKinney, 80 P.3d 823 (Colo. App. 2003), rev'd on other grounds, 99 P.3d 1038 (Colo. 2004).

Minor variations from standards for admission of evidence of other crimes not prejudicial. Stanmore v. People, 146 Colo. 445, 362 P.2d 1042 (1961), cert. denied, 368 U.S. 993, 82 S. Ct. 611, 7 L. Ed. 2d 529 (1962).

Evidence of plaintiff's prior acts of negligence was admissible to support defendant's theory that negligence of plaintiff and others was the sole cause of the accident. Armentrout v. FMC Corp., 819 P.2d 522 (Colo. App. 1991).

Trial court did not err when it allowed the prosecution to introduce evidence of defendant's prior felony convictions as character evidence where the record supports the trial court's finding that the defendant opened the door for the prosecution to pose questions of the defendant's character by eliciting testimony that the defendant's aggression was directed only at a car until the victim provoked him, that aggressive behavior against the car was unusual, that

defendant's girl friend had never witnessed that type of aggressive behavior, and that defendant was an "easy-going person" and had never harmed the witness. People v. Pennese, 830 P.2d 1085 (Colo. App. 1991).

Because defense initially adduced evidence concerning prior misconduct, trial court was not required to comply with the procedural requirements under section (b). People v. Deroulet, 22 P.3d 939 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 520 (Colo. 2002).

Evidence of defendant's prior domestic violence conviction was properly admitted. The conviction was relevant for impeachment purposes and was not prejudicial since it was a single, isolated, brief statement that was not a significant part of the prosecution's cross-examination or closing argument. People v. Sommers, 200 P.3d 1089 (Colo. App. 2008).

While section (b) is more frequently applied in criminal prosecutions, it also applies in civil cases if the proffered evidence is relevant to the issues. Munson v. Boettcher & Co., Inc., 832 P.2d 967 (Colo. App. 1991).

Evidence of previous drug transactions between defendant and witness admissible to refute witness's testimony that their relationship was casual and pertained only to radio-controlled car racing, where trial court weighed probative value and potential prejudicial effect of evidence before ruling on admissibility. People v. Miller, 890 P.2d 84 (Colo. 1995).

Evidence that defendant had supplied witness with methamphetamine was relevant and admissible to refute defendant's claim that she did not knowingly possess controlled substance. People v. Warren, 55 P.3d 809 (Colo. App. 2002).

Court properly admitted evidence of defendant's drug dealing. The evidence related to material facts of identity, intent, and motive. The evidence in relation to other evidence at trial tended to show that defendant was the killer. People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011), rev'd on other grounds, 2014 CO 21, 321 P.3d 487.

Court did not err in allowing factual evidence of defendant's previous failure to register as a sex offender conviction in subsequent failure to register trial. The evidence showed defendant's knowledge of the requirement and negated any argument of mistake. People v. Foster, 2013 COA 85, 364 P.3d 1149.

Evidence of victim's letter to the court, over defendant's objection, was not admitted as proof of other acts but was properly admitted solely for impeachment purposes. People v. Covington, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

Where defense is based on defendant's claim that he acted under duress, the jurors' perceptions regarding his credibility and weight to be given to his testimony substantially affect the outcome of the trial. Under these circumstances, refusal to admit evidence of the defendant's character for truthfulness is grounds for reversal. People v. Meinerz, 890 P.2d 130 (Colo. App. 1994).

Court erred in admission of other act evidence. The court wrongfully admitted evidence regarding: (1) Defendant's ownership of other weapons and knives that were unlike the murder knife; (2) defendant's training in martial arts and self-defense; (3) defendant's possession of reading material on martial arts and the use of knives; (4) defendant's drawing from several days after the murder; and (5) defendant's previous two dissimilar bar fights. Kaufman v. People, 202 P.3d 542 (Colo. 2009).

Trial court's error in admitting prior bad act evidence and limiting it to one count was not harmless error relating to the two remaining counts. It was error to admit the evidence for one count since the evidence's danger of unfair prejudice substantially outweighed any probative value. All three counts included a similar element regarding sexual conduct, and the prosecutor's opening and closing statements repeatedly urged the jury to consider the evidence beyond its limited scope, implying it was relevant to all counts. Therefore, it could not be presumed that the jury would follow the court's instruction limiting the evidence to only one of the three counts. All three convictions were reversed. Perez v. People, 2015 CO 45, 351 P.3d 397.

Court properly admitted other act evidence regarding defendant's knife and bayonet training and his religious beliefs. Kaufman v. People, 202 P.3d 542 (Colo. 2009).

Any error in admitting evidence was harmless beyond a reasonable doubt where such evidence consisted of exhibits denoting a charge originally filed against defendant prior to his entry into a plea agreement on the conviction that formed the basis for his adjudication as a habitual criminal and records from Ohio showing the charges for which defendant was convicted. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

Any error in admitting testimony that someone matching defendant's description was seen driving defendant's car erratically and at a high rate of speed four hours prior to the accident did not substantially influence the verdict or affect the fairness of the trial. People v. Medrano-Bustamante, 2013 COA 139, 412 P.3d 581, aff'd in part and rev'd in part on other grounds sub nom. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Similar transaction evidence held admissible. People v. Herrera, 633 P.2d 1091 (1981); People v. Mason, 643 P.2d 745 (Colo. 1982); People v. Adams, 678 P.2d 572 (Colo. App. 1984); People v. Montoya, 703 P.2d 606 (Colo.

App. 1985); People v. Mathes, 703 P.2d 608 (Colo. App. 1985); People v. Hogan, 703 P.2d 634 (Colo. App. 1985); O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986); People v. Conley, 804 P.2d 240 (Colo. App. 1990); People v. Leonard, 872 P.2d 1325 (Colo. App. 1993).

Evidence of prior criminal, wrongful, or bad acts perpetrated against others was inadmissible where the defendant failed to testify that he had knowledge of these acts and acted on the basis of that knowledge, and the trial court's rejection of such evidence was not an abuse of discretion. People v. Ibarra, 849 P.2d 33 (Colo. 1993).

No abuse of discretion found in admitting testimony regarding previous explosions not involving defendant when such testimony was briefly elicited during cross-examination of a witness to impeach witness's testimony about the safeness of natural gas and so limited in scope and use. Bennett v. Greeley Gas Co., 969 P.2d 754 (Colo. App. 1998).

It was not impermissible profiling where a psychological theory and analysis, founded on research and study, was used to provide a framework for the crime at hand and to examine and to give context to defendant's previous acts that were independently admissible; evidence was properly admitted since it was neither logically irrelevant nor unduly prejudicial, confusing, misleading, time-consuming, or cumulative. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

Evidence showing that defendant had never been convicted of a crime was not evidence of a "pertinent trait". Further, nonoccurrence evidence is improper under C.R.E. 405 because it is not in the form of an opinion and it does not describe a specific instance of conduct. People v. Goldfuss, 98 P.3d 935 (Colo. App. 2004).

No abuse of discretion when trial court joined two sexual assault cases against defendant involving two victims, his daughters. The evidence from each case would have been admissible in the other case, the evidence was material to defendant's intent and common plan, and the evidence made it more likely defendant committed the crimes. Defendant's claim that he would have testified in one case, but not the other, making joinder improper did not rise to the level of prejudice. Defendant was still able to show the jury a police interview in which he claimed the same intoxication defense he claimed he would have testified to had the charges involving the other victim been tried separately. People v. Curtis, 2014 COA 100, 350 P.3d 949.

Trial court did not abuse its discretion in limiting cross-examination of witness's involvement in a second robbery for which the witness was not convicted. The witness had already admitted past deceptions, and additional inquiry into the elaborate robbery scheme would have, at most, provided one more instance of that conduct. The trial court's decision that the information would have been cumulative and could confuse the jury was reasonable. People v. Clark, 2015 COA 44, 370 P.3d 197.

Trial court did not abuse its discretion in limiting cross-examination of witness's involvement in a theft for which the witness was not convicted. The trial court reasonably determined that the defense attorney's follow-up question regarding the theft was not merely aimed at impeaching his credibility, but at maligning his character and conduct generally. People v. Clark, 2015 COA 44, 370 P.3d 197.

Evidence of defendant's other bad acts related to the family pets and step-siblings was relevant using the theory of the doctrine of chances to show that defendant's daughter's death was not accidental, but rather from an act of the defendant. In each instance, the defendant lost his temper and became physically abusive when a child or pet urinated in the house, the same circumstances that led to his daughter's death. People v. Weeks, 2015 COA 77, 369 P.3d 699.

Court properly admitted previous incident evidence based on imprecise offer of proof by the prosecution because the court explicitly acknowledged the inaccuracy in the second statement of the offer and still found the offer sufficient. People v. Raehal, 2017 COA 18, 401 P.3d 117.

Court's admission of sex toys and pornography that were not identified by the victims or found in a location described by the victims was in error. But the error does not require reversal since there was no reasonable probability that the evidence contributed to the conviction. People v. Relaford, 2016 COA 99, 409 P.3d 490.

Court erred in admitting prior act evidence that defendant hid from the police in a previous incident when those circumstances were not logically relevant to the question in this case of whether defendant knew police were chasing him or not. People v. Stewart, 2017 COA 99, 417 P.3d 882.

Applied in People v. Roybal, 775 P.2d 67 (Colo. App. 1989), cert. denied, 785 P.2d 917 (Colo. 1989); People v. Blehm, 791 P.2d 1177 (Colo. App. 1989), aff'd in part and rev'd in part, 817 P.2d 988 (Colo. 1991); People v. Adams, 867 P.2d 54 (Colo. App. 1993); People v. Collie, 995 P.2d 765 (Colo. App. 1999); People v. Cooper, 104 P.3d 307 (Colo. App. 2004).

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. Except as limited by §§ 16-10-301 and 18-3-407, in cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

(Federal Rule Identical Except for Statutory Limitation.)

Source: (b) amended September 29, 2005, effective January 1, 2006.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence'', see 58 U. Colo. L. Rev. 1 (1986-87).

Evidence may show character trait of aggression of victim. When the purpose of the evidence is to show a pertinent character trait of the victim from which it may be inferred that he was the initial aggressor, that trait may be shown by specific instances of past conduct. People v. Jones, 635 P.2d 904 (Colo. App. 1981).

But where theory of defense was that homicide was committed in self-defense against a homosexual assault and the victim's alleged homosexuality itself would not prove an element of self-defense, evidence of the victim's homosexuality could only be introduced via reputation or opinion evidence, not via a specific instance of conduct. People v. Miller, 981 P.2d 654 (Colo. App. 1998).

Reputation and rumor distinguished. People v. Erickson, 883 P.2d 511 (Colo. App. 1994).

Evidence in the form of reputation or opinion concerning a witness' character for truthfulness may be introduced to support the credibility of the person when the witness' character for truthfulness has been attacked; however, such testimony must be based on opinion held generally in a broad community. People v. Ayala, 919 P.2d 830 (Colo. App. 1995).

Reputation is distinguished from rumor in that is must be established over a period of time. People v. Ayala, 919 P.2d 830 (Colo. App. 1995).

Trial court has the responsibility to ensure that an adequate foundation has been laid for the introduction of reputation evidence. People v. Erickson, 883 P.2d 511 (Colo. App. 1994).

Defendant's offer of proof, consisting of opinions of two unnamed declarants, regarding victim's sexual orientation was mere rumor and not admissible as evidence of reputation in the community. People v. Erickson, 883 P.2d 511 (Colo. App. 1994).

Improper use of character evidence by permitting the prosecution to present evidence regarding the violent character of defendant's witnesses, purportedly in order to challenge their testimony regarding defendant's nonviolent character, was not objected to at trial court level on grounds of improper character evidence, and under standard of plain error, the admission of the improper character evidence did not so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. People v. Deroulet, 22 P.3d 939 (Colo. App. 2000), rev'd on other grounds, 48 P.3d 520 (Colo. 2002).

Applied in People v. Jones, 675 P.2d 9 (Colo. 1984); People v. Thomas, 694 P.2d 1280 (Colo. App. 1984).

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Rule 406: Admissibility of Evidence Of Habit or Routine Practice'', see 23 Colo. Law. 2747 (1994).

Rationale behind rule. In case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing, than that he acted otherwise. Bloskas v. Murray, 646 P.2d 907 (Colo. 1982).

Testimony that a person is a "cautious driver" is character evidence under CRE 404 and not habit evidence under this rule. People v. T.R., 860 P.2d 559 (Colo. App. 1993).

Applied in Bloskas v. Murray, 44 Colo. App. 480, 618 P.2d 719 (1980); Columbia Sav. and Loan Ass'n v. Zelinger, 794 P.2d 231 (Colo. 1990).

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Federal Rule Identical.)

COMMITTEE COMMENT

The phrase ''culpable conduct'' is not deemed to include proof of liability in a ''strict liability'' case based on defect, where the subsequent measures are properly admitted as evidence of the original defect. *But see* § 13-21-404, C.R.S. (1978 Supp.).

ANNOTATION

Law reviews. For article, ''Rule 407: Subsequent Remedial Measures?'', see 20 Colo. Law. 895 (1991). For article, ''Applicability of C.R.E. 407 In Federal Court'', see 34 Colo. Law. 77 (Jan. 2005).

This rule is applicable in product liability cases involving allegation of inadequate warnings. Uptain v. Huntington Lab, Inc., 723 P.2d 1322 (Colo. 1986).

The "feasibility of precautionary measures" exception to this rule is applicable when the defendant contests the feasibility of precautionary measures at the time of the incident. Evidence of ''subsequent remedial measures'' may be used to impeach testimony that precautionary measures were not feasible at the time of the incident. Duggan v. Weld County Bd. of Comm'rs, 747 P.2d 6 (Colo. App. 1987).

Testimony as to subsequent remedial measures proper for impeachment. In a slip and fall case, where landlord testified to changes in a ditch owned by the landlord only prior to the time of the fall, questioning concerning whether landlord had previously testified that changes occurred after the fall was for impeachment purposes and was proper under this rule. Vallejo v. Eldridge, 764 P.2d 417 (Colo. App. 1988).

Evidence of subsequent remedial measures is admissible as evidence concerning the issue of visibility of the obstacle and to impeach expert on that issue. Martinez v. W.R. Grace Co., 782 P.2d 827 (Colo. App. 1989).

Evidence that one of the defendants had recommended installation of air inlet shutoff devices on gas hauling trucks fell within one of the exceptions of the rule. In light of defense offered by defendants that the devices create a hazard rather than a safety feature when used on truck engines, the evidence directly impeached the contention of the defendants. White v. Caterpillar, Inc., 867 P.2d 100 (Colo. App. 1993).

Evidence that, after plaintiff's accident, defendant changed its manual to move a warning from the end of a section to the beginning of the same section is excluded. To the extent that this evidence was offered to prove negligence or culpable conduct, it was not admissible. White v. Caterpillar, Inc., 867 P.2d 100 (Colo. App. 1993).

Only measures which take place after the "event" are excluded under this rule. Combined Com. Corp. v. Pub. Serv. Co., 865 P.2d 893 (Colo. App. 1993).

Evidence of subsequent remedial measures may be admitted to prove feasibility of precautionary measures, if that issue is controverted. Biosera, Inc. v. Forma Scientific, Inc., 941 P.2d 284 (Colo. App. 1996), aff'd, on other grounds, 960 P.2d 108 (Colo. 1998).

The provisions of this rule do not apply in strict liability claims that are premised on a design defect theory. The explicit language of the rule does not permit the exclusion of evidence of remedial actions in strict liability claims premised on design defect because the manufacturer's conduct, whether culpable or negligent, is not germane. Forma Scientific, Inc. v. Biosera, Inc., 960 P.2d 108 (Colo. 1998).

Applied in Larsen v. Archdiocese of Denver, 631 P.2d 1163 (Colo. App. 1981).

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

(Federal Rule Identical.)

Source: Entire rule amended and effective September 27, 2007.

ANNOTATION

Law reviews. For article ''ADR: Explanations, Examples and Effective Use'', see 18 Colo. Law. 843 (1989). For article, ''Admissibility of a Party's Own Settlement Offer'', see 21 Colo. Law. 1893 (1992).

This rule applies to every offer of settlement and makes such offers inadmissible to prove liability. Therefore, the rule does not impose a condition on an offer of settlement. Further, an offer may be admissible under this rule for purposes other than to prove liability. Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

Whether the statements contained in a letter plaintiff's counsel had written were actually made in the course of a "settlement negotiation" or "compromise" is a question of fact, and since there was evidentiary support for the trial court's finding that the letter was part of an effort to compromise the plaintiff's claims, that finding is binding on appeal. H&H Distributors v. BBC Intern., 812 P.2d 659 (Colo. App. 1990).

Even if the letter plaintiff's counsel had written constituted an "admission of fact", plaintiff's ''admission'' would be excludable under CRE 408 because it was made in a letter offering to settle the dispute. H&H Distributors v. BBC Intern., 812 P.2d 659 (Colo. App. 1990).

A document entitled "Settlement Detail" was admissible because it was a status report for defendant's use in the ordinary course of business, not for the purpose of discussing settlement with plaintiff. Scott Co. of California v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991).

Situations in which someone acknowledges that a certain claim is valid or is valid to a certain extent, or statements to the effect: "I think your claim is worth 'X' number of dollars," are not offers within the meaning of CRE 408. Scott Co. of California v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991).

The threshold question, which is a question of fact for the trial court, is whether the conduct or statements were made in settlement negotiations, for if they were not, the rule is inapplicable. Scott Co. of California v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991).

This rule applies to statements made in regard to a settlement for a civil claim, not a criminal charge; therefore, statements made by a defendant to police concerning criminal charges are admissible at trial. People v. Butson, 2017 COA 50, 410 P.3d 744.

Evidence supported trial court's finding and was binding on appeal that the document was admissible because it was a status report prepared for defendants' use in the ordinary course of business, not for the purpose of discussing settlement with plaintiff. Scott Co. of California v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991).

No error in admitting statements by plaintiff that a representative of defendants stated that he felt plaintiff's claims had merit in certain amount where court stated that situations in which someone acknowledges that a certain claim is valid or is valid to a certain extent, or statements to the effect: ''I think your claim is worth 'X' number of dollars,'' are not offers within the meaning of this rule. Scott Co. of California v. MK-Ferguson, 832 P.2d 1000 (Colo. App. 1991).

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(Federal Rule Identical.)

ANNOTATION

Evidence of defendant's offer to pay a plaintiff's medical expenses not admissible to establish liability. Bonser v. Shainholtz, 983 P.2d 162 (Colo. App. 1999), rev'd on other grounds, 3 P.3d 422 (Colo. 2000).

Rule 410. Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty

Except as otherwise provided by statutes of the State of Colorado, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere,* or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in any connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

This rule shall be superseded by any amendment to the Colorado Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the effective date of these Colorado Rules of Evidence.

COMMITTEE COMMENT

The Committee wishes to advise the Court of a proposed Federal Amendment to Rule 410 as follows:

Rule 410. **Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of *the following* is not admissible against the person who made the plea or *was a party to the discussions, in any civil or criminal proceeding:*

(1) *a plea of guilty which was later withdrawn;*

(2) *a plea of nolo contendere;*

(3) *plea discussions with the attorney for the government, concerning the crime charged or any other crime, which do not result in a plea of guilty or which result in a plea of guilty later withdrawn; or*

(4) *statements made in the course of or as a consequence of such pleas or plea discussions.*

However, *such* a statement is admissible *in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced,* or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FRE ADVISORY COMMITTEE NOTE: Present Rule 410 conforms to Rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to Rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; *see* Advisory Committee Note thereto. The amendment proposed above would make comparable changes in Rule 410.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979).

Application of this rule, when read in light of Crim. P. 11 (e)(6) and § 16-7-303, requires the exclusion of evidence of statements made by defendant during plea bargaining process only in regard to plea discussions with the attorney for the government. People v. Rollins, 759 P.2d 816 (Colo. App. 1988).

While the prosecuting attorney need not be physically present, his or her knowledge and consent to be bound by the plea discussions is an essential prerequisite to application of the rule. People v. Martinez, 36 P.3d 154 (Colo. App. 2001).

Defendant's unilateral choice to provide statements to law enforcement officers unauthorized to conduct plea negotiations failed to transform the statements into disclosures made ''in any connection with'' any offers to plead guilty. Such statements, therefore, did not fall within the ambit of this rule. People v. Martinez, 36 P.3d 154 (Colo. App. 2001).

Since this rule is substantially the same as Fed. R. Evid. 410, absent case authority in Colorado, federal cases on issue of whether a statement by defendant constitutes an inadmissable statement during plea negotiations are instructive in interpretations of this rule. People v. Rollins, 759 P.2d 816 (Colo. App. 1988).

"Conviction" as used in the habitual offender statute, includes a judgment of conviction entered upon a plea of nolo contendere. People v. Windsor, 876 P.2d 55 (Colo. App. 1993).

In the context of the bail bond statute, a plea of guilty, when accepted by the court which grants a deferred judgment and sentence, constitutes a ''conviction''. Evidence of the guilty plea is no longer admissible, however, after successful completion of the period of the deferred sentence. Hafelfinger v. District Court, 674 P.2d 375 (Colo. 1984).

A letter from the defendant to the county court judge constitutes an offer to plead nolo contendere to the crime charged and, therefore, should not have been admitted where the letter stated that the defendant did not want to contest the charges against him, that he did not wish to remain free, and that he hoped the court would exercise mercy and send him to a minimum security facility. People v. Flores, 902 P.2d 417 (Colo. App. 1994).

Where defendant was the first to refer to his initial insanity plea, he could not claim error when the court allowed the prosecution to explore his insanity plea. People v. Kruse, 819 P.2d 548 (Colo. App. 1991).

This rule does not bar the introduction, for impeachment purposes, of voluntary statements made to prosecutors after the acceptance of a plea agreement and the plea is subsequently withdrawn. People v. Butler, 929 P.2d 36 (Colo. App. 1996).

Sua sponte hearing on voluntariness not required, if there is no basis in the record for concluding the voluntariness of statements might be challenged. People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000).

Statements in the court file, including defendant's written statement in support of a rejected plea agreement, are "on the record" and may be used for impeachment purposes. People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000).

Defendant's statements made during polygraph not admissible under this rule when polygraph conducted as part of plea negotiation. Here, prosecution asked defendant to take a polygraph to see ''what type of plea may or may not be made'', thus constituting part of a plea negotiation; therefore, defendant is entitled to the implied promise of this rule. People v. Garcia, 169 P.3d 223 (Colo. App. 2007).

Statements defendant made in a federal case in accepting guilty plea and not in allocution for purposes of sentencing are admissible against the defendant in a state court case. People v. Rabes, 258 P.3d 937 (Colo. App. 2010).

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Rule 411: Permitting Evidence of Insurance to Show Witness Bias'', see 30 Colo. Law. 41 (Jan. 2001). For article, ''Rule 411: Excluding Evidence of In-

surance Offered to Show Witness Bias'', see 38 Colo. Law. 17 (Jan. 2009).

Allusion to insurance coverage improper. Evidence of a party's liability insurance is irrelevant to the question of whether he acted negligently or otherwise, and as such, any allusion to insurance coverage is improper. Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); Jacob v. Com. Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986).

However, mere inadvertent or incidental mention of insurance before the jury does not automatically call for a mistrial. Unless prejudice is shown, there is no reversible error in denying a mistrial. Jacob v. Com. Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986).

Court properly denied mistrial motion where party, rather than counsel, made incidental reference to insurance, counsel did not exploit the reference, party was promptly admonished by counsel, the court outside the presence of the jury ordered counsel to avoid any future reference to the existence of insurance, and movant failed to request jury instruction to disregard testimony. Miller v. Rowtech, LLC, 3 P.3d 492 (Colo. App. 2000).

And the fact that the defendant's expert witness had a "substantial connection" with the defendant's insurer is probative of bias, and admission of evidence of such connection was within the trial court's discretion. Bonser v. Shainholtz, 3 P.3d 422 (Colo. 2000).

Rule 412. (No Colorado Rule Codified)

COMMITTEE COMMENT

See 18-3-407, C.R.S.

(Adopted March 5, 1981, effective July 1, 1981.)

ARTICLE V
PRIVILEGES

Rule 501. Privileges Recognized Only as Provided

Except as otherwise required by the Constitution of the United States, the Constitution of the State of Colorado, statutes of the State of Colorado, rules prescribed by the Supreme Court of the State of Colorado pursuant to constitutional authority, or by the principles of the common law as they may be interpreted by the courts of the State of Colorado in light of reason and experience, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

ANNOTATION

Law reviews. For comment ''Reporter's Privilege: Pankratz v. District Court'', see 58 Den. L.J. 681 (1981). For article, ''Rule 501: The Privilege of Self-Critical Analysis'', see 24 Colo. Law. 1291 (1994).

Rule applies to all stages of an action and is applicable to pretrial discovery. Sherman v. District Court, 637 P.2d 378 (Colo. 1981).

Third persons may testify to overheard confidential conversations. If parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as police officers or indifferent bystanders, such third persons are not prohibited from testifying to what they heard. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

News reporter has no privilege to refuse to respond to subpoena. Where a news reporter, who is a first-hand observer of criminal conduct, is subpoenaed to testify and to produce relevant documents in the course of a valid grand jury investigation or criminal trial, there is no privilege under the Colorado constitution to refuse to respond to a subpoena. Pankratz v. District Court, 199 Colo. 411, 609 P.2d 1101 (Colo. 1980).

Hospital inspection committees' privilege not expanded. Absent legislative action and in light of the general policy favoring liberal dis-

covery, the public interest in the confidentiality of hospital inspection committees is insufficient to warrant judicial expansion of the privilege contained in § 12-43.5-102(3)(e). Sherman v. District Court, 637 P.2d 378 (Colo. 1981).

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Colorado Proceeding or to a Colorado Office or Agency; Scope of a Waiver. When the disclosure is made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Colorado proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government, the disclosure does not operate as a waiver in a Colorado proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following C.R.C.P. 26(b)(5)(B).

(c) Disclosure Made in a Federal or other State Proceeding. When the disclosure is made in a proceeding in federal court or the court of another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Colorado proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Colorado proceeding; or

(2) is not a waiver under the law governing the state or federal proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Colorado court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Colorado proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) ''attorney-client privilege'' means the protection that applicable law provides for confidential attorney-client communications; and

(2) ''work-product protection'' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Source: Adopted, effective March 22, 2016.

ANNOTATION

Law reviews. For article, ''Colorado Rule of Evidence 502: Preserving Privilege and Work Product Protection in Discovery'', see 45 Colo. Law. 19 (Oct. 2016).

ARTICLE VI
WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules, or in any statute of the State of Colorado.

COMMITTEE COMMENT

The present rule preserves the general Colorado rule under § 13-90-101, *et seq.,* C.R.S.; and the exceptions listed in §§ 13-90-102 through 13-90-108.

ANNOTATION

Law reviews. For article ''The Child Witness'', see 22 Colo. Law. 1201 (1993).

Determination within trial court's discretion. Determination of the competency of a witness is a matter within the trial court's discretion. People v. District Court, 647 P.2d 1206 (Colo. 1982).

Testimonial incapacity due to age is not a bar to admission of a hearsay statement which would otherwise be admissible in evidence as res gestae. People v. Roark, 643 P.2d 756 (Colo. 1982).

Witness presumed competent when never adjudicated insane. People v. Galloway, 677 P.2d 1380 (Colo. App. 1983).

A witness's intoxication, alone, is not sufficient to determine that the witness is incompetent to testify. There is nothing in the record that indicated the witness lacked the capacity to observe, recollect, communicate, and understand the oath to tell the truth. The witness was thoroughly cross-examined by defense counsel and the court informed the jury of the witness's intoxication status. There was no error in allowing the witness's testimony. People v. Alley, 232 P.3d 272 (Colo. App. 2010).

Further, a witness's intoxication, alone, does not require the court to conduct a competency hearing. The court has wide latitude to determine whether to admit an intoxicated witness's testimony and it is the jury's role to determine the witness's credibility. People v. Alley, 232 P.3d 272 (Colo. App. 2010).

Procedures for cases involving posthypnotic testimony are as follows: (1) Party intending to elicit such testimony at trial should timely advise opposing party of that fact and make available for inspection any records dealing with the hypnosis sessions. (2) The proponent of the testimony bears the burden of establishing the reliability of such testimony whenever a challenge is made to its admissibility. (3) The preponderance of evidence is the suitable standard for resolving this issue. People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Hypnotized witness competent to testify to statements made prior to hypnosis if there is an accurate record of prehypnotic recollection which helps insure reliability. People v. Angelini, 706 P.2d 2 (Colo. App. 1985).

Posthypnotic testimony. Trial courts must make an individualized inquiry in each case to determine whether the trial testimony of a witness who has been hypnotized will be sufficiently reliable to qualify for admission. This rule is incompatible with either a per se rule of admissibility or a per se rule of inadmissibility. To the extent that People v. Quintanar, 659 P.2d 710 (Colo. App. 1982), adopts such a per se rule of inadmissibility, it is expressly overruled. People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

The central inquiry at a challenge to admissibility is whether, notwithstanding the events occurring during the hypnosis session, the witness' trial testimony will be sufficiently reliable to be admissible. The trial court should consider the totality of circumstances bearing on the issue of reliability and should make adequate findings so as to permit meaningful appellate review. People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied, 485 U.S. 990, 108 S. Ct. 1296, 99 L. Ed. 2d 506 (1988).

Witness who has been hypnotically relaxed without questioning or suggestion has not thereby been rendered incompetent to testify, although evidence of relaxation technique may be used to impeach witness' credibility. People v. McKeehan, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988).

Applied in Wise v. Hillman, 625 P.2d 364 (Colo. 1981).

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Admissibility of Governmental Studies to Prove Causation'', see 11 Colo. Law. 1822 (1982). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002).

This rule is a specialized application of CRE 104(b) regarding conditionally relevant evidence. In a personal injury case by a husband against his employer, the question of whether the husband's spouse had personal knowledge as to the husband's admissions regarding the fraudulent nature of his claim was for the jury to determine in accordance with CRE 104(b). The trial court erred in not admitting, as conditionally relevant evidence, testimony of a wife as to admissions made by the wife's spouse about the fraudulent nature of his personal injury claim against his employer even though there was an issue about whether the admission was actually made by the spouse or based on the wife's dream. The proper analysis by the court in determining the admissibility of the wife's testimony should have been whether the jury could reasonably find by a preponderance of the evidence that the conditional fact, i.e. that the wife had personal knowledge of admissions made by her spouse regarding the fraudulent nature of his claim. Burlington Northern R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

The threshold for establishing the personal knowledge requirement is not very high and may be inferable from sources other than the witness and from the total circumstances surrounding the matter that is the subject of the witness's testimony. As long as there is evidence before the trial court such that the jury could reasonably find that the witness has personal knowledge of the event, the witness should be permitted to testify and the question of credibility and weight should be left for the jury to resolve. Burlington Northern R. Co. v. Hood, 802 P.2d 458 (Colo. 1990); People v. Garcia, 826 P.2d 1259 (Colo. 1992).

Trial courts may allow summary witness testimony if, in their discretion, they determine that the evidence is sufficiently complex and voluminous that a summary witness would assist the trier of fact. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

In those circumstances, summary witnesses may satisfy this rule's personal-knowledge requirement by examining the underlying documentary evidence on which they based their summary testimony. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

A better practice is to issue a limiting instruction in conjunction with the testimony. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Where the witness was not qualified as an expert and the witness had no personal experience with the maintenance expenses on the property, evidence presented as to the amount of future maintenance expenses was legally insufficient. Pomeranz v. McDonald's Corp., 843 P.2d 1378 (Colo. 1993).

Testimony of summary witness who did not have personal knowledge admissible under this rule. Witness who reviewed and summarized documents could provide the jury with a summary analysis of the documents and the information contained in the documents that had been admitted into evidence. Just in Case Bus. Lighthouse, LLC v. Murray, 2013 COA 112M, 383 P.3d 1, aff'd, 2016 CO 47M, 374 P.3d 443.

Applied in Wise v. Hillman, 625 P.2d 364 (Colo. 1981); Nat'l Sur. Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982); Graham v. Lombardi, 784 P.2d 813 (Colo. App. 1989).

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

(Federal Rule Identical.)

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.
(Federal Rule Identical.)

ANNOTATION

A translating witness may testify without first being certified as an interpreter if he or she has personal knowledge of the relevant conversation or evidence, is capable of testifying to a translation of its contents without misleading the jury, and is subject to cross-examination. People v. Munoz-Casteneda, 2012 COA 109, 300 P.3d 944.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.
(Federal Rule Identical.)

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Source: Entire rule amended and effective and committee comment added and effective September 27, 2007.

COMMITTEE COMMENT

Rule 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule, providing that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The federal amendment responded to a divergence between the text of the Rule and the case law that had established an exception for proof of clerical errors. See Fed. R. Evid. 606(b) advisory committee notes (2006 Amendments); see also Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

ANNOTATION

Law reviews. For article, ''Rule 606(b): Competency of Jurors as Witnesses'', see 25 Colo. Law. 47 (Mar. 1996). For article, ''Admissibility of Juror Affidavits Under C.R.E. 606(b)'', see 32 Colo. Law. 61 (Mar. 2003). For article, ''People v. Harlan: The Colorado Supreme Court Takes a Step Toward Eliminating Religious Influence on Juries'', see 83 Den. U.L. Rev. 613 (2005).

Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the sixth amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pena-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct. 855, 197 L.

Ed. 2d 107 (2017).

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. Pena-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017).

Purpose of this rule is to reinforce the finality of jury verdicts, to protect the sanctity of jury deliberations, and to safeguard the privacy of jurors; however, in cases where result of jury deliberations are substantially undermined due to fundamental flaws in deliberation process, courts must weigh these policies against overriding concern that parties to judicial process be assured of fair result. Ravin v. Gambrell by and through Eddy, 788 P.2d 817 (Colo. 1990).

Section (b) has three fundamental purposes: To promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Section (b) allows juror testimony on the question of whether extraneous prejudicial information was improperly brought to the jurors' attention. People v. Harlan, 109 P.3d 616 (Colo. 2005).

The common law in Colorado supports a plain meaning application of section (b) and its two stated exceptions. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Section (b) precludes the use of jurors' post-verdict statements to the court to impeach the unanimous verdict. Granting of new trial based upon jurors statements improper even if statements made prior to the jury being disbursed. Hall v. Levine, 104 P.3d 222 (Colo. 2005).

This rule contains no exception for clerical error. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

The Colorado supreme court amended section (b) in 2007 to add an exception for a mistake in entering a verdict on the verdict form. Malpica-Cue v. Fangmeier, 2017 COA 46, 395 P.3d 1234.

The mistake exception in section (b) is narrow and limited to cases in which the verdict rendered is not the verdict to which the jury agreed. Malpica-Cue v. Fangmeier, 2017 COA 46, 395 P.3d 1234.

An exception to the rule that a trial court cannot reconvene a discharged jury applies when the jury has not yet dispersed, there is no evidence that the jury has been subjected to outside influences from the time of the initial discharge to the time of re-empanelment, and the jury remains under the de facto control of the court. It was appropriate to modify a judgment that relied on an ambiguous verdict form based on the proceedings following the discharge of the jury because the foregoing requirements were met. Hanna v. State Farm Ins. Co., 169 P.3d 267 (Colo. App. 2007).

Trial court erred in refusing to reconvene a discharged jury the day the trial ended. The jurors, who were still in the courthouse, made a mistake on the verdict form and wanted to fix it. Malpica-Cue v. Fangmeier, 2017 COA 46, 395 P.3d 1234.

Jury foreman's statements concerning a possible clerical mistake in filling out dollar amounts of verdict forms held not precluded by this rule. Kading v. Kading, 683 P.2d 373 (Colo. App. 1984).

Jury foreman's affidavit that a clerical error was made on the verdict form justifies an evidentiary hearing on the issue to ascertain the jurors' true verdict. Malpica-Cue v. Fangmeier, 2017 COA 46, 395 P.3d 1234.

The affidavit does not, by itself, require changing the verdict. The court must attempt to ascertain whether the foreman's position actually reflects the views of all of the jurors. Malpica-Cue v. Fangmeier, 2017 COA 46, 395 P.3d 1234.

Manner in which district court polled jury regarding perceived inconsistent verdicts exceeded the bounds of section (b). Court violated rule by engaging in a detailed and lengthy conversation with the jury regarding its deliberative confusion. Where none of the rule's exceptions applied, the manner of the court's questioning of the jury was obviously erroneous as it resulted in impermissible jury testimony that revealed the mental processes of the jurors. People v. Juarez, 271 P.3d 537 (Colo. App. 2011).

A two-part inquiry determines whether extraneous prejudicial information was improperly brought to the jurors' attention. First, the court decides whether extraneous information was improperly before the jury, and then, second, based on the objective "typical juror" standard, the court determines whether use of the extraneous information posed a reasonable probability of prejudice to the defendant. This inquiry is a mixed question of law and fact. The appellate court defers to the trial court's findings of historical facts if supported by competent evidence and reviews the conclusions of law de novo. People v. Harlan, 109 P.3d 616 (Colo. 2005).

Extraneous information encompasses any information that is not properly received into evidence or included in the court's instructions. Extraneous information is improper whether or not the court specifically warned against its use. People v. Harlan, 109 P.3d 616 (Colo. 2005).

Competent evidence supports the trial court's finding that the jury considered extraneous information in the jury room in the form of Bible passages related to the death penalty. People v. Harlan, 109 P.3d 616 (Colo. 2005).

Text messages stored on cell phone not extraneous information. Text messages at issue were stored in cell phone that was admitted into evidence without qualification or limitation, and the jury used the cell phone as a cell phone is intended to be used by turning it on and discovered information within the scope and purview of the admitted evidence. People v. Garrison, 2012 COA 132M, 303 P.3d 117.

Jurors may rely on their professional and educational expertise to inform their deliberations so long as they do not bring in legal content or specific factual information learned from outside the record. Kendrick v. Pippin, 252 P.3d 1052 (Colo. 2011).

Juror's pre-existing personal expertise or knowledge of a general nature does not constitute extraneous information. Juror may use his or her particular pre-existing knowledge of mathematics to analyze admitted evidence of relevant locations and distances and the speed of defendant's vehicle. Kendrick v. Pippin, 222 P.3d 391 (Colo. App. 2009), rev'd on other grounds, 252 P.3d 1052 (Colo. 2011).

Juror's statement during deliberations regarding the severity of a charged offense does not constitute extraneous information because the statement was based on the juror's general knowledge or personal experience. Therefore, the statement cannot be used to impeach the verdict. People v. Holt, 266 P.3d 442 (Colo. App. 2011).

In order to determine whether improper introduction of extraneous information into the jury room created a reasonable possibility that the jury's verdict was influenced to the detriment of the defendant, the following factors may be considered: (1) How the extraneous information relates to critical issues in the case; (2) how authoritative the source consulted is; (3) whether a juror initiated the search for extraneous information; (4) whether the information obtained by one juror was brought to the attention of another juror; (5) whether the information was presented before the jury reached a unanimous decision; and (6) whether the information would be likely to influence a typical juror to the detriment of the defendant. People v. Harlan, 109 P.3d 616 (Colo. 2005).

A reasonable possibility exists that Bible material introduced into the jury room could have influenced a typical juror to vote for the death penalty instead of a life sentence; therefore, the defendant was prejudiced, and the death penalty sentence must be vacated. People v. Harlan, 109 P.3d 616 (Colo. 2005).

Use of dictionary by a juror to obtain a definition of the crime with which the defendant was charged was improper and constituted misconduct. Wiser v. People, 732 P.2d 1139 (Colo. 1987).

However, defendant bears the burden of proving that use of a dictionary definition posed a reasonable possibility of prejudice to him. People v. Holt, 266 P.3d 442 (Colo. App. 2011).

Juror's use of the internet to obtain information about a drug prescribed to the defendant was improper and constituted misconduct. People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd on other grounds, 97 P.3d 932 (Colo. 2004).

Inquiry by juror about source of jury instructions to friend who was a legal secretary was misconduct which had potential for distorting the deliberations of the jury. Wiser v. People, 732 P.2d 1139 (Colo. 1987).

Section (b) bars a court from considering juror affidavits if they do not address matters within the two stated exceptions: Extraneous prejudicial information improperly brought to the juror's attention or improper outside influence exerted upon a juror. Stewart v. Rice, 47 P.3d 316 (Colo. 2002); People v. Richardson, 184 P.3d 755 (Colo. 2008).

A jury verdict may not be impeached by affidavit except in very limited circumstances involving external influence improperly bearing upon the jury. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

A jury verdict in a criminal case may not generally be impeached by affidavits of jurors unless there has been external influence on the jury or there has been jury misconduct. People v. Collins, 730 P.2d 293 (Colo. 1986); People v. Garcia, 752 P.2d 570 (Colo. 1988); People v. Burke, 2018 COA 166, __ P.3d __.

Defendant convicted of theft by receiving may not use affidavit of jury foreman to show that jury's finding regarding value of items involved in theft was based on speculation. People v. McCoy, 764 P.2d 1171 (Colo. 1988).

Affidavits concerning jurors' mental processes held inadmissible. Rome v. Gaffrey, 654 P.2d 333 (Colo. App. 1982); People v. Collins, 730 P.2d 293 (Colo. 1986); Ravin v. Gambrell by and through Eddy, 788 P.2d 817 (Colo. 1990); Davis v. Lira, 817 P.2d 539 (Colo. App. 1991), rev'd on other grounds, 832 P.2d 240 (Colo. 1992).

Juror's affidavit about her physical condition and her position as holding out alone against other jurors cannot be received under this rule.

Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988), aff'd, 788 P.2d 817 (Colo. 1990).

Juror's affidavit and testimony about her physical condition and its effect on her ability to hold out against the other jurors' yelling constituted an improper inquiry into her thought processes and emotions and was, therefore, inadmissible. People v. Ferrero, 874 P.2d 468 (Colo. App. 1993).

Juror's affidavits concerning mental processes in determining the amount of the verdict, including specific statements that the damages awarded were to pay for the plaintiff's attorney fees were not admissible and could not be used to impeach the jury award. Munoz v. State Farm Mut. Auto. Ins. Co., 968 P.2d 126 (Colo. App. 1998).

Trial court properly considered affidavit alleging coercion against a juror and hearing testimony from juror who asserted the misconduct. People v. Collins, 730 P.2d 293 (Colo. 1986).

Testimony concerning jurors' mental processes held inadmissible and such testimony cannot serve as basis for denial of defendant's postconviction motion. People v. Crespin, 682 P.2d 58 (Colo. App. 1984), rev'd on other grounds, 721 P.2d 688 (Colo. 1986).

Witness's testimony as to the juror's fear was an improper inquiry into the juror's thought processes and emotions and was, therefore, inadmissible. People v. Harrison, 746 P.2d 66 (Colo. App. 1987).

Testimony at hearing as to the jurors' emotional reactions to extraneous information was excludable as improper inquiry into the jurors' thought processes and emotions during deliberations. People v. Ferrero, 874 P.2d 468 (Colo. App. 1993).

Court may only consider evidence of objective circumstances and overt coercive acts by other members of jury and may not consider the effect this conduct had on the minds of the jurors. People v. Rudnick 878 P.2d 16 (Colo. App. 1993).

A juror may not testify as to the wrong exercise of his judgment or his confusion on the law or the facts or his misunderstandings. People v. Collins, 730 P.2d 293 (Colo. 1986).

Courts are precluded by section (b) from engaging in direct post-verdict investigations into the deliberative processes of jurors. Wilson v. O'Reilly, 867 P.2d 92 (Colo. App. 1993).

But where court simply asked the juror if this in fact was her verdict and where only the juror's answers to the court's questions discussed the jury's deliberations, court's actions were consistent with section (b). People v. Barnard, 12 P.3d 290 (Colo. App. 2000).

When juror was questioned about whether the verdict in favor of defendant as reported by a written special verdict was her verdict and juror responded "no", judge should have declared a mistrial or directed the jurors to deliberate further; by engaging in extended questioning as to why the juror had said the verdict was not hers, the court and counsel improperly delved into the deliberations and mental processes of the jurors and risked unduly influencing the juror to conform to the signed verdict. Simpson v. Stjernholm, 985 P.2d 31 (Colo. App. 1998).

Trial court erred by failing to strike affidavit of juror in which he stated he dissented from the jury's award because he thought the award inadequate. Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987).

Rule applicable to the impeachment of a certificate of ascertainment and assessment in eminent domain proceedings. Aldrich v. District Court, 714 P.2d 1321 (Colo. 1986).

To prevail on motion for new trial on basis of juror testimony alleging misconduct, movant must establish he was prejudiced by the misconduct. People v. Hernandez, 695 P.2d 308 (Colo. App. 1984); Wiser v. People, 732 P.2d 1139 (Colo. 1987); People v. Garcia, 752 P.2d 570 (Colo. 1988); Ravin v. Gambrell by and through Eddy, 788 P.2d 817 (Colo. 1990); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd on other grounds, 97 P.3d 932 (Colo. 2004).

Test for setting aside jury verdicts in both civil and criminal actions is not whether the impropriety actually influenced a juror, but whether it had the capacity of doing so. Ravin v. Gambrell by and through Eddy, 778 P.2d 817 (Colo. 1990).

One seeking to set aside a verdict based on allegations of improper extraneous influence on the jury must establish the fact of such influence and also that there was a reasonable possibility of prejudice. Wilson v. O'Reilly, 867 P.2d 92 (Colo. App. 1993).

Evidentiary hearing on jury misconduct. In order to constitute grounds for setting aside a verdict because of any unauthorized or improper communication with the jury, it is incumbent upon defendant to show that he was prejudiced thereby. The determination of whether prejudice has occurred is a matter within the sound discretion of the trial court. People v. Heller, 698 P.2d 1357 (Colo. App. 1984), rev'd on other grounds, 712 P.2d 1023 (Colo. 1986); People v. Garcia, 752 P.2d 570 (Colo. 1988).

Review of whether a new trial is required because of juror misconduct is a mixed question of law and fact. The court must apply a normal deferential standard to the trial court's factual findings, but review de novo the trial court's conclusions of law. People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

Defendant not entitled to a new trial as a result of influence upon two jurors by other jurors absent evidence of threats, abuse, or any coercion beyond mere argumentation. People v. Black, 725 P.2d 8 (Colo. App. 1986).

To prevail on a motion for a new trial based on exposure of jurors to extraneous information or influences, defendant must establish that he was prejudiced by the exposure. People v. Harrison, 746 P.2d 66 (Colo. App. 1987).

Prejudice is shown if the jurors' exposure to extraneous information or influences establishes a reasonable possibility that the extraneous information affected the verdict. People v. Harrison, 746 P.2d 66 (Colo. App. 1987).

However, defendant cannot claim prejudice resulting from his own conduct as a ground for setting aside the verdict. People v. Harrison, 746 P.2d 66 (Colo. App. 1987).

In determining whether a new trial is required due to juror misconduct, the court must determine whether there is a reasonable possibility that the extraneous contact or influence affected the verdict, so as to require a new trial only where there is a reasonable possibility that verdict was tainted by introduction of outside information or influences into jury deliberations. Wiser v. People, 732 P.2d 1139 (Colo. 1987); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

New trial required where there was reasonable possibility that jury verdict was affected by bailiff's remark that if a verdict could not be reached the judge might make jury deliberate for up to two weeks. Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988), aff'd, 788 P.2d 817 (Colo. 1990).

Trial court erred by failing to consider part of a juror's affidavit discussing another juror's potential misrepresentation or concealment of prejudicial beliefs during voir dire. Black v. Waterman, 83 P.3d 1130 (Colo. App. 2003).

Trial court properly considered affidavits of three jurors in determining whether an envelope containing defendant's suppressed statement which had been accidentally taken to the jury room affected the jury's determination. People v. Smith, 856 P.2d 26 (Colo. App. 1992).

Trial court abused its discretion in denying a motion for new trial which was filed because the jury foreman obtained extraneous information that was pertinent to the issue of the credibility of the accused versus the victim. People v. Fox, 862 P.2d 1000 (Colo. App. 1993).

No abuse of discretion to deny new trial when jury foreman obtained extraneous information that was not pertinent to the issue at trial and did not share that information with the other jurors. People v. Bohl, 2018 COA 152, __ P.3d __.

Trial court erred in granting a new trial based on the jury's supposed mental processes. Despite any initial appearance of confusion, once a jury has rendered a consistent final verdict it is inappropriate to set aside the verdict because of the court's speculation that the confusion may have continued. People v. Angell, 917 P.2d 312 (Colo. App. 1995).

Rule applicable to deliberations prior to a verdict. The integrity of jury deliberations and assurance that jurors will be protected from coercion are no less important in the process of attempting to reach a verdict than they are in the process of polling a jury once the verdict is reached. To hold otherwise would disserve the purpose of section (b) and expose individual jurors to potential harassment or pressure that the rule was designed to avoid. People v. Rivers, 70 P.3d 531 (Colo. App. 2002).

Court did not err in giving a special interrogatory to the jury before the jury announced its decision. The special interrogatory was necessary to ensure the validity of the verdict on the felony murder charge and was not a post-verdict statement under section (b). People v. Doubleday, 2012 COA 141M, 369 P.3d 595, rev'd on other grounds, 2016 CO 3, 364 P.3d 193.

Applied in T.S. v. G.G., 679 P.2d 118 (Colo. App. 1984); People v. Cornett, 685 P.2d 224 (Colo. App. 1984); People v. Mollaun, 194 P.3d 411 (Colo. App. 2008).

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him. Leading questions may be used for the purpose of attacking such credibility.

COMMITTEE COMMENT

This rule abandons the traditional position against impeaching one's own witness. The additional sentence in the Colorado version of the rule should assist in resolving conflicts now existing between Rule 43(b) of the Colorado Rules of Civil Procedure and § 13-90-116, C.R.S. A minority opinion concerning Rule 607 feels that this rule should be restricted to civil cases since it may be prosecutorial misconduct for a prosecutor to attack the credibility of his own witness without a showing of hostility or surprise. The likelihood of a defendant's being

found guilty because of a ''coparticipant'' hesitation to testify against the defendant may prejudice the jury to such an extent that a fair trial cannot be obtained.

ANNOTATION

Law reviews. For article, ''Admissibility of a Witness's Mental Health History for Purposes of Impeachment'', see 21 Colo. Law. 1405 (1992). For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993).

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in §13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(Federal Rule Identical.)

Source: (b) amended September 29, 2005, effective January 1, 2006.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993). For article, ''C.R.E. 608(b): Challenging Witness Credibility'', see 29 Colo. Law. 99 (July 2000). For article, ''Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness'', see 35 Colo. Law. 37 (Dec. 2006).

Common-law rule. Prior to the adoption of the Colorado rules of evidence, Colorado adhered to the general rule that evidence of misdeeds was inadmissible for the purpose of attacking a witness's character in regard to his truthfulness. People v. Saldana, 670 P.2d 14 (Colo. App. 1983).

While this rule allows for extrinsic evidence under certain circumstances, the adoption of this rule has not materially altered the previously established general rule. People v. Saldana, 670 P.2d 14 (Colo. App. 1983).

Right to confront and cross-examine witnesses not absolute. An accused's constitutional right to confront and to cross-examine witnesses is not absolute and may be limited to accommodate other legitimate interests in the criminal trial process. People v. Cole, 654 P.2d 830 (Colo. 1982).

Trial court properly limited cross-examination where answers sought by defendant involved cumulative or collateral testimony concerning co-defendant's credibility and were only marginally related to commission of charged crime. People v. Ray, 109 P.3d 996 (Colo. App. 2004).

The trial court did not abuse its discretion in limiting the cross-examination related to a witness's felony conviction. The record shows the jury had ample information about the felony conviction and background to assess the witness's credibility. People v. Lane, 2014 COA 48, 343 P.3d 1019.

Bias on the part of a witness is a state of mind and only those demands which can influence the mind at the moment of testifying are relevant to a demonstration of bias. People v. Simmons, 182 Colo. 350, 513 P.2d 193 (1973).

Impeachment inquiry directed to witness's credibility, not character. In impeaching a witness, the inquiry ought to be directed to the witness's credibility rather than to his moral character. People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972).

Rule applies only to the admissibility of character evidence. Proffered evidence of whether a witness was testifying truthfully in the case did not constitute a general character attack on witness. People v. Hall, 107 P.3d 1073 (Colo. App. 2004).

Cross-examination held to be proper attack upon witness's credibility, not his character. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972).

The exclusion of proper opinion testimony is harmless where the defense can fully cross-examine the witness whose credibility was to be impeached, and where that witness's credibility was otherwise impeached through the testifying witness. People v. Davis, 312 P.3d 193 (Colo. App. 2010), aff'd on other grounds, 2013 CO 57, 310 P.3d 58 (Colo. 2013).

Defendant who takes witness stand is subject to same tests of credibility as any other witness. People v. Neal, 181 Colo. 341, 509 P.2d 598 (1973).

Trial court did not err by admitting extrinsic evidence of defendant's audiotaped statement to rebut his testimony. It is well established that evidence may be introduced that specifically contradicts a defendant's direct testimony. By making statements on redirect examination that contradicted his testimony during cross-examination, defendant opened the door to the extrinsic evidence to contradict his statements on cross-examination. People v. Thomas, 2014 COA 64, 345 P.3d 959.

Defendant may be examined on previous felony convictions. A defendant who elects to be a witness in his own behalf in a criminal case subjects his credibility to question, like any other witness, and he may therefore be examined on the matter of previous felony convictions. People v. Thompson, 182 Colo. 198, 511 P.2d 909 (1973).

Nature of particular crime for which defendant was convicted. Although evidence of prior felony convictions is admissible to impeach a defendant who voluntarily takes the stand and testifies in his own behalf, such an inquiry is not confined to the mere fact of the conviction of some crime, but the nature or name of the particular crime of which the witness was convicted may be brought out. Mays v. People, 177 Colo. 92, 493 P.2d 4 (1972).

Where defendant testifies, motion to suppress prior conviction denied. The denial of the defendant's motion to suppress his prior felony conviction is proper where the defendant takes the witness stand to testify. People v. Neal, 181 Colo. 341, 509 P.2d 598 (1973).

Where, before the defendant testifies in his defense, he moves that the court prohibit the prosecution from showing on cross-examination that he has been previously convicted of a felony, the court correctly denies the motion to suppress as it is without discretion to prohibit such evidence. People v. Bueno, 183 Colo. 304, 516 P.2d 434 (1973).

Defendant's past crimes may be used to discredit defendant's witness. Where a defendant places a psychiatrist on the stand to testify that the defendant is a person unlikely to commit the crime in question, it is not error to permit the district attorney, in an effort to discredit this testimony, to refer to the defendant's past criminal behavior in an effort to discredit the psychiatrist's testimony during cross-examination of the psychiatrist. People v. Pacheco, 180 Colo. 39, 502 P.2d 70 (1972).

Prosecutor must ask impeachment questions in good faith. The prosecutor may in cross-examination ask the witness if he has been convicted of a felony, but he must ask the question in good faith. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); People v. Thompson, 182 Colo. 198, 511 P.2d 909 (1973).

Judge to determine good faith. When prosecutors are about to impeach witnesses by reason of former felonies, they should advise the judge on what background they will propound questions, and the judge must determine, within his discretion, whether good faith is present. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973); People v. Thompson, 182 Colo. 198, 511 P.2d 909 (1973).

Where defendant denies prior felony convictions, counsel to make offer of proof. The only way that counsel can establish good faith in asking questions about prior felonies if the defendant denies any prior felony convictions is to make an offer of proof to the court. People v. Thompson, 182 Colo. 198, 511 P.2d 909 (1973).

Proof not necessary where defendant admits prior convictions. When a defendant exercises his statutory privilege of testifying, all prior felony convictions and their nature may be shown to impeach his testimony, and where a defendant admits any prior convictions, proof thereof is not necessary. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

Felony inquiry reversible error where prosecution knows there are no prior convictions. Asking the defendant, who has taken the stand in his own defense, whether he has ever been arrested for a felony when the district attorney knows that there is no prior felony conviction is reversible error. People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973).

Use of void prior convictions need not require reversal. The error implicit in the use of void prior convictions for impeachment purposes need not necessarily require reversal, particularly where the error is found to be harmless beyond a reasonable doubt. People v. Neal, 187 Colo. 12, 528 P.2d 220 (1974).

Trial court did not abuse its discretion in limiting cross-examination of specific details related to witness's prior conviction. The defense had already established defendant's previ-

ous criminal conduct and the number of times defendant had been dishonest with the police. The factual details underlying defendant's previous conviction were collateral matters with little probative force, and the jury had sufficient information to determine the witness's credibility. People v. Clark, 2015 COA 44, 370 P.3d 197.

Limiting instruction required. When prior felony convictions are elicited during defendant's testimony, a limiting instruction is required. People v. Goldsberry, 181 Colo. 406, 509 P.2d 801 (1973).

Drug abuse by witness excluded. Where testimony concerning alleged drug abuse by the witness was irrelevant, the trial court does not abuse its discretion in refusing to allow the questioning. People v. St. John, 668 P.2d 988 (Colo. App. 1983).

Generally, witness cannot be impeached by acts of "bad character". Generally, impeachment of a witness's character is confined to showing former convictions of a felony, but not acts or occurrences which show "bad character". People v. Barker, 189 Colo. 148, 538 P.2d 109 (1975).

It is improper to impeach a witness with convictions short of felonies, but absent a contemporaneous objection, this error is not reversible. People v. Ciari, 189 Colo. 325, 540 P.2d 1094 (1975).

Impeachment of witnesses with questions concerning arrests is generally prohibited. People v. Ciari, 189 Colo. 325, 540 P.2d 1094 (1975); People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Evidence of witness's plea agreements in prior, unrelated cases was properly excluded. People v. Fears, 962 P.2d 272 (Colo. App. 1997).

Questions on arrests allowed on recross where arrest record put in evidence. Where on redirect examination, an attempt is made to restore a witness's credibility, and the defense counsel asks the witness if he has been in any further trouble since a misdemeanor conviction, and the witness responds that he has been in jail a few times, but that he had been mistakenly arrested for aggravated assault, the prosecutor on recross-examination is properly permitted to explore the arrest record of the witness. People v. Ciari, 189 Colo. 325, 540 P.2d 1094 (1975).

Where hostility of witness not shown, restricted examination allowed. The court does not err in restricting examination of a police detective whom the defendant calls as his own witness, on the basis that the officer is a hostile witness, where no foundation is shown that the officer is in fact a hostile witness. People v. York, 189 Colo. 16, 537 P.2d 294 (1975).

Witness giving a character opinion is not required to have long-term acquaintance with witness to be impeached. Honey v. People, 713 P.2d 1300 (Colo. 1986).

Testimony which referred to a specific occasion of truthfulness and which did not express an opinion as to character may not be admitted under this rule. People v. Koon, 713 P.2d 410 (Colo. App. 1985); People v. Ross, 745 P.2d 277 (Colo. App. 1987).

Such testimony constitutes reversible error and requires a new trial. People v. Oliver, 745 P.2d 222 (Colo. 1987).

Evidence of prior misdemeanor convictions involving false statements to police held admissible for impeachment purposes where focus was on the specific instances of lying, not on the convictions themselves, and jury was instructed to consider the evidence only for the limited purpose of evaluating defendant's credibility. People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

Evidence of misdemeanor shoplifting is not admissible under section (b). Although shoplifting involves a form of dishonesty, a disregard of property rights of others is not probative of a propensity to be truthful or untruthful. People v. Jones, 971 P.2d 243 (Colo. App. 1998), overruled in People v. Segovia, 196 P.3d 1126 (Colo. 2008).

Shoplifting is a specific instance of conduct that is probative of truthfulness pursuant to section (b). People v. Segovia, 196 P.3d 1126 (Colo. 2008) (overruling People v. Jones, 971 P.2d 243 (Colo. App. 1998)).

Because theft generally is not probative of character for truthfulness, exclusion of evidence of theft by prosecution witness did not constitute abuse of discretion by trial court. People v. Knight, 167 P.3d 141 (Colo. App. 2006).

Trial court did not abuse its discretion by ruling that evidence of check fraud was admissible, because check fraud involved taking property in a fraudulent manner and was probative of character for truthfulness. McGill v. DIA Airport Parking, LLC, 2016 COA 165, 395 P.3d 1153.

Trial court did not abuse its discretion by excluding statements related to a 10-year-old felony shoplifting incident. Because of the remoteness of the incident and its dissimilarity with the case at hand, admission of the evidence would have caused undue delay, waste of time, and confusion and was properly excluded under C.R.E. 403. People v. Williams, 89 P.3d 492 (Colo. App. 2003).

A trial court has discretion to exclude evidence under section (b) of this rule on C.R.E. 403 grounds. Because the subject of the witness's prior narcotics arrest raised a collateral issue, the trial court acted within the range of permissible choices in precluding defendant from asking the witness whether she had been

truthful in her prior statements on that subject. People v. Wilson, 2014 COA 114, 356 P.3d 956.

Rape trauma syndrome evidence generally inadmissible to determine whether an adult woman was in fact raped. However, in cases involving child incest victims, upon proper foundation, evidence of incest victim psychology may be admitted. People v. Koon, 724 P.2d 1367 (Colo. App. 1986); People v. Lucero, 724 P.2d 1374 (Colo. App. 1986).

Expert's evaluation of victim inadmissible. Where the credibility of a child victim for truth and veracity has not been attacked, the admission of the testimony of a clinical psychologist, who has been appointed by the court for a competency evaluation of the victim, is error. People v. Ortega, 672 P.2d 215 (Colo. App. 1983).

Where the credibility of a child victim for truth and veracity has not been attacked, the admission of the testimony of a social worker as to the truth and veracity of child victims in general is prejudicial error. People v. Snook, 729 P.2d 1026 (Colo. App. 1986), aff'd, 745 P.2d 647 (Colo. 1987).

Interviewer's and mother's statements regarding child victims' testimony improperly bolstered the children's credibility and led to the impermissible inference that the children were telling the truth about the incident. Venalonzo v. People, 2017 CO 9, 388 P.3d 868.

Pediatrician's statement concerning believability of child-victim statements violated this rule but was harmless error. People v. Gaffney, 769 P.2d 1081 (Colo. 1989).

Social worker's lay statement concerning sincerity of child-victim's statements violated this rule because the statement constituted impermissible character testimony. However, admission of statement was not plain error. People v. Eppens, 979 P.2d 14 (Colo. 1999).

Admission of the social worker's statement was not error where the child-victim herself testified and was vigorously cross-examined, the social worker testified as a lay witness, and the statement was corroborated by the testimony of the child-victim's examining physician. People v. Eppens, 979 P.2d 14 (Colo. 1999).

Testimony by police officer that witnesses seemed sincere was improper. People v. Hall, 107 P.3d 1073 (Colo. App. 2004).

Admission of investigating officer's testimony that victims were credible so undermined the fundamental fairness of the trial that serious doubt existed as to the reliability of the judgment of conviction, especially where there was an insufficient quantum and quality of other evidence and independent corroborating evidence of guilt. People v. Cook, 197 P.3d 269 (Colo. App. 2008).

Evidence referencing victim's credibility is admissible when describing a technique used to interrogate a suspect and to explain the context in which a suspect's statements are made. People v. Lopez, 129 P.3d 1061 (Colo. App. 2005).

Admission of statements by witnesses commenting on other witnesses' veracity not error where comments were elicited to explain police officers' investigative techniques and to rebut defense arguments. People v. Davis, 312 P.3d 193 (Colo. App. 2010), aff'd, 2013 CO 57, 310 P.3d 58 (Colo. 2013).

A law enforcement officer may testify about the officer's assessments of interviewee credibility when that testimony is offered to provide context for the officer's interrogation tactics. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Officer's testimony not improper commentary on defendant's credibility, but instead an explanation of officer's interview tactics that were brought into question by defendant's allegation that confession was coerced and a product of what defendant believed police wanted to hear. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Where defendant attacks victim's credibility, testimony regarding victim's truthfulness is admissible. People v. Exline, 775 P.2d 48 (Colo. App. 1988), 985 F.2d 487 (10th Cir. 1993).

Questioning of a defendant's credibility while on the witness stand does not necessarily constitute an attack on that defendant's character for truthfulness for purposes of introducing character evidence under the rule. Whether a witness's character is attacked will always depend on the circumstances of a particular case. People v. Miller, 890 P.2d 84 (Colo. 1995).

The mere contradiction of the testimony of the defendant by another witness does not constitute an attack on the character of the defendant such that the defendant may introduce opinion evidence as to his truthful character. People v. Wheatley, 805 P.2d 1148 (Colo. App. 1990).

Because defense counsel's cross-examination of the victim did not amount to an attack on her character for truthfulness, testimony that she was a truthful person was inadmissible. Questions during cross-examination that imply a witness's testimony is not credible, such as emphasizing that the witness is under oath or has potential motives to lie or sources of bias, or questioning his or her failure to disclose information to the police are not necessarily attacks on a witness's character for truthfulness. The questions must do more than attack the truthfulness of testimony, but attack a witness's general propensity to tell the truth. People v. Serra, 2015 COA 130, 361 P.3d 1122.

Questions of witnesses whether they took seriously their oath to testify truthfully and if they were telling the truth, where such wit-

nesses were not asked if other witnesses or parties were telling the truth, although of limited probative value, does not constitute improper bolstering and do not constitute plain error. People v. Lee, 989 P.2d 777 (Colo. App. 1999).

Trial court erred in admitting into evidence the opinion of a social services intake worker that a child was being truthful in reporting the alleged sexual assault by the defendant on the occasion in question. People v. Eppens, 948 P.2d 20 (Colo. App. 1997), rev'd on other grounds, 979 P.2d 14 (Colo. 1999).

Evidence inadmissible where prosecutor did not seek to elicit opinion or reputation evidence from witness about child victim's general character for truthfulness; rather, prosecutor elicited, on direct examination of the witness, evidence of victim's specific veracity habit and its application to a specific occasion. People v. Cernazanu, 2015 COA 122, 410 P.3d 603.

No abuse of discretion or violation of defendant's confrontation right in trial court's decision to limit cross-examination. People v. Sweeney, 78 P.3d 1133 (Colo. App. 2003).

Judge who presided over earlier proceedings may testify in rebuttal as to defendant's truthfulness. Where defendant testified to events leading to his arrest for taking children in violation of court order, the judge who presided over divorce could testify as rebuttal witness as to character of defendant for truthfulness. People v. Tippett, 733 P.2d 1183 (Colo. 1987).

Unproven accusations, by themselves, do not raise an inference of improper actions. People v. Pratt, 759 P.2d 676 (Colo. 1988).

Opinion and reputation evidence of character is admissible as long as the evidence refers only to character for truthfulness or untruthfulness and that element of witness's character has been attacked. People v. Woertman, 786 P.2d 443 (Colo. App. 1989); People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

A stipulation concerning allegations of unprofessional conduct of a physician does not constitute a finding of misconduct by the medical board. Therefore, court did not abuse its discretion in limiting cross-examination of doctor who conducted competency evaluation of criminal defendant. People v. Thomas, 962 P.2d 263 (Colo. App. 1997).

Evidence of witness's general character was properly disallowed where the evidence was not limited to the witness's truthfulness and veracity. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

The advisement by the trial court of the defendant's right to testify was inadequate when the court failed to inform defendant that the decision to testify was personal to the defendant and failed to advise defendant as to the limited evidentiary use of any admission by the defendant. People v. Chavez, 832 P.2d 1026 (Colo. App. 1991), aff'd, 853 P.2d 1149 (Colo. 1993).

Opinion testimony regarding a witness's truthfulness on a specific occasion rather than to the witness's general character for truthfulness is inadmissible. People v. Ayala, 919 P.2d 830 (Colo. App. 1995).

Reversible error for forensic interviewer to state in response to jury questions that he concluded that the victim had not been coached or that the victim or witness did not come across as coached. An interviewer may not usurp the jury's role of assessing the credibility of a witness's statement by offering an ultimate conclusion about the statement's truthfulness. The error was not harmless because the credibility of the witnesses, particularly in the forensic interviews, was the central issue in the case. People v. Bridges, 2014 COA 65, 410 P.3d 512.

"Were they lying?" type questions are categorically improper. Witnesses are prohibited from commenting on the veracity of another witness, because such opinions are prejudicial, argumentative, and ultimately invade the province of the fact-finder. Such concerns outweigh any potential or supposed probative value elicited by the question. Liggett v. People, 135 P.3d 725 (Colo. 2006).

Therapist's testimony about children fabricating sexual assault allegations did not serve any purpose other than to attempt to influence the jury's credibility determinations and was admitted in error. The error was not plain since it was not obvious and there was substantial evidence of defendant's guilt. People v. Relaford, 2016 COA 99, 409 P.3d 490.

Trial court properly precluded cross-examination on crime of bigamy to impeach a witness' credibility in a criminal eavesdropping prosecution. The court determined that even if bigamy were an offense relating to truthfulness, the witness had been neither convicted, arrested, nor charged with such offense, and there was no evidence of an agreement by the prosecution not to file such charges against the witness in exchange for his testimony. People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Evidence of defendant's intentional failure to file tax returns for multiple years is admissible and probative of defendant's character for truthfulness, provided that the probative value of the evidence is not outweighed by the danger of unfair prejudice under C.R.E. 403. Leaf v. Beihoffer, 2014 COA 117, 338 P.3d 1136.

Even if it were in the trial court's discretion to permit questioning of the witness as to the act of bigamy, it was also within the court's discretion to exclude the questioning as being

more prejudicial than probative. People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Applied in People v. Sasson, 628 P.2d 120 (Colo. App. 1980); People v. Walker, 666 P.2d 113 (Colo. 1983); People v. Manners, 713 P.2d 1348 (Colo. App. 1985); Tevlin v. People, 715 P.2d 338 (Colo. 1986); People v. Jensen, 747 P.2d 1247 (Colo. 1987); People v. Penn, 2016 CO 32, 379 P.3d 298.

Rule 609. (No Colorado Rule Codified)

COMMITTEE COMMENT

See § 13-90-101, C.R.S.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purposes of showing that by reason of their nature his credibility is impaired or enhanced.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993). For article, ''Witness Competence and Credibility: The Relevance of Religious Beliefs'', see 26 Colo. Law. 121 (June 1997).

When evidence of beliefs admissible. Where evidence of witnesses' religious beliefs is relevant to the determination of questions other than impeaching or enhancing credibility, including the plaintiffs' standing to sue, the personal knowledge of certain witnesses as to religious practices about which they testified, and the basis for witnesses' opinions that the effect of a nativity scene was to prefer the Christian religion, questioning the witnesses about their religious beliefs is not objectionable under this rule. Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982).

This section was not violated in felony child abuse case where defendant raised religious healing as an affirmative defense and was cross-examined as to his religious beliefs. The examination was probative of something other than the veracity of such witness and the court properly instructed the jury to consider the defendant's testimony only for such limited purpose. People v. Lybarger, 790 P.2d 855 (Colo. App. 1989), rev'd on other grounds, 807 P.2d 570 (Colo. 1991).

This rule and § 13-90-110 do not apply to statements made by a prosecutor in closing argument. A prosecutor is not a witness, and his or her statements made in closing argument are not evidence. People v. Krutsinger, 121 P.3d 318 (Colo. App. 2005).

Applied in People v. Mandez, 997 P.2d 1254 (Colo. App. 1999).

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Common Evidentiary Mistakes'', see 18 Colo. Law. 1129 (1989). For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993).

Trial court did not abuse its discretion in requiring testimony in court. Trial court did not abuse its discretion in denying the prosecution's request to have its witness testify remotely through video-conferencing. People v. Gutierrez, 2018 CO 75, 432 P.3d 579.

Trail court did not abuse its discretion in requiring defendant to present his expert testimony in court rather than through video-conferencing. People v. Casias, 2012 COA 117, 312 P.3d 208.

Court may limit right to cross-examination. The constitutional right to confront and cross-examine witnesses is tempered by the trial court's authority to prohibit cross-examination on matters wholly irrelevant and immaterial to issues at trial. People v. Loscutoff, 661 P.2d 274 (Colo. 1983); People v. Hernandez, 695 P.2d 308 (Colo. App. 1984); People v. McKeehan, 732 P.2d 1238 (Colo. App. 1986), cert. denied, 753 P.2d 243 (Colo. 1988).

Trial judge has discretion to determine the scope and the limit of cross-examination. People v. Homan, 185 Colo. 56, 521 P.2d 1262 (1974); People v. Fresquez, 186 Colo. 146, 526 P.2d 146 (1974).

Limits of cross-examination of a witness concerning general credibility is within the sound discretion of the trial court. People v. Evans, 630 P.2d 94 (Colo. App. 1981).

Absent abuse, judge's rulings not disturbed on review. The scope and limits of cross-examination are determined by the trial judge, and absent an abuse of discretion his rulings will not be disturbed on review. McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); People v. Lucero, 677 P.2d 370 (Colo. App. 1983), cert. dismissed, 706 P.2d 1283 (Colo. 1985).

In the absence of an abuse of discretion in ruling on the scope of cross-examination, a trial judge's ruling will not be disturbed on review. People v. Homan, 185 Colo. 56, 521 P.2d 1262 (1974); People v. Fresquez, 186 Colo. 146, 526 P.2d 146 (1974).

The scope and limits of cross-examination are within the sound discretion of the trial court and absent an abuse of that discretion, the rulings of the court will not be disturbed on review. People v. Raffaelli, 647 P.2d 230 (Colo. 1982); Jackson v. Harsco Corp., 653 P.2d 407 (Colo. App. 1982).

Although the scope of the cross-examination is within the trial court's discretion, its decision will be reversed on appeal if that discretion is abused. People v. Diaz, 644 P.2d 71 (Colo. App. 1981).

Cross-examination into witnesses' motives. Cross-examination should be liberally extended to permit a thorough inquiry into the motives of witnesses. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

Any evidence tending to show bias or prejudice, or to throw light upon the inclinations of witnesses, should be permitted on cross-examination. People v. Peterson, 633 P.2d 1088 (Colo. App. 1981).

Whether leading questions are permissible is a question within the trial court's discretion. Bruce Hughes, Inc. v. Ingels & Assocs., 653 P.2d 88 (Colo. App. 1982); People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

Section (c) enlarges class of adverse witnesses. The purpose of section (c) is to enlarge that class of witnesses recognized as adverse, or identified with a party adverse, to one of the parties. This intent is demonstrated by the elimination of specific classes of adverse parties, including officers, directors, or managing agents of a public or private corporation, from section (c). Bruce Hughes, Inc. v. Ingels & Assocs., 653 P.2d 88 (Colo. App. 1982).

If a witness may be characterized as adverse under the more stringent C.R.C.P. 43(b), it follows that section (c) of this rule would most certainly include him as either an adverse party or a witness identified with an adverse party. Bruce Hughes, Inc. v. Ingels & Assocs., 653 P.2d 88 (Colo. App. 1982).

Trial court has discretion to limit cross-examination without probative force. While adhering to the general rule that a defendant should be allowed wide latitude to cross-examine a prosecution witness for the purpose of showing bias or undue interest, the trial court has some discretion in limiting such cross-examination where it is without probative force. People v. Simmons, 182 Colo. 350, 513 P.2d 193 (1973).

Court did not deny defendant due process by requiring defendant to testify on the first day of trial. The order of proof at trial is a matter within the court's discretion. Court required defendant to testify in order to make use of jury's time. Defendant had previously expressed his intent to testify, and court permitted defendant to testify again, following the testimony of his expert witness. People v. Walden, 224 P.3d 369 (Colo. App. 2009).

The court may terminate cross-examination altogether, if it is clear further testimony would not advance the truth-seeking function of the trial. When defense counsel continued baseless cross-examination, termination of cross-examination was warranted where the

court believed defense counsel had no further line of inquiry. People v. James, 40 P.3d 36 (Colo. App. 2001).

Recross-examination may embrace those matters testified to on redirect examination. People v. Ciari, 189 Colo. 325, 540 P.2d 1094 (1975).

Whether to allow late indorsement of witness is within discretion of trial court, and absent an abuse of such discretion, the ruling will not be disturbed on review. People v. MacFarland, 189 Colo. 363, 540 P.2d 1073 (1975).

No reversible error where trial court permitted prosecutor to ask leading questions on redirect to develop and clarify witness's testimony. People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

Section (b) does not limit cross-examination to the same acts and facts to which a witness has testified on direct examination. The rule must be liberally construed to permit cross-examination on any matter germane to the direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict, or rebut testimony given by the witness. People v. Sallis, 857 P.2d 572 (Colo. App. 1993); People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

Section (b) should be liberally construed to permit cross-examination on any matter germane to the direct examination. People v. Marion, 941 P.2d 287 (Colo. App. 1996).

If a defendant makes a general denial of the offense charged or as to a matter of ultimate fact, the prosecutor is not limited to a mere categorical review of the evidence testified to on direct examination. The prosecutor must be permitted to examine the defendant in detail as to matters directly referred to during direct examination. People v. Sallis, 857 P.2d 572 (Colo. App. 1993).

Trial court erred in denying cross-examination of a wife as to the fraudulent nature of her spouse's personal injury claim against his employer where the wife testified during direct examination only as to the effect of the spouse's injuries on his family. The scope of cross-examination includes the subject matter of direct examination and matters affecting witness credibility. Admissions by the wife's spouse was related directly to the wife's direct testimony concerning the spouse's injuries. Burlington Northern R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

No reversible error where administrative hearing officer permitted testimony on cross examination as to whether petitioner believed that complaining witness was telling the truth where petitioner did not object and record did not reflect that such testimony affected the result of hearing. Knowles v. Bd. of Educ., 857 P.2d 553 (Colo. App. 1993).

Trial court may not place excessive limitations on defendant's cross-examination of witness especially regarding bias, prejudice, or motive for testifying. People v. Griffin, 867 P.2d 27 (Colo. App. 1993).

Trial court neither abused its discretion nor violated defendant's right to confrontation where defendant was prohibited from revealing to jury through cross-examination that witness was in custody in another state on unrelated charges where such testimony would have been cumulative and of little or no probative value and where defendant was otherwise provided with ample opportunity to impeach the witness's credibility by showing ulterior motive. People v. Griffin, 867 P.2d 27 (Colo. App. 1993).

Prosecutor asking a witness "And if you told the officer at the time that you heard 'stop police' would that be accurate?" was an impermissible leading question. People v. Stewart, 2017 COA 99, __ P.3d __.

Applied in Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984); People v. Mandez, 997 P.2d 1254 (Colo. App. 1999).

Rule 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh his memory for the purpose of testifying, either —
(1) while testifying, or
(2) before testifying, if

the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera,* excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

ANNOTATION

Law reviews. For article, ''A Deposition Primer, Part II: At the Deposition'', see 11 Colo. Law. 1215 (1982). For article, ''Rule 612 Revisited'', see 11 Colo. Law. 1553 (1982). For article, ''Waiver of Privilege Under Rule 612'', see 24 Colo. Law. 2563 (1995). For article, ''Rule 612: Discovery of Documents Shown to a Witness Before Deposition'', see 37 Colo. Law. 41 (June 2008).

Error to admit report not used or referred to by witness. Where no part of a report is used or referred to by a witness in his direct testimony, the admission of the report in the course of cross-examination on the theory that the witness has used the report to refresh his memory before testifying is error. People v. Bugarin, 181 Colo. 62, 507 P.2d 875 (1973).

Allowing prosecutor's leading question to cure a witness's lack of recollection was in error since there was no writing and the court did not follow this rule. People v. Stewart, 2017 COA 99, 417 P.3d 882.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior inconsistent statements for impeachment purposes. Before a witness may be examined for impeachment by prior inconsistent statement the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As a part of that foundation, the examiner may refer to the witness statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given.

Where the witness denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible.

Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made.

COMMITTEE COMMENT

Concerning prior statements of witnesses, the Colorado Rule of Evidence as it now exists is set forth in Transamerica Insurance Co. v. Pueblo Gas & Fuel Co., 33 Colo. App. 92, 95, 519 P.2d 1201, 1203 (1973).

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Prior Inconsistent Statements'', see 17 Colo. Law. 1977 (1988). For article, ''Rules 801 and 613: Evidentiary Uses of Pleadings Filed in Other Cases'', see 21 Colo. Law. 2389 (1992).

Comparing this rule to § 16-10-201, it is clear that this rule is directed to situations in which a prior inconsistent statement is used for impeachment purposes only, but § 16-10-201 eliminates the hearsay impediment to using prior inconsistent statements for proving the truth of matters asserted so long as statutory foundation requirements for admissibility of the evidence have been satisfied. People v. Madril, 746 P.2d 1329 (Colo. 1987).

Section (a) simply sets forth the procedure for proper impeachment of a witness with that witness's prior inconsistent statements; it does not permit, much less address, the permissible uses of other act evidence. People v. Fortson, 2018 COA 46M, 421 P.3d 1236.

No need to prove admitted contradictory statements. Where an attempt is made to impeach a witness through a prior statement and the witness admits having made the contradictory statement in question, there is no necessity for proving it, and the statement itself is inadmissible. Walker v. People, 175 Colo. 173, 489 P.2d 584 (1971).

When prosecution asks impeachment questions that imply witness has changed his story, but does not offer extrinsic evidence to prove the making of those statements, admission of that questioning is not plain error. This rule allows the prosecution to offer extrinsic evidence to prove the disputed point but does not require it. People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011), rev'd on other grounds, 2014 CO 21, 321 P.3d 487.

Witness may be impeached without prior interrogation where witness contradicted by inconsistent actions. The rule that a witness cannot be impeached by showing he has made statements at another time inconsistent with his testimony without a foundation being laid by interrogating the witness does not apply where the attempt to contradict the witness merely consists of showing acts and circumstances inconsistent with his testimony. People v. Hutto, 181 Colo. 279, 509 P.2d 298 (1973).

Prosecution may use another portion of same testimony used by defense to impeach. Where the defense counsel tries to impeach on only a portion of prior testimony in an attempt to show an inconsistency or contradiction, he waives any objection to the prosecution's using another portion of the same testimony in order to show that in its totality the testimony was not actually inconsistent. People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975).

Deposition used for impeachment purposes is always admissible under rules of evidence to discredit witness, even if opposing party was not represented at deposition, if it is relevant, material, and not collateral. Appel v. Sentry Life Ins. Co., 739 P.2d 1380 (Colo. 1987).

Although this rule was an inappropriate vehicle for admission of prior inconsistent statement, evidence held properly admissible under § 16-10-201, and defendant's conviction would not be overturned. People v. Jenkins, 768 P.2d 727 (Colo. App. 1988).

The court need not determine that the prior inconsistent statement was voluntary before permitting counsel to cross-examine a witness concerning the prior statement. People v. Ball, 821 P.2d 905 (Colo. App. 1991).

A specific exception to the foundational requirements of CRE 613 is created by CRE 806. Thus, where a transcript of a witness' testimony at the first trial was admitted into evidence at the second trial, testimony of a police detective as to inconsistent statements made by the witness were admissible without the witness first having opportunity to explain the prior inconsistent statements. People v. Ball, 821 P.2d 905 (Colo. App. 1991).

Applied in City of Gunnison v. McCabe Hereford Ranch, 702 P.2d 768 (Colo. App. 1985).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(Federal Rule Identical.)

ANNOTATION

Court's prerogative and duty to question witnesses. A trial court has the prerogative and, sometimes, the duty to question witnesses called by a party. People v. Ray, 640 P.2d 262 (Colo. App. 1981).

The trial court may interrogate witnesses, regardless of which party has produced them. It is sometimes the court's duty to question witnesses to develop the truth more fully and to clarify testimony. Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986).

Questions by court are not improper where purpose is to more fully develop truth and to clarify testimony already given. People v. Ray, 640 P.2d 262 (Colo. App. 1981).

Test to be applied when court interrogates witnesses is whether the trial court's conduct so departed from the required impartiality as to deny the defendant a fair trial. People v. Ray, 640 P.2d 262 (Colo. App. 1981); Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986); Sanchez v. Lauffenburger, 784 P.2d 855 (Colo. App. 1989).

Applied in People in Interest of Archuleta, 653 P.2d 93 (Colo. App. 1982).

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or

employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''A Deposition Primer, Part I: Setting Up the Deposition'', see 11 Colo. Law. 938 (1982). For article, ''Rule 615: Exclusion of Witnesses'', see 24 Colo. Law. 1299 (1995). For article, ''The Ethical Preparation of Witnesses'', see 42 Colo. Law. 51 (May 2013).

Policy reasons for sequestration rule are to prevent a witness from conforming his testimony to that of another and to discourage fabrication and collusion. Martin v. Porak, 638 P.2d 853 (Colo. App. 1981).

Purpose of rule is accomplished under rule's terms by ordering witnesses to withdraw from courtroom until called; however, to make rule effective, court may also direct witnesses not to discuss case with each other. People v. Brinson, 739 P.2d 897 (Colo. App. 1987).

This rule applies only to witnesses, not attorneys. Thus, an attorney's discussion of one witness's testimony with a prospective witness does not violate the rule. People v. Villalobos, 159 P.3d 624 (Colo. App. 2006).

A court has discretion, in appropriate circumstances, to grant an exception allowing a witness to impeach the testimony of a criminal defendant after hearing the defendant's testimony. Trial court properly granted exception to sequestration order by allowing prosecution's toxicologist to hear defendant's testimony and testify in response thereto. People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

For the purposes of determining who may be excluded from a pretrial deposition, CRCP 26 (c)(5) and not this rule controls. Hamon Contractors, Inc. v. District Court, 877 P.2d 884 (Colo. 1994).

When denial of sequestration mandates new trial. A trial court's error in denying a sequestration request does not mandate a new trial unless the requesting litigant demonstrates that the error constitutes sufficient prejudice to amount to an abuse of discretion. Martin v. Porak, 638 P.2d 853 (Colo. App. 1981); Williamson v. Sch. District No. 2, 695 P.2d 1173 (Colo. App. 1984).

Corporation's officers allowed to remain in courtroom. Although witnesses who are officers of a party-corporation are not formally designated as representatives, the trial court may still allow the witnesses to remain in the courtroom. Jefferson-Western Corp. v. Chefas, 670 P.2d 431 (Colo. App. 1983).

Rule prohibits the sequestration of an officer or employee of a nonnatural party who has been duly designated as its representative. People v. Cheeks, 682 P.2d 484 (Colo. 1984).

Determination of whether there has been a violation of a sequestration order and the penalty or sanction to be imposed are all matters resting within the discretion of the court. People v. P.R.G., 729 P.2d 380 (Colo. App. 1986).

Where trial court simply ordered district attorney to tell his witnesses not to talk to each other about their testimony, the sequestration order had not been violated when prosecutor talked to his witnesses in a group prior to presentation of any evidence. People v. Brinson, 739 P.2d 897 (Colo. App. 1987).

It is in the trial court's discretion to determine the appropriate penalty for a violation of a sequestration order. People v. Johnson, 757 P.2d 1098 (Colo. App. 1988).

In determining whether to impose sanctions for violation of sequestration order, court must consider three things: (1) The involvement, or lack thereof, of a party or his counsel in the violation of the order; (2) the witness' actions and state of mind in his violation of the order and whether the violation was inadvertent or deliberate; and (3) the subject matter of the violation in conjunction with the substance of the disobedient witness' testimony. People v. P.R.G., 729 P.2d 380 (Colo. App. 1986).

Test applied in People v. Melendez, 80 P.3d 883 (Colo. App. 2003), aff'd on other grounds, 102 P.3d 315 (Colo. 2004).

The supreme court modified the first factor set forth above to require evidence of the party's or counsel's consent, connivance, procurement, or knowledge regarding the violation before a sanction can be imposed against that party. People v. Melendez, 102 P.3d 315 (Colo. 2004).

In determining whether to impose sanctions for violation of a sequestration order, the trial court must consider, in addition to other things, the subject matter of the violation in conjunction with the substance of the testimony of the disobedient witness. Also, in order to prevail, the defendant must show that the witness' testimony would have been different but for the conversation which violated the court's order. People v. Johnson, 757 P.2d 1098 (Colo. App. 1988).

Sanctions for violation of a sequestration order, in addition to a mistrial, fall into three

categories: (1) Citing the witness for contempt; (2) permitting comment on the witness' noncompliance in order to reflect on his credibility; or (3) refusing to let the witness testify or striking his testimony. People v. P.R.G., 729 P.2d 380 (Colo. App. 1986).

It was an abuse of discretion to impose the extreme sanction of witness exclusion without an inquiry into the factors governing the imposition of such a sanction, and, in particular, without evidence that the defense was at fault for the violation. People v. Melendez, 80 P.3d 883 (Colo. App. 2003), aff'd, 102 P.3d 315 (Colo. 2004).

Prejudice resulting from violation of a sequestration order must be shown in order to require granting of a mistrial. People v. P.R.G., 729 P.2d 380 (Colo. App. 1986).

A victim's right to be present at all critical stages of the criminal justice process under Const. Art. II § 16a and § 24-4.1-302.5 (1)(d) takes precedence over a party's right to sequester witnesses under this rule. The father of a murder victim who testified in the defendant's trial was wrongly excluded from subsequent portions of the trial. People v. Coney, 98 P.3d 930 (Colo. App. 2004).

Applied in People v. Beltran, 634 P.2d 1003 (Colo. App. 1981).

ARTICLE VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Federal Rule Identical.)

Source: Entire rule amended and adopted June 20, 2002, effective July 1, 2002.

COMMITTEE COMMENT

This rule does not foreclose an owner from giving an opinion as to the value of his real property. Universal Insurance Company v. Arrigo, 96 Colo. 531, 44 P.2d 1020 (1935).

ANNOTATION

Law reviews. For article, ''Opinion Testimony'', see 22 Colo. Law. 1185 (1993). For article, ''Rule 701: Admissibility of Opinion Testimony by Lay Witnesses'', see 26 Colo. Law. 63 (Mar. 1997). For article, ''Rules 701 and 702: Boundary Between Lay and Expert Opinion Testimony'', see 34 Colo. Law. 53 (July 2005). For article, ''Lay Versus Expert Testimony: Does Venalonzo v. People Clarify the Law?'', see 46 Colo. Law. 46 (Aug.-Sept. 2017).

Lay testimony must be: (1) Rationally based on the perception of the witness; and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. People v. Baird, 66 P.3d 183 (Colo. App. 2002).

Lay witness may testify only to opinions or inferences that are (1) rationally based on the perception of the witness, (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge within the scope of C.R.E. 702. People v. Russell, 2014 COA 21M, 338 P.3d 472, aff'd, 2017 CO 3, 387 P.3d 750; People v. Acosta, 2014 COA 82, 338 P.3d 472.

In determining whether testimony is lay testimony or expert testimony, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony. Venalonzo v. People, 2017 CO 9, 388 P.3d 868; People v. Howard-Walker, 2017 COA 81M, __ P.3d __.

Establishment of qualifications to express opinion is question for trial court. The sufficiency of evidence to establish the qualifications and knowledge of a witness to express an opinion based on physical facts he has observed is a question for the trial court, not subject to

reversal unless clearly erroneous. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Attorney's opinion about client's mental condition admissible. The trial court errs in refusing to permit an attorney to express his opinion, as a lay witness, on the question of whether his client suffered from an impaired mental condition at the time of his alleged commission of an offense. People v. Rubanowitz, 673 P.2d 45 (Colo. App. 1983).

In a first-degree sexual assault trial, testimony of counselor consisting of general comments based on her observations of victim's demeanor following alleged sexual assault was not inadmissible as amounting to a scientific diagnosis of rape trauma syndrome, as long as counselor did not use scientific terminology, discuss theory, or state an opinion as to whether she believed victim. People v. Farley, 712 P.2d 1116 (Colo. App. 1985), aff'd, 746 P.2d 956 (Colo. 1987).

Lay opinion from police officer admitted where police officer testified he had been involved in law enforcement for fourteen years, had experience investigating burglaries of parking lot money depositories, and was familiar with the tools similar to those allegedly used in burglary of money depository. People v. Garcia, 784 P.2d 823 (Colo. App. 1989).

Lay opinion from police officer admitted where police officer testified he had been involved in law enforcement for sixteen years and had never had a suspect test positive for gun residue and had never experienced a recovery of a latent fingerprint from a firearm. The testimony was relevant to show that the absence of gun-shot residue and fingerprint evidence was not necessarily exculpatory. People v. Theus-Roberts, 2015 COA 32, 378 P.3d 750.

No plain error in allowing police officer to testify without qualifying him as an expert when the testimony was brief and cumulative of the testimony of experts who had already testified, in detail and without objection, about why gun-shot residue or latent fingerprint tests might be negative. People v. Theus-Roberts, 2015 COA 32, 378 P.3d 750.

Police officer may offer lay testimony if based on his or her perceptions and experiences but does not require specialized training or education. People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005).

Lay opinion from detective stating he recognized defendant on a surveillance videotape was admissible, regardless of the fact that defendant's appearance had not changed and the jury was allowed to view the videotape. The court held the detective's testimony was rationally based on his knowledge of the defendant's appearance and that, since the defendant's identity was at issue in the trial, the detective's testimony was helpful to a clear understanding of a fact at issue. People v. Robinson, 908 P.2d 1152 (Colo. App. 1995), aff'd, 927 P.2d 381 (Colo. 1996).

Lay opinion of crime scene technician admitted where the technician testified to the location of bullet holes and the paths of the bullets. The holes and paths of the bullets were evident from photographs. Technician did not perform any experiments or reconstruct the incident, therefore his testimony did not require any specialized or scientific knowledge to understand. People v. Caldwell, 43 P.3d 663 (Colo. App. 2001).

Detective's computer-related testimony was lay testimony because it was not based upon specialized knowledge of computers or technology. Detective's testimony was derived from plugging a flash drive into her computer and right-clicking on the image file to view the file's properties and then reporting on what she observed without interpreting those observations. While this requires basic computer competency, it is within the realm of knowledge of ordinary people who use computers in everyday life. People v. Froehler, 2015 COA 102, 373 P.3d 672.

Allowing police officer's testimony regarding use of glass pipe and torch lighter to smoke methamphetamine not plain error. People v. Malloy, 178 P.3d 1283 (Colo. App. 2008).

Detective's testimony about Facebook was lay testimony where the detective's understanding of Facebook and its features was based on information from his investigation and experience or knowledge common among ordinary people using, or considering the use of, Facebook. People v. Glover, 2015 COA 16, 363 P.3d 736.

Police officer's interpretation of her conversation with defendant was not expert testimony. The testimony was not based on specialized skills but rather the ability to interpret a conversation in which officer took part, a process of reasoning familiar in everyday life. People v. Douglas, 2012 COA 57, 296 P.3d 234.

Officers' testimony about tracing the physical address of an email sender from an internet protocol address was improperly admitted as lay testimony. People v. Garrison, 2017 COA 107, 411 P.3d 270.

Officer's testimony about which part of the marijuana plant is used to make edibles and whether drug dealers commonly maintain separate production and distribution centers was improperly admitted as lay testimony. The testimony was based on the officer's specific experience as a police officer and is not the type of information that an average citizen would be expected to know. Admitting the evidence did not constitute plain error since the prosecution also presented expert testimony on the same points. People v. Douglas, 2015 COA 155, 412 P.3d 785.

Officer's testimony identifying plants in defendants' home as marijuana improperly admitted as lay testimony. The officer's ability to identify marijuana plants was based exclusively on his specialized knowledge as a police officer, and therefore he should have been qualified as an expert before rendering his opinion. The error was harmless since the defendant presented a medical marijuana affirmative defense, admitting to possessing the marijuana plants. People v. Douglas, 2015 COA 155, 412 P.3d 785.

Officer's testimony that marijuana edibles are typically candies, sodas, brownies, and butter was properly admitted as lay testimony. An ordinary citizen could reasonably have come to such an opinion based on a process of reasoning familiar in everyday life. People v. Douglas, 2015 COA 155, 412 P.3d 785.

A lay witness may testify concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to identify the defendant from the photograph than the jury is. Robinson v. People, 927 P.2d 381 (Colo. 1996); People v. Howard-Walker, 2017 COA 81M, __ P.3d __.

Lay opinion testimony of analyst from division of insurance that petitioner's income was not misrepresented admitted when she reviewed documents already before the jury and she based her testimony on her common tax knowledge and her experience as an insurance analyst. Hock v. New York Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Lay opinion of analyst from division of insurance regarding petitioner's mental health admissible where testimony was based upon documentation analyst received as well as a personal meeting with the petitioner, and was supported by other evidence. Even if the testimony was inadmissible lay opinion, admission of testimony was cumulative, corrected by a limiting instruction, and harmless. Hock v. New York Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Lay opinion testimony is admissible to prove drug-induced intoxication. There is no basis to distinguish lay testimony regarding alcohol-induced intoxication from lay testimony regarding drug-induced intoxication, as long as the proper foundation has been laid. People v. Souva, 141 P.3d 845 (Colo. App. 2005).

Lay opinion testimony of witnesses, including minors, admissible to identify the substance provided to them by defendant was marijuana. The witnesses described prior experiences with marijuana and based their identification on its appearance, taste, and distinctive smell. These matters did not require any technical or specialized knowledge that would fall within the scope of C.R.E. 702. Accordingly, the minors established a proper foundation for their identification testimony. People v. Graybeal, 155 P.3d 614 (Colo. App. 2007).

A person may testify as a lay witness only if his or her opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person. To determine whether an opinion is one "which could be reached by any ordinary person", courts consider whether ordinary citizens can be expected to know or to have certain experiences. In this case, although the officer had experience with photo arrays that an ordinary person would not, the officer's opinion could have been reached by an ordinary person. People v. Rincon, 140 P.3d 976 (Colo. App. 2005).

There is no requirement that chemical tests be administered or that expert testimony be offered to bolster such lay identification testimony. People v. Graybeal, 155 P.3d 614 (Colo. App. 2007).

Trial court inappropriately admitted lay testimony of investigating police officer as to experimentation with respect to and reconstruction of an incident without qualifying the officer as an expert witness. The officer's testimony involved more than common experience and required practical knowledge of a scientific, technical, or specialized nature. Admission of the testimony constitutes harmless error, however, and does not require reversal. People v. Stewart, 55 P.3d 107 (Colo. 2002).

Trial court erred in admitting police officer's testimony that did not result from a process of reasoning familiar in everyday life. The testimony was not proper lay opinion but rather was expert testimony presented in the guise of lay opinion. The error in admitting the testimony did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliablity of the conviction. People v. McMinn, 2013 COA 94, 412 P.3d 551.

Trial court improperly admitted as lay testimony police officer's testimony about the meaning of the term "sherm". The testimony relied on the officer's specialized training and experience as a police officer. People v. Bryant, 2018 COA 53, 428 P.3d 669.

But the testimony did not have a substantial influence on the verdict or impair the fairness of the trial. People v. Bryant, 2018 COA 53, 428 P.3d 669.

Trial court improperly admitted expert testimony of police officers concerning methamphetamine amounts, production chemicals, and manufacture under the guise of lay testimony. The testimony required specialized knowledge and training and, thus, was subject to the expert witness requirements of C.R.E. 702. People v. Veren, 140 P.3d 131 (Colo. App. 2005).

Trial court abused its discretion by allowing detective to testify as a lay witness regarding blood spatter and blood transfer. De-

tective's testimony had the hallmarks of expert testimony, but detective had not been qualified as an expert. Detective testified about his extensive experience investigating cases involving blood; detective used and defined technical terms; detective testified not based on his personal knowledge or investigation of the case; and the prosecutor advised the court that detective was testifying as to his training and experience. People v. Ramos, 2012 COA 191, 396 P.3d 21, aff'd, 2017 CO 6, 388 P.3d 888.

Trial court abused its discretion when it allowed a witness to testify about grooming as it relates to a sexual predator's methods of acquiring victims without qualifying that witness as an expert. An ordinary citizen could not be expected to possess the experience, skills, or knowledge required to understand the concept of grooming as it relates to sexual predation. People v. Romero, 2017 CO 37, 393 P.3d 973.

Court abused its discretion in admitting some lay opinions from mental health providers who had not been properly noticed as experts by the prosecution. Some of the opinions were expert opinions improperly admitted under the guise of lay opinion testimony. The improper testimony related to symptoms of specific mental illness and opinions about whether defendant suffered from mental illness. The evidence relied upon the witness' specialized knowledge and training and, therefore, went beyond the bounds of lay opinion. The error in this case was harmless since there was ample evidence in addition to the improperly admitted opinions. Dunlap v. People, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Lay opinion from alleged murder victim's coworker who heard abusive statements made by defendant to victim found admissible and the coworker could make characterization of such statements as a part of the testimony. People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).

Admission of the opinion testimony of lay witnesses on the issue of causation does not constitute reversible error. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Forensic interviewer's testimony properly admitted. Testimony was not expert opinion evidence but rather an opinion based on observation. People v. Tillery, 231 P.3d 36 (Colo. App. 2009), aff'd on other grounds sub nom. People v. Simon, 266 P.3d 1099 (Colo. 2011); People v. Marsh, 396 P.3d 1 (Colo. App. 2011), aff'd, 2017 CO 10M, 389 P.3d 100.

Lay witness testimony that defendant was very "guilty-looking" immediately after the incident was not improper testimony. The witness's statement was not that defendant was guilty or even that the witness believed that a crime had been committed, but statements describing the witness's rational perception of the defendant's actions and demeanor after the alleged event. Although the witness used the term ''guilty'', she was clearly not opining on whether the defendant was legally guilty, and the prosecutor's questions as to what the witness meant were phrased to elicit a factual rather than ''legal'' response. People v. Acosta, 2014 COA 82, 338 P.3d 472.

A lay witness may state an opinion about another person's motivation or intent only if the witness had sufficient opportunity to observe the person and to draw a rational conclusion about the person's state of mind; an opinion that is speculative or not based on personal knowledge is not admissible. People v. Jones, 907 P.2d 667 (Colo. App. 1995); People v. Howard-Walker, 2017 COA 81M, __ P.3d __.

The trial court did not abuse its discretion in allowing a counselor from the detoxification facility at which the defendant allegedly committed a sexual assault to state an opinion as to whether the sexual encounter was consensual, since the testimony was based on the counselor's own observations. The trial court appropriately allowed the counselor to testify as to whether the victim was in an unconscious state at the time of the assault and to testify as to whether the defendant's actions constituted a sexual assault. People v. Hoskay, 87 P.3d 194 (Colo. App. 2003).

A lay witness may testify as to the substantial similarity between shoeprints found in connection with a crime and the defendant's shoes if the witness's conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe. People v. Vigil, 2015 COA 88M, __ P.3d __.

Where the witness was not qualified as an expert and the witness had no personal experience with the maintenance expenses on the property, evidence presented as to the amount of future maintenance expenses was legally insufficient. Pomeranz v. McDonald's Corp., 843 P.2d 1378 (Colo. 1993).

Applied in People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984); Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984); Witcher v. Canon City, 716 P.2d 445 (Colo. 1986); People v. Collins, 730 P.2d 293 (Colo. 1986); People v. Brown, 731 P.2d 763 (Colo. App. 1986); Sandoval v. Birx, 767 P.2d 759 (Colo. App. 1988); Pyles-Knutzen v. Bd. of County Comm'rs, 781 P.2d 164 (Colo. App. 1989); Graham v. Lombardi, 784 P.2d 813 (Colo. App. 1989); People v. Caldwell, 43 P.3d 663 (Colo. App. 2001).

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ANNOTATION

Law reviews. For article, ''Selecting an Expert Witness'', see 12 Colo. Law. 1464 (1983). For review, ''Admissibility of Thermography: Objective Evidence or a Mystical Procedure'', see 65 Den. U. L. Rev. 295 (1988). For article, ''Hearsay as a Basis for Opinion Testimony'', see 17 Colo. Law. 2337 (1988). For article, ''DNA: The Eyewitness of the Future'', see 18 Colo. Law. 1333 (1989). For article, ''Rule 702: Admissibility of Expert Testimony Regarding Eyewitness Identification'', see 21 Colo. Law. 927 (1992). For article, ''Introduction of Scientific Evidence in Criminal Cases'', see 22 Colo. Law. 273 (1993). For article, ''Opinion Testimony'', see 22 Colo. Law. 1185 (1993). For article, ''The Misuse and Abuse of Psychological Experts in Court'', see 23 Colo. Law. 2757 (1994). For article, ''Evaluating Recovered Memories of Trauma as Evidence'', see 25 Colo. Law. 1 (Jan. 1996). For article, ''Rule 702: Admissibility of Expert Testimony'', see 30 Colo. Law. 55 (Nov. 2001). For article, ''Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704'', see 31 Colo. Law. 53 (March 2002). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002). For article, ''Polygraph Examinations: Admissibility and Privilege Issues'', see 31 Colo. Law. 69 (Nov. 2002). For article, ''Challenging the Unreliable Damages Expert—Part I'', see 32 Colo. Law. 119 (Oct. 2003). For article, ''Challenging the Unreliable Damages Expert—Part II'', see 32 Colo. Law. 103 (Nov. 2003). For article, ''Colorado's Certificate of Review Statute: Considerations in Professional Negligence Cases'', see 33 Colo. Law. 11 (Feb. 2004). For article, ''The Admissibility of Expert 'Profile Evidence'", see 33 Colo. Law. 53 (March 2004). For article, ''Rules 701 and 702: Boundary Between Lay and Expert Opinion Testimony'', see 34 Colo. Law. 53 (July 2005). For article, ''Using Experts to Aid Jurors in Assessing Child Witness Credibility'', see 35 Colo. Law. 65 (Aug. 2006). For article, ''Lay Versus Expert Testimony: Does Venalonzo v. People Clarify the Law?'', see 46 Colo. Law. 46 (Aug.-Sept. 2017).

This rule governs a trial court's determination regarding the admissibility of expert testimony. When proposed expert testimony involves experience-based specialized knowledge, the court must consider whether the testimony will be helpful to the jury and whether the witness is qualified to render an expert opinion on the subject in question. Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

In determining whether testimony is lay testimony or expert testimony, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony. Venalonzo v. People, 2017 CO 9, 388 P.3d 868 ; People v. Howard-Walker, 2017 COA 81M, __ P.3d __.

Determination of expert within court's discretion. The trial court has wide discretion in determining whether the requirements to qualify a witness as an expert are met. Connell v. Sun Exploration & Prod. Co., 655 P.2d 426 (Colo. App. 1982).

Matter of the qualification of expert witness is discretionary with the trial court. White v. People, 175 Colo. 119, 486 P.2d 4 (1971); People v. Tidwell, 706 P.2d 438 (Colo. App. 1985); People v. Koon, 724 P.2d 1367 (Colo. App. 1986); People v. Williams, 790 P.2d 796 (Colo. 1990).

The court should consider the expert's experience of the time of trial, not on the date of the alleged malpractice. Durkee v. Oliver, 714 P.2d 1330 (Colo. App. 1986); People v. Braley, 879 P.2d 410 (Colo. App. 1993).

The trial court determines the qualification of witnesses and has discretion to admit expert witness testimony. Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986).

The qualification of an expert is a matter within the sound discretion of the trial judge. People v. Chavez, 182 Colo. 216, 511 P.2d 883 (1973); People v. Lomanaco, 802 P.2d 1143 (Colo. App. 1990).

The qualification of expert witness to competently testify on a matter of opinion is one of judicial discretion. People v. DeLuna, 183 Colo. 163, 515 P.2d 459 (1973).

The qualification of an expert witness to testify is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

The competency of an expert is for the trial court to determine. People v. Anderson, 184 Colo. 32, 518 P.2d 828 (1974).

Whether opinion testimony is within a witness's expertise generally is a matter addressed to the sound discretion of the court. People v. Gomez, 632 P.2d 586 (Colo. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982).

Trial court has broad discretion to determine the admissibility of expert testimony pursuant to this section. People v. Fasy, 820 P.2d 1314 (Colo. 1992).

Trial court has discretion in determining the qualifications of an expert and the admissibility of expert evidence, and the court's ruling will not be disturbed absent an abuse of discretion. Baird v. Power Rental Equip., Inc., 191 Colo. 319, 552 P.2d 494 (1976); Klein v. State Farm Mut. Auto. Ins. Co., 948 P.2d 43 (Colo. App. 1997).

Trial judge did not assume the role of advocate by asking questions of a potential expert witness. The court's questions served to aid the court in determining whether the expert testimony was admissible. The nature of the questions reflect that the court was not advocating a position but rather was seeking to satisfy itself—in its gatekeeper role—that the proffered scientific evidence was reliable. After the court questioned the proposed expert, the court invited the prosecutor and defense counsel to ask additional questions. Both sides accepted the invitation and further questioned the witness. Based on the record, the court's questions were not of such a nature as to transform the court from neutral gatekeeper to advocate for the prosecution. People v. Medrano-Bustamante, 2013 COA 139, 412 P.3d 581, aff'd in part and rev'd in part on other grounds sub nom. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Court did not abuse its discretion in determining that expert witness's opinions were based on reasonably reliable scientific principles and that the witness was qualified to render them. People v. Medrano-Bustamante, 2013 COA 139, 412 P.3d 581, aff'd in part and rev'd in part on other grounds sub nom. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Court did not abuse its discretion in denying defendant's motion for a pretrial hearing on the admissibility of GPS data. GPS technology is prevalent in modern society and widely regarded as reliable. People v. Campbell, 2018 COA 5, 425 P.3d 1163.

Court's decision not disturbed absent abuse. A court's decision to allow a witness to testify as an expert will not be disturbed without a clear showing of an abuse of discretion. White v. People, 175 Colo. 119, 486 P.2d 4 (1971); People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972); McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); People v. Drumright, 181 Colo. 137, 507 P.2d 1097 (1973); People v. Anderson, 184 Colo. 32, 518 P.2d 828 (1974); Bd. of Comm'rs v. Fixed Base Operators, 939 P.2d 464 (Colo. App. 1997); People v. Bornman, 953 P.2d 952 (Colo. App. 1997).

The sufficiency of foundation evidence to establish qualifications and knowledge of a witness to entitle him to express an opinion is a question for the trial court's determination, and in the absence of a showing of abuse of discretion this determination will not be overturned. People v. Jiminez, 187 Colo. 97, 528 P.2d 913 (1974).

The discretion of the trial judge over the scope of expert testimony will not be disturbed on review absent a clear showing of abuse. People v. Davis, 187 Colo. 16, 528 P.2d 251 (1974); People v. Jensen, 747 P.2d 1247 (Colo. 1987).

The determination of whether a witness is qualified to render an expert opinion is committed to the discretion of the trial court, and will not be disturbed on review unless that discretion is abused. People v. District Court, 647 P.2d 1206 (Colo. 1982).

The trial court has discretion to rule upon the qualifications of expert witnesses and unless that discretion is abused its decision will not be disturbed on appeal. Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982).

Trial court not required to make specific finding that witness is qualified as an expert. People v. Lomanaco, 802 P.2d 1143 (Colo. App. 1990).

Disqualification of experts based on a conflict of interest is governed by a two-part test. First, whether it was objectively reasonable for the party to conclude that a confidential relationship existed with an expert consultant. Second, whether any confidential or privileged information was disclosed by that party to the expert consultant. In re Page, 70 P.3d 579 (Colo. App. 2003).

A confidential relationship may arise if: (1) One party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice; (2) one party has gained the confidence of the other and purports to act or advise with the other's interest in mind; or (3) the parties' relationship is such that one is induced to relax the care and vigilance that ordinarily would be exercised in dealing with a stranger. In re Page, 70 P.3d 579 (Colo. App. 2003).

Rule does not require previous qualification as an expert or that the proposed expert belong to any particular organization. White v. People, 175 Colo. 119, 486 P.2d 4 (1971); People v. Bornman, 953 P.2d 952 (Colo. App. 1997).

Trial court inappropriately admitted lay testimony of investigating police officer as to experimentation with respect to and recon-

struction of an incident without qualifying the officer as an expert witness. The officer's testimony involved more than common experience and required practical knowledge of a scientific, technical, or specialized nature. Admission of the testimony constitutes harmless error, however, and does not require reversal. People v. Stewart, 55 P.3d 107 (Colo. 2002).

Trial court erred when it allowed police officer to testify as a lay witness that he could detect the smell of metabolized alcohol and draw other conclusions based on metabolized alcohol. The portion of the officer's testimony about metabolized alcohol was expert testimony because the opinion, as acknowledged by the officer, was based on years of experience and extensive training as a police officer. The error was not harmless because the improperly admitted expert testimony was the only evidence that specifically refuted defendant's testimony. People v. Kubuugu, 2019 CO 9, 433 P.3d 1214.

Trial court abused its discretion by allowing detective to testify as a lay witness regarding blood spatter and blood transfer. Detective's testimony had the hallmarks of expert testimony, but detective had not been qualified as an expert. Detective testified about his extensive experience investigating cases involving blood; detective used and defined technical terms; detective testified not based on his personal knowledge or investigation of the case; and the prosecutor advised the court that detective was testifying as to his training and experience. People v. Ramos, 2012 COA 191, 396 P.3d 21, aff'd, 2017 CO 6, 388 P.3d 888.

Court erred in admitting as lay testimony detective's computer-related testimony that was based on specialized knowledge. While the detective did not claim to have specialized training in the software or expertise in forensic computer analysis, the testimony went beyond that of the average layperson, including at least some technical knowledge of the software program developed for law enforcement. People v. Froehler, 2015 COA 102, 373 P.3d 672.

Court erred by allowing evidence that traced the physical address of an email sender from an internet protocol address as lay testimony. People v. Garrison, 2017 COA 107, 411 P.3d 270.

Trial court improperly admitted expert testimony of police officers concerning methamphetamine amounts, production chemicals, and manufacture under the guise of lay testimony. The testimony required specialized knowledge and training and, thus, was subject to the expert witness requirements of this rule. People v. Veren, 140 P.3d 131 (Colo. App. 2005).

Trial courts possess broad discretion to allow or prohibit testimony by expert witnesses in criminal cases and an exercise of that discretion will not be overturned absent a showing of manifest error. People v. Lanari, 926 P.2d 116 (Colo. App. 1996).

Trial court properly concluded that a witness was not qualified to give expert testimony on the use of force by law enforcement officers effecting an arrest when the witness had never (1) been employed in a law enforcement field, (2) participated professionally in a determination of what force a police officer may use in making an arrest, (3) arrested anyone, (4) completed a police officer training course, or (5) been retained by a police department to teach use of force. Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

This rule requires a two-tiered analysis for determining the reliability and validity of the underlying substance of an expert's opinion and a trial court must balance the reliability of the scientific principles upon which the testimony rests and the likelihood that the introduction of the evidence may overwhelm or mislead the jury. Colwell v. Mentzer Inv., Inc., 973 P.2d 631 (Colo. App. 1998); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

In exercising its discretion under this rule, the court should consider numerous factors, including the nature and extent of evidence in the case, the expertise of the proposed witness, the sufficiency and extent of the foundational evidence upon which the expert witness' ultimate opinion is to be based, and the scope and content of the opinion itself. People v. Lanari, 926 P.2d 116 (Colo. App. 1996); People v. Lesslie, 939 P.2d 443 (Colo. App. 1996); People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002).

Lanari factors applied and admission of proffered expert testimony properly denied in People v. Miller, 981 P.2d 654 (Colo. App. 1998).

This rule provides a more lenient standard for the admission of opinion evidence than does the test originally developed in Frye v. United States. The rule allows the admission of scientific evidence if such evidence will assist the jury in understanding the evidence or determining a fact at issue. DNA identification testimony in sexual assault case admissible under the rule and under Frye. People v. Fishback, 829 P.2d 489 (Colo. App. 1991), aff'd, 851 P.2d 884 (Colo. 1993).

This rule represents the appropriate standard for determining the admissibility of scientific evidence, rather than the test developed in Frye v. United States. Under the standard established in this rule, the trial should focus on the reliability and relevance of the scientific evidence and determine the reliability of the scientific principles, the qualifications of the witness, and the usefulness of the testimony to the jury. In determining the reliability and relevance of the evidence, the court should apply a broad inquiry and consider the totality of

the circumstances in each specific case, considering a wide range of factors. Because the applicable standard is so liberal, the court should also apply its discretionary authority under C.R.E. 403 to ensure the probative value of the evidence is not substantially outweighed by unfair prejudice. People v. Shreck, 22 P.3d 68 (Colo. 2001); Masters v. People, 59 P.3d 979 (Colo. 2002); People v. Rector, 248 P.3d 1196 (Colo. 2011).

Process of elimination and use of patient's medical history to rule out alternative explanations for injuries are reliable scientific methods. Eliminating the presence of any illness or disease and finding an absence of any accidental trauma to explain a patient's injuries satisfy the reliability requirement of Shreck. People v. Friend, 2014 COA 123M, 431 P.3d 614, aff'd in part and rev'd in part on other grounds, 2018 CO 90, 429 P.3d 1191.

Trial court has discretion to decide whether to conduct an evidentiary hearing when a party requests a Shreck analysis. A court is not required to conduct an evidentiary hearing under Shreck provided it has before it sufficient information to make specific findings under C.R.E. 403 and this rule about the reliability of the scientific principles involved, the expert's qualification to testify to such matters, the helpfulness to the jury, and potential prejudice. People v. Rector, 248 P.3d 1196 (Colo. 2011).

A party raising a challenge under Shreck to the admissibility of expert testimony must sufficiently identify the testimony or witness being challenged. People v. Rector, 248 P.3d 1196 (Colo. 2011).

"Reasonable medical probability" standard should no longer be used. This rule allows the admission of scientific expert testimony when: (1) The scientific principles at issue are reasonably reliable; (2) the witness is qualified to opine on such principles; (3) the testimony is useful to the jury; and (4) the probative value of the evidence outweighs any potential prejudice. An inquiry into whether the expert expresses his or her opinion to the required degree of medical probability is not appropriate. Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011).

The reliability analysis hinges on whether the scientific principles the expert employed are grounded in the methods and procedures of science. Estate of Ford v. Eicher, 250 P.3d 262 (Colo. 2011).

Gatekeeping function to rule out "junk science" only allows court to determine whether an alternative theory is reasonably reliable. The court abuses its discretion when it determines which of two competing medical theories of causation is the more plausible and prevents the expert from offering the other. Estate of Ford v. Eicher, 220 P.3d 939 (Colo. App. 2008), aff'd, 250 P.3d 262 (Colo. 2011).

The fact that there is no ethical way to test an alternative medical theory does not preclude the admissibility of testimony but goes to the weight that the jury may assign to it. Estate of Ford v. Eicher, 220 P.3d 939 (Colo. App. 2008), aff'd, 250 P.3d 262 (Colo. 2011).

In determining that expert's testimony is unreliable and, therefore, should not be admitted under this rule, it is not enough for a court to conclude that the testimony is "speculative". Instead, the court must consider whether the scientific principles underlying the testimony are reasonably reliable and whether the expert is qualified to opine on such matters. People v. Ramirez, 155 P.3d 371 (Colo. 2007).

Because the trial court made no specific finding that the theory of "overkill" testified to by the witness was reliable, nor was the reliability of that theory either supported by the evidence in the record or accepted in Colorado, its admission was an abuse of discretion. However, because there was overwhelming evidence of defendant's guilt apart from the expert testimony, the error was harmless. Ruibal v. People, 2018 CO 93, 432 P.3d 590.

Statement of opinion in terms indicating a lack of certainty, such as "a possible mechanism" or "a reasonable supposition", do not by themselves render the opinion speculative. Estate of Ford v. Eicher, 220 P.3d 939 (Colo. App. 2008), aff'd, 250 P.3d 262 (Colo. 2011).

Trial court did not commit manifest error when it determined that forensic psychologists' testimony related to motivation and behavior of individuals committing sexual homicides, a recognized subspecialty of forensic psychology, was reasonably reliable, that it was helpful to the jury, and that under C.R.E. 403 the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the evidence. Masters v. People, 59 P.3d 979 (Colo. 2002).

A trial court has the discretion to determine the admissibility of expert evidence and the trial court committed harmless error by refusing to permit an expert witness to testify on behalf of the plaintiff. Simon v. Truck Ins. Exch., 757 P.2d 1123 (Colo. App. 1988).

Admissibility of expert evidence must be evaluated in light of its offered purpose on review for potential abuse of discretion, and prosecution's proffered reason for admitting testimony to show the basis of the expert's opinion that a subdural hematoma is only caused by massive, violent force was an undisputed fact that helped the jury understand the facts of the case, and therefore was not an abuse

of discretion. People v. Martinez, 74 P.3d 316 (Colo. 2003).

But trial court's admission of evidence of accident scenarios without a showing of a link between shaken-impact syndrome and the accident scenarios was error, as C.R.E. 702's helpfulness standard requires a valid scientific connection, enunciated to the jury. People v. Martinez, 74 P.3d 316 (Colo. 2003).

It was reversible error for the court to fail to apply the helpfulness standard of this rule in determining the admissibility of testimony on the reliability of eyewitness identification. Campbell v. People, 814 P.2d 1 (Colo. 1991).

When expert testimony unnecessary. Where the trial court is sitting as a finder of fact and is capable of drawing its own inferences from the facts in the record, it need not admit expert testimony on a matter that it is capable of resolving without such testimony. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982).

Trial court did not abuse its discretion in admitting expert testimony where defendant did not present any evidence rebutting the reliability or general acceptance of the evidence. Stoczynski v. Livermore, 782 P.2d 834 (Colo. App. 1989).

The basis for admissibility under this rule is not that the witness possesses skill in a particular field but that the witness can offer assistance on a matter not within the knowledge or common experience of people of ordinary intelligence. Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990); Hines v. D. & R.G.W. R. Co., 829 P.2d 419 (Colo. App. 1991).

The fact that a witness gained specialized knowledge while working under the supervision of others does not render the witness unqualified. Town of Red Cliff v. Reider, 851 P.2d 282 (Colo. App. 1993).

Expert testimony by an architect not licensed in the state may be properly admitted if the trial court determines whether the individual's education, training, experience, and knowledge in the field of architecture establishes that he has special knowledge concerning the architectural standards, including statewide standards applicable to Colorado practitioners, and whether the testimony would aid the court. Corcoran v. Sanner, 854 P.2d 1376 (Colo. App. 1993).

Competence to testify as to medical standards. Generally, practitioners of one school of medicine are not competent to testify as experts relative to standards of care required of practitioners of another school. Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982).

However, a physician from one specialty may testify concerning the standard of care required of a physician with a different specialty, provided that the expert witness has acquired, through experience or study, more than just a casual familiarity with the standards of care of the defendant's specialty. Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982); Connelly v. Kortz, 689 P.2d 728 (Colo. App. 1984).

Where the witness and the defendant are both doctors of podiatric medicine, the testimony is admissible regardless of the difference of the practices. Durkee v. Oliver, 714 P.2d 1330 (Colo. App. 1986).

A physician may be qualified as an "expert in medicine" rather than a specialty so long as his or her knowledge, skill, experience, training, or education supports the qualification and he or she is capable of providing specialized knowledge that will assist the decision-maker in determining the issues. People ex rel. Strodtman, 293 P.3d 123 (Colo. App. 2011); Gonzales v. Windlan, 2014 COA 176, 411 P.3d 878.

The test developed in Frye v. United States is applicable to novel scientific devices or processes involving the evaluation of physical evidence. The test contained in this rule is applicable if the evidence is of a general nature and the expert's testimony does not concern this particular victim. Fishback v. People, 851 P.2d 884 (Colo. 1993) (disapproved in People v. Shreck, 22 P.3d 68 (Colo. 2001)).

The test developed in Frye v. United States is applicable to the admission of novel scientific evidence. Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997), overruled by implication in People v. Shreck, 22 P.3d 68 (Colo. 2001).

Frye test has not been abandoned in Colorado as an exclusive test of admissibility of certain expert testimony, but its application remains very narrow. Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Frye test may be used only if proffered scientific evidence is based on novel scientific devices and processes involving the evaluation of physical evidence. People v. Perryman, 859 P.2d 263 (Colo. App. 1993); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

The test established in Frye v. United States requires a showing of (1) general acceptance in the relevant scientific community of the underlying theory or principle, and (2) general acceptance in the relevant scientific community of the techniques used to apply that theory or principle. Fishback v. People, 851 P.2d 884 (Colo. 1993); Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

In evaluating novel scientific evidence under the Frye test, a court must identify the scientific theory, techniques used, and relevant scientific community at issue and then consider the evidence presented at trial, scientific literature on the state of the science in question, and rulings from other jurisdictions employing the same admissibility questions. Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997).

Test for admissibility of expert testimony that does not deal with scientific devices or processes is whether the testimony will assist the trier of fact to understand the evidence or fact in issue. Colwell v. Mentzer Invs., Inc., 973 P.2d 631 (Colo. App. 1998).

To determine the admissibility of this type of testimony, the court must hold an in limine proceeding to balance the reliability of the scientific principles upon which the testimony rests with the likelihood that the testimony may overwhelm or mislead the jury. Colwell v. Mentzer Invs., Inc., 973 P.2d 631 (Colo. App. 1998).

Applying this test, the court did not abuse its discretion in admitting testimony concerning the effect of stress on causing multiple sclerosis to become symptomatic. Colwell v. Mentzer Invs., Inc., 973 P.2d 631 (Colo. App. 1998).

Neither of the tests established in Frye v. United States or Daubert v. Merrell Dow Pharmaceuticals is applicable to dog-tracking evidence because it does not depend upon any scientific device, method, or process. People v. Brooks, 950 P.2d 649 (Colo. App. 1997), aff'd, 975 P.2d 1105 (Colo. 1999).

Instead, such evidence concerns a subject of common knowledge: Some dogs can track. While specialized knowledge is involved, the reliability of a particular track is typically demonstrated by evidence that is easily understood by a jury such as the handler's experience, knowledge, and training. People v. Brooks, 950 P.2d 649 (Colo. App. 1997), aff'd, 975 P.2d 1105 (Colo. 1999).

Elements of a proper foundation for dog tracking evidence listed in Brooks v. People, 975 P.2d 1105 (Colo. 1999).

Harmless error to admit dog tracking evidence, despite improper foundation, where dog handler later testified she and the dog had worked together for five years and performed numerous narcotics sniffs, and that the dog had never alerted officers about money determined to be clean. People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Frye test does not apply to shoe print identification. The expert's comparative process involves no ''manipulation'' of evidence, and an understanding of the techniques used is readily accessible to the jury. People v. Perryman, 859 P.2d 263 (Colo. App. 1993); People v. Fears, 962 P.2d 272 (Colo. App. 1997).

Frye test should not have been used to exclude evidence related to the results of automobile collision experiments with human volunteers as the tests did not involve a novel scientific process or device applied to the manipulation of physical evidence, but exclusion was nonetheless proper as the trial court did not rely exclusively on the Frye test but also applied C.R.E. 402 and this rule. Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Concerns which may arise in the implementation of otherwise generally accepted techniques go to the weight to be accorded to scientific or technical evidence and not to the admissibility of such evidence. Fishback v. People, 851 P.2d 884 (Colo. 1993).

Evidence derived from multiplex DNA testing systems was admissible under this rule based on the supreme court findings that multiplex systems are generally reliable, questions as to the reliability of a specific type of multiplex system go to the weight of the evidence, and the specific multiplex systems used in this case had been deemed reliable by other courts. Further, the court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion, delay, waste of time, or needless presentation of cumulative evidence under C.R.E. 403. People v. Shreck, 22 P.3d 68 (Colo. 2001); People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004).

Inconclusive and no conclusion DNA evidence is not relevant direct evidence. People v. Marks, 2015 COA 173, 374 P.3d 518.

Court acted within its discretion by determining that the scientific principles underlying the use of the Y Chromosome Short Tandem Repeat (Y-STR) analysis and the YFiler database of individuals' Y-STR profiles with the counting method analysis to generate exclusion statistics were reliable. There was testimony that the statistical methods used were generally accepted by other laboratories and used in several other fields and that other jurisdictions had admitted similar evidence as reliable. People v. Tunis, 2013 COA 161, 318 P.3d 524.

Quantitative electroencephalogram (QEEG), which is a computer enhanced electroencephalogram that compares a patient's brain activity with the activity of normally functioning brains, is not generally accepted in the community of clinicians who treat brain injured patients and QEEG evidence is thus not admissible. Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997).

But videofluoroscopy (VF), which is a videotaped x-ray motion picture of a patient's bones and soft tissue structures in motion, is generally accepted by the relevant community of chiropractic professionals and VF evidence is thus admissible. Tran v. Hilburn, 948 P.2d 52 (Colo. App. 1997).

The water court properly excluded results derived from surface and ground water models because of a lack of reliability caused by a variety of technical failures by the expert witnesses. In re Water Rights of Park County Sportsmen's Ranch, 105 P.3d 595 (Colo. 2005).

Exclusion of testimony held abuse of discretion where oral surgeon had testified as to standard of care for general dentist after the trial court had accepted the witness as an expert in both fields, neither the defendant nor the court had objected to the surgeon's qualification as an expert witness at the time of his testimony, and surgeon had testified that the standard of care for extraction of tooth would be the same for both practitioners. Surgeon's statement, in response to questioning of court, that he could not testify to the overall standard of care for general dentists goes to the weight to be accorded to testimony rather than to its admissibility. Sanchez v. Lauffenburger, 784 P.2d 855 (Colo. App. 1989).

Attorneys may testify as experts with respect to insurance industry standards. Klein v. State Farm Mut. Auto. Ins. Co., 948 P.2d 43 (Colo. App. 1997).

Certified public accountant (CPA) qualified as expert in accounting. A trial court has discretion in determining the qualifications of an expert and the admissibility of expert evidence. That discretion is properly exercised where a certified public accountant is properly qualified as an expert in accounting and he testifies only regarding his professional opinions as a CPA which have to be made by him in the performance of his duties. Andrikopoulos v. Broadmoor Mgt. Co., 670 P.2d 435 (Colo. App. 1983).

Police officers employed in crime lab may testify as experts. A trial court does not abuse its discretion in allowing police officers employed in the crime laboratory to testify as experts when the technicians have qualifications as experts based on technical training and pretrial experience, and the jury is adequately instructed on the weight to be given expert testimony and opinion evidence. People v. Hankin, 179 Colo. 70, 498 P.2d 1116 (1972).

There is no requirement that a forensic chemistry expert follow a "written analytical method" before his or her expert testimony may be admitted. Based on the totality of the circumstances, the trial court did not abuse its discretion in admitting the expert testimony without a ''written analytical method''. People v. Laurent, 194 P.3d 1053 (Colo. App. 2008).

Testimony concerning Mexican culture did not constitute specialized knowledge that would assist the trier of fact, and exclusion of proffered expert testimony did not deprive defendant of his constitutional right to present a defense. People v. Salcedo, 985 P.2d 7 (Colo. App. 1998), rev'd on other grounds, 999 P.2d 833 (Colo. 2000).

Fact that witness not college graduate does not preclude his testifying as expert. The fact that a police officer is not a college graduate does not preclude his testifying as an expert on the basis of other technical training and pretrial experience. White v. People, 175 Colo. 119, 486 P.2d 4 (1971).

Error not found in allowing handwriting expert to testify. People v. Drumright, 181 Colo. 137, 507 P.2d 1097 (1973).

Court did not abuse its discretion in refusing to qualify defendant's witness as an expert. The witness claimed that his expert knowledge was self-taught, but he did not explain how he learned about medical marijuana grows. Although expertise can be based solely on experience, the court had no basis to determine whether the testimony was reliable without additional information about the genesis of his knowledge and skills. People v. Douglas, 2015 COA 155, 412 P.3d 785.

Jury is not bound by the testimony of expert witnesses, which must be considered and weighed as that of other witnesses. People v. King, 181 Colo. 439, 510 P.2d 333 (1973).

A medical opinion is admissible if founded on reasonable medical probability. Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. App. 1983).

These rules, not the standard of "reasonable medical probability", govern the admissibility of expert testimony. To the extent earlier cases approve of this standard, they are overruled. People v. Ramirez, 155 P.3d 371 (Colo. 2007).

Internist not allowed to testify regarding the practice of surgeons. Trial court did not abuse its discretion in refusing to allow internist to testify to the standards of practice of surgeons in the Denver metropolitan area when proponent failed to demonstrate that the standards of care in the two fields are in fact similar, and there was testimony that the standards of practice concerning the need for surgery followed by surgeons differ from the standards of practice followed by internists. Connelly v. Kortz, 689 P.2d 728 (Colo. App. 1984).

Dispositive consideration in ruling on admissibility of medical witness' expert testimony regarding whether the defendant, who practices in another school of medicine, has adhered to or deviated from the requisite standard of care should be (1) whether the expert is, by reason of knowledge, skill, experience, training, or education, so substantially familiar with the standard or care applicable to the defendant's specialty as to render the witness' opinion testimony as well-informed as would be the opinion of an expert witness practicing the same specialty as the defendant, or (2) whether the standard of care for the condition in question is substantially identical for both specialties. Melville v. Southward, 791 P.2d 383 (Colo. 1990).

Expert's testimony of personal practices may be admissible if an expert testified concerning the applicable standard of care because (1) expert's personal practices may help jurors understand why that standard of care is

followed; (2) testimony regarding personal practices may either bolster or impeach the credibility of the expert; and, (3) each expert addressed the applicable standard of care. Wallbank v. Rothenberg, 74 P.3d 413 (Colo. App. 2003).

Expert testimony by a physician who had never conducted an examination for a medical marijuana applicant may properly be admitted where the defendant provides no authority to show that the medical assessment and diagnosis required for a medical marijuana recommendation differ from that performed by physicians for other purposes. People v. Montante, 2015 COA 40, 351 P.3d 530.

Testimony of orthopedic surgeon should not have been admitted on the issue of podiatrist's alleged negligence. The plaintiff failed to establish that the orthopedic surgeon was so substantially familiar with the standard of care for podiatric surgery as to render his opinion testimony as well-informed as that of a podiatrist and failed to establish that the standard of care for the surgery was substantially identical for both the practice of orthopedic surgery and podiatry. Melville v. Southward, 791 P.2d 383 (Colo. 1990).

Neuropsychologists are not per se unqualified to speak on the causation of organic brain injury, but a court must satisfy the two-part approach to questions arising under this rule. Huntoon v. TCI Cablevision of Colo., 969 P.2d 681 (Colo. 1998).

Trial court did not err when it permitted a physician accepted as an expert in plastic and reconstructive surgery and the care of burn patients to testify that he had discontinued a steroid treatment after burn victim reported gynecological symptoms where physician was not offering an expert opinion on gynecological and obstetrical medicine but rather was giving the reasons for his course of treatment, which were based on the burn victim's physical response to the treatment. Simon v. Coppola, 872 P.2d 10 (Colo. App. 1993).

In a trial for sexual assault on a child, the trial court did not err in admitting testimony by the child's therapist, a social worker, about the characteristics present in sexually abused children, the presence of similar characteristics in the child, and the purpose of therapy since such testimony does not rise to the level of an improper assertion that the child was telling the truth and the testimony would assist the jury in determining a fact in issue. People v. Cordova, 854 P.2d 1337 (Colo. App. 1992).

In a first-degree sexual assault trial, testimony of counselor consisting of general comments based on her observations of victim's demeanor following alleged sexual assault was not inadmissible as amounting to a scientific diagnosis of rape trauma syndrome, as long as counselor did not use scientific terminology, discuss theory, or state an opinion as to whether she believed victim. People v. Farley, 712 P.2d 1116 (Colo. App. 1985), aff'd, 746 P.2d 956 (Colo. 1987).

The trial court did not err by allowing expert testimony in sexual assault case because the lay notion of what behavior follows being raped may not be consistent with the behavior that social scientists have found. This satisfies the test that expert testimony be helpful to the jury. Further, rape trauma syndrome evidence has repeatedly been held to be reliable. People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

Denial of effective counsel. Admission of testimony of defense-retained handwriting expert called by prosecution constitutes denial of effective assistance of counsel. Perez v. People, 745 P.2d 650 (Colo. 1987).

Expert witness evidence not admissible. Where expert witness' opinion evidence would not assist the trier of fact in understanding the evidence and where evidence is not of a technical or complex nature, expert testimony is not admissible under this rule. People v. Snook, 729 P.2d 1026 (Colo. App. 1986), aff'd, 745 P.2d 647 (Colo. 1987).

This rule was not intended to allow expert testimony on the issue of whether a witness is telling the truth. People v. Snook, 729 P.2d 1026 (Colo. App. 1986), aff'd, 745 P.2d 647 (Colo. 1987).

Court properly excluded defendant's expert heat of passion testimony because the heat of passion mitigator does not apply when a person seeks out the highly provoking act in question, as defendant did here. Therefore, trial court properly excluded the testimony since it would not have been helpful to the jury. People v. Valdez, 183 P.3d 720 (Colo. App. 2008).

Expert's testimony that victim's statements are consistent with the medical diagnosis do not constitute a subjective opinion concerning the veracity of victim's statements, therefore the testimony may be properly admitted. People v. Wittrein, 198 P.3d 1237 (Colo. App. 2008), rev'd on other grounds, 221 P.3d 1076 (Colo. 2009).

Doctor's testimony that she could not imagine that victim's story was fabricated was improper since it was an opinion that victim was telling the truth. People v. Wittrein, 198 P.3d 1237 (Colo. App. 2008), aff'd, 221 P.3d 1076 (Colo. 2009).

However, the error was invited by defense counsel's questioning, so reversal is not required. People v. Wittrein, 221 P.3d 1076 (Colo. 2009).

While expert opinion on whether children generally have the sophistication to lie about having experienced a sexual assault is admissible, neither a lay nor expert witness may give opinion testimony with respect to whether a

witness is telling the truth on a specific occasion. Such testimony invades the province of the jury with respect to its determination of credibility. People v. Higa, 735 P.2d 203 (Colo. App. 1987).

Expert testimony on "rape trauma syndrome" admissible on issue of victim's delay in reporting sexual assault where testimony concerned only existence of syndrome and did not involve specific diagnosis of victim. People v. Hampton, 746 P.2d 947 (Colo. 1987).

Defense may present expert testimony as to defendant's state of mind in order to bolster a claim of self-defense in a homicide case. People v. Young, 825 P.2d 1004 (Colo. App. 1991).

Expert testimony on posttraumatic syndrome admissible on issue of child victim's delay in reporting sexual assault, where testimony of expert did not address opinion as to truthfulness of child's statements. People v. Fasy, 829 P.2d 1314 (Colo. 1992).

Expert's testimony was properly received to aid the jury in understanding the typicality of reactions by children who have been subjected to sexual abuse. Because the expert testified in general terms, did not focus on the truthfulness of the child's statements, and did not make any explicit reference to the child's truthfulness, it was proper expert testimony. People v. Morrison, 985 P.2d 1 (Colo. App. 1999), aff'd on other grounds, 19 P.3d 668 (Colo. 2000); People v. Mintz, 165 P.3d 829 (Colo. App. 2007); People v. Short, 2018 COA 47, 425 P.3d 1208.

Trial court did not abuse its discretion by finding that an expert's explanation of possible child behaviors and reactions would be helpful to the trier of fact and was admissible. People v. Whitman, 205 P.3d 371 (Colo. App. 2007).

Admissibility of expert testimony based on results of absorption inhibition testing in rape case. Since the absorption inhibition method has been recognized as based upon accepted scientific principles, trial court admission of such evidence based upon an offer of proof was a proper exercise of discretion. People v. Banks, 804 P.2d 203 (Colo. App. 1990).

Testimony by voice-print expert is not sufficiently reliable to be admissible. People v. Drake, 748 P.2d 1237 (Colo. 1988).

Investigating police officer determined to be expert. An investigating police officer may give expert opinion if the subject is complex, is susceptible to opinion evidence, and the witness is qualified to give an opinion. Eggert v. Mosler Safe Co., 730 P.2d 895 (Colo. App. 1986).

Trial court did not err in refusing to permit expert testimony on the factors affecting the reliability of eyewitness identification. People v. Beaver, 725 P.2d 96 (Colo. App. 1986).

Expert testimony on the reliability of eyewitness identification is not per se admissible. Rather, admissibility of such evidence is left to the trial court's discretion. The trial judge must consider both this rule and C.R.E. 403 in determining the admissibility of such evidence and such determination may not be reversed unless it is manifestly erroneous. Campbell v. People, 814 P.2d 1 (Colo. 1991).

Trial court did not err in admitting results of a defendant's breath-alcohol test and allowing expert witness to testify about alcohol's effect on a person's inhibitions. People v. Covington, 988 P.2d 657 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 15 (Colo. 2001).

The trial court has broad discretion to evaluate on a case by case basis whether expert testimony on the issue would assist the trier of fact to understand evidence or to determine facts in issue. The appellate court will not reverse the trial court's ruling to admit or exclude such expert testimony unless the ruling is manifestly erroneous. People v. Kemp, 885 P.2d 260 (Colo. App. 1994).

Admissibility of experience-based specialized knowledge that is not dependent on a scientific explanation depends on whether the evidence is reasonably reliable information that will assist the trier of fact, which question requires the court to find that the testimony on the subject would be useful to the jury and that the witness is qualified to render an opinion on the subject. Brooks v. People, 975 P.2d 1105 (Colo. 1999); Salcedo v. People, 999 P.2d 833 (Colo. 2000).

Trial court erred in excluding expert testimony on reliability of eyewitness identification where eyewitness identification of defendant was the only substantial element of the prosecution's case, eyewitnesses expressed high confidence in their identification of defendant, and proffered expert testimony would have shown a poor relationship between the confidence of eyewitnesses, in general, and the reliability of such witnesses' testimony. People v. Campbell, 847 P.2d 228 (Colo. App. 1992).

Trial court erred in excluding expert testimony on the whether all of the damages were foreseeable. It was sufficient that the expert's testimony permitted the jury to infer that not all of the damages were foreseeable even if the expert did not qualify how much was not foreseeable. Core-Mark Midcontinent v. Sonitrol Corp., 2012 COA 120, 300 P.3d 963.

Three-part test under equivalent federal rule applied in People v. Campbell, 847 P.2d 228 (Colo. App. 1992).

Where challenged testimony addressed a collection of behaviors which are typical of children who have been sexually abused, the fact that some of these behaviors were observed as occurring in the victim serves the proper

purposes of corroborating the testimony of the victim and does not make such testimony inadmissible. The testimony of the dynamics of child sexual assault could be used by the jury to understand the evidence and determine facts in issue and was properly admitted. People v. Woertman, 786 P.2d 443 (Colo. App. 1989).

Expert testimony concerning drug courier profile was not properly admitted because it was not helpful to the jury since it was inherently subjective, of dubious reliability, and logically irrelevant, and because its probative value was substantially outweighed by a risk of misleading the jury. Salcedo v. People, 999 P.2d 833 (Colo. 2000).

Evidence of child sexual abuse and sex offender characteristics was not improper "profile" evidence, but was designed to aid the jury regarding the modus operandi of sex offenders and was useful because jurors cannot be presumed to have knowledge of such characteristics. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Present or former employees of the insurance industry are not the only persons qualified to render expert opinions about its operation. Attorneys with extensive experience in workers' compensation who have dealt extensively with defendant and other insurance companies may testify as experts regarding the standard of good faith conduct of an insurer. Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990).

Trial court did not abuse discretion by not accepting a convict to testify as an expert witness in parole procedures. Cardiel v. Brittian, 833 P.2d 748 (Colo. 1992).

District court did not abuse discretion in denying habeas corpus petitioner proffered expert witness. Although witness, a fellow inmate of the petitioner, had some training and experience with habeas corpus petitions and other parole issues, trial court cannot be found to have abused its discretion in refusing to accept the witness as an expert in administrative procedures concerning parole. Cardiel v. Brittian, 833 P.2d 748 (Colo. 1992).

This rule contained the appropriate test to determine the admissibility of expert testimony when the process used by the expert involved no manipulation of physical evidence and the understanding of the expert's techniques was readily accessible to the jury. The expert's testimony compared the characteristics of defendant's shoes with prints found near the victim's body. People v. Perryman, 859 P.2d 263 (Colo. App. 1993).

A court may rely on the testimony of a single witness in admitting scientific evidence under Frye if the witness is qualified to render an opinion as to the general acceptance of the techniques and the opposing party has the opportunity to cross-examine the expert. People v. Perryman, 859 P.2d 263 (Colo. App. 1993).

Where expert witness had 16 years' experience, was familiar with literature in the field, and had testified as an expert in numerous prior cases the court could rely on such expert's testimony without additional, independent expert testimony. People v. Perryman, 859 P.2d 263 (Colo. App. 1993).

Court did not abuse its discretion in deeming witness qualified to testify as an expert given witness's extensive experience, knowledge, and training. People v. Rojas, 181 P.3d 1216 (Colo. App. 2008).

Where expert's opinion is based upon reliable data, including unrebutted published studies and the treatment of at least 50 patients with exposure to the same toxic substance as that to which plaintiff was exposed, there was no error in admitting testimony regarding causation, as it is both helpful and competent. Salazar v. Am. Sterlizer Co., 5 P.3d 357 (Colo. App. 2000).

Court did not abuse its discretion in concluding that a witness who was not a real estate appraiser could offer testimony concerning property values. The court was satisfied that the extent of the witness's training and experience qualified him to express an expert opinion regarding the effect of environmental contamination on property values even though he was not a real estate appraiser. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Where substantial expert testimony concerning DNA testing supported admissibility of DNA evidence, it was within the trial court's discretion to allow consideration of the evidence. People v. Lindsey, 868 P.2d 1085 (Colo. App. 1993).

Trial court did not err in admitting DNA evidence where DNA expert could not definitely identify victim as a contributor of the DNA. Testimony was relevant in that it showed it was more probable than not that victim contributed to the DNA. People v. Rojas, 181 P.3d 1216 (Colo. App. 2008).

Expert testimony that there are no physical findings in 90 to 95 percent of child sex assault cases was relevant to rebut defense counsel's argument concerning the lack of physical evidence and to explain to the jury why the lack of physical findings in victim's case did not refute the allegations. People v. Conyac, 2014 COA 8M, 361 P.3d 1005.

Although an expert witness should not dictate the law that a jury should apply, an expert witness is permitted, in the trial court's discretion, to refer to the facts of a case in legal terms. Thus, expert's testimony was admissible insofar as it concerned party's contention that insurer's conduct constituted bad faith based on purported violations of the

Unfair Claims Settlement Practices Act. Such testimony was helpful as it served to explain complex issues of insurance company claims management practices. Peiffer v. State Farm Mut. Auto. Ins., 940 P.2d 967 (Colo. App. 1996), aff'd on other grounds, 955 P.2d 1008 (Colo. 1998).

Any legal conclusions tendered by witness were elicited during her cross-examination by defendant's counsel, and thus, any error regarding witness's testimony was injected at defendant's behest. Such error cannot serve as grounds for reversal on appeal by defendant. Bd. of Comm'rs v. Fixed Base Operators, 939 P.2d 464 (Colo. App. 1997).

No abuse of discretion for trial court to permit expert testimony regarding the steps a reasonably prudent applicant in a Torrens action would take to ascertain the names of persons who claimed an interest in the property and to rely on that testimony in reaching its conclusions on due process issues. Lobato v. Taylor, 13 P.3d 821 (Colo. App. 2000), rev'd on other grounds, 71 P.3d 938 (Colo. 2002).

Expert testimony concerning reasons for victims' recantations is admissible in cases involving domestic violence. People v. Johnson, 74 P.3d 349 (Colo. App. 2002); People v. Wallin, 167 P.3d 183 (Colo. App. 2007).

Trial court properly excluded expert witness's testimony as unnecessary and as improperly usurping the court's function because: (1) The testimony was not needed to describe or interpret the crime setting; (2) the testimony was not a question for the jury; (3) the testimony would not have assisted the trier of fact; and (4) an expert testifying as to issues of law may not simply tell the jury what result to reach. People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Prosecutor's use of expert testimony regarding drug courier profiles as substantive evidence of defendant's guilt was improper, and, although a reasonable jury could have convicted on other evidence, the admissible evidence did not overwhelmingly establish defendant's guilt, and there is a significant probability that the erroneously admitted testimony substantially influenced the jury's verdict, and thus was not harmless. Salcedo v. People, 999 P.2d 833 (Colo. 2000).

Court abused its discretion in admitting some lay opinions from mental health providers who had not been properly noticed as experts by the prosecution. Some of the opinions were expert opinions improperly admitted under the guise of lay opinion testimony. The improper testimony related to symptoms of specific mental illness and opinions about whether defendant suffered from mental illness. The evidence relied upon the witness' specialized knowledge and training and, therefore, went beyond the bounds of lay opinion. The error in this case was harmless since there was ample evidence in addition to the improperly admitted opinions. Dunlap v. People, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Mathematical probability statements or numerical conclusions by an expert witness on ergonomics properly excluded if (1) the conclusion was without statistical support in the record and (2) such a statement or conclusion implied a non-purposeful or non-intentional state of mind by the defendant and the expert was not qualified to testify regarding the defendant's psychological condition. People v. Wilkerson, 114 P.3d 874 (Colo. 2005).

Allowing police officer's testimony regarding the use of glass pipe and torch lighter to smoke methamphetamine not plain error. People v. Malloy, 178 P.3d 1283 (Colo. App. 2008).

Trial court improperly limited testimony of defendant's expert witness after prosecution had opened the door to this testimony and error was not harmless beyond a reasonable doubt. Golob v. People, 180 P.3d 1006 (Colo. 2008).

Child forensic interviewer's testimony that the alleged victim did not seem to be coached, although normally not admissible, was admissible because the defense opened the door to the questioning. People v. Heredia-Cobos, 2017 COA 130, 415 P.3d 860.

Trial court did not abuse its discretion in requiring defendant to present his expert testimony in court rather than through video-conferencing. People v. Casias, 2012 COA 117, 312 P.3d 208.

Videos introduced at trial were animations not simulations, so they are not subject to the scientific evidence standard of this rule. The videos were animations because: an officer supplied the calculations and opinions used to create the videos; the officer formed the opinions based on a review of the physical evidence and the victim's statements; the videos were demonstrative exhibits that illustrated the officer's opinion; and the jury knew the videos were not a re-creation of the actual event. People v. Douglas, 2016 COA 59, 411 P.3d 1026.

Applied in People in Interest of K.A.J., 635 P.2d 921 (Colo. App. 1981); People v. Ortega, 672 P.2d 215 (Colo. App. 1983); People v. Jones, 743 P.2d 44 (Colo. App. 1987); People v. Williams, 761 P.2d 258 (Colo. App. 1988); People v. Groves, 854 P.2d 1310 (Colo. App. 1992); People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd, 59 P.3d 979 (Colo. 2002); People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 69 P.3d 1029 (Colo. 2003); Luster v. Brinkman, 205 P.3d 410 (Colo. App. 2008).

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Federal Rule Identical.)

Source: Entire rule amended and adopted June 20, 2002, effective July 1, 2002.

COMMITTEE COMMENT

The Committee believes this rule is a substantial deviation from former Colorado law, but there are former cases lending partial support to the rule. *See:* Hensel Phelps Construction Co. v. U.S., 413 F.2d 701 10th Cir. (1969); Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962); Ison v. Stewart, 105 Colo. 55, 94 P.2d 701 (1939); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 P. 76 (1894). *See also,* Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977). Although not directly in point, we believe the case supports the last sentence of Rule 703. (Amended March 5, 1981, effective July 1, 1981.)

ANNOTATION

Law reviews. For article, ''Admissibility of Governmental Studies to Prove Causation'', see 11 Colo. Law. 1822 (1982). For article, ''Hearsay as a Basis for Opinion Testimony'', see 17 Colo. Law. 2337 (1988). ''Opinion Testimony'', see 22 Colo. Law. 1185 (1993). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002).

Fact that expert witness has not examined accused does not necessarily disqualify him from expressing his opinion based upon a hypothetical question, but such an opinion must be based on facts in evidence. People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974).

Neither collegiate degrees nor formal training in an established curriculum is necessarily required before one may be considered an expert in a particular field. People v. Genrich, 928 P.2d 799 (Colo. App. 1996).

Expert's opinion may not be predicated on others' opinions. An expert's opinion must not be predicated, in whole or in part, on opinions of others, expert or lay. People v. Beasley, 43 Colo. App. 488, 608 P.2d 835 (1979); People v. District Court, 647 P.2d 1206 (Colo. 1982).

Nor on facts varying from actual facts. An expert opinion buttressed by assumed facts at variance with the actual facts has no evidential efficacy. High v. Indus. Comm'n, 638 P.2d 818 (Colo. App. 1981).

Opinion based on information gained through hypnosis inadmissible. A psychiatrist will not be permitted to testify as to the mental state of the defendant if his opinion is based on information gained through hypnosis. People v. Diaz, 644 P.2d 71 (Colo. App. 1981).

Expert witness may be cross-examined. It is fundamental that an expert witness may be cross-examined concerning the basis of his opinion. People v. Alward, 654 P.2d 327 (Colo. App. 1982).

By learned treatises. Expert may be cross-examined using learned treatises even though he did not rely upon them in reaching his conclusions. People v. Beasley, 43 Colo. App. 488, 608 P.2d 835 (1979).

Competence to testify as to medical standards. Generally, practitioners of one school of medicine are not competent to testify as experts relative to standards of care required of practitioners of another school. Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982).

However, a physician from one specialty may testify concerning the standard of care required of a physician with a different specialty, provided that the expert witness has acquired, through experience or study, more than just a casual familiarity with the standards of care of the defendant's specialty. Greene v. Thomas, 662 P.2d 491 (Colo. App. 1982).

Opinion may be based on facts or data not admissible in evidence. Graefe & Graefe v. Beaver Mesa Exploration, 695 P.2d 767 (Colo. App. 1984).

But this rule does not permit otherwise inadmissible facts or data contained in a report or statement to be admitted merely be-

cause the expert relied on them. Leiting v. Mutha, 58 P.3d 1049 (Colo. App. 2002).

It is not proper to equate "weren't admitted" with "otherwise inadmissible". The balancing test provided in this rule is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies. Dorsey & Whitney LLP v. RegScan, Inc., 2018 COA 21, __ P.3d __.

Expert's testimony itself is inadmissible when underlying basis for the expert opinions and recommendations is not accepted as reliable by the courts. Because of the lack of a scientific basis and reliability, it is inappropriate for an expert witness to rely on polygraph results to form or render an opinion. Trial court should not have listened to, or considered, the opinions of any experts based, in whole or in part, on polygraph examinations. People ex rel. M.M., 215 P.3d 1237 (Colo. App. 2009).

Interpretation of blood test results by expert whose qualifications are established in field of blood type testing was admissible evidence. K.H.R. by and through D.S.J. v. R.L.S., 807 P.2d 1201 (Colo. App. 1990).

It is permissible for an expert to rely on data which itself may be inadmissible. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

Expert's opinion may be based upon other reliable expert opinions due to the adoption of this rule. Gold Rush Inv. v. G.E. Johnson Const., 807 P.2d 1169 (Colo. App. 1990).

Court did not err in admitting expert testimony of licensed physician whose opinion was based in part upon information received from psychiatrist in residency together with the physician's own examination of hospital records, charts, hospital admission data, and his own observations of respondent. People in Interest of Martinez, 841 P.2d 383 (Colo. App. 1992).

Admission of expert testimony was not abuse of trial court's discretion, where expert based his opinion on data contained in microscope slides and reports prepared by two other doctors since that opinion was based upon an opinion of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Trial court did not abuse its discretion in allowing pediatrician to testify that rib fractures were a basis for the pediatrician's conclusion that child died as a result of shaken baby syndrome. People v. Cauley, 32 P.3d 602 (Colo. App. 2001).

An expert may express an opinion based upon assumptions that have a reasonable basis in the evidence so long as the information is of the type reasonably relied upon by experts in the field of expertise. Vento v. Colo. Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995).

Reliance upon facts not personally observed but which have been reasonably relied upon by experts in the same field is an acceptable basis of expert opinion and the trial court has broad discretion in determining whether the requirements governing expert opinions have been satisfied and whether the expert's testimony is admissible. Gold Rush Investments, Inc. v. Johnson, 807 P.2d 1169 (Colo. App. 1990); Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

An expert is not required on direct examination to disclose the underlying facts that form the basis for his or her opinion, however, nothing prevents an expert from doing so, and it was proper for expert in case at hand to give his opinion on how defendant's drawings and narratives related to a sexual homicide. People v. Masters, 33 P.3d 1191 (Colo. App. 2001), aff'd on other grounds, 59 P.3d 979 (Colo. 2002).

The weight to be accorded to the property valuation techniques of an expert in a marriage dissolution is for the trial court's determination, depending upon the court's assessment of the reliability of the data in a particular case. In re Bookout, 833 P.2d 800 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

The weight to be accorded to the valuation techniques of an expert is for the trial court to determine depending upon the court's assessment of the reliability of the data in a particular case. In re Bookout, 833 P.2d 800 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

Certainty goes to weight, not admissibility. Once a witness is qualified as an expert, the fact that the examination reveals that he or she cannot support the opinion with certainty goes only to the weight to be given the opinion and not its admissibility. Vento v. Colo. Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. App. 1995).

A doctor may testify to the fact that he or she believed a child suffered injuries consistent with medical child abuse; the doctor may not opine as to whether the injuries constituted the legal definition of child abuse. Testimony that the injuries suffered were the result of nonaccidental trauma are admissible opinions of medical child abuse. People v. Weeks, 2015 COA 77, 369 P.3d 699.

Expert testimony comparing the force that caused the victim's injuries to that of various common accidents is logically related to the issue of whether the injuries suffered were the result of a low-impact injury or high-impact trauma. People v. Weeks, 2015 COA 77, 369 P.3d 699.

Applied in Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982); People v. Williams, 654 P.2d 319 (Colo. App. 1982); Jimerson v. Prendergast, 697 P.2d 804 (Colo. App. 1985).

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Federal Rule Identical.)

COMMITTEE COMMENT

The present Federal and Colorado rules may conflict with preceding Colorado case law. (*Compare* Bridges v. Lintz, 140 Colo. 582, 346 P.2d 571 (1959) and McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962).) It is felt that the rule expresses the better alternative. The conflict arises in the area of lay witnesses testifying as to an ultimate issue of fact. In Colorado, case law says that he may testify concerning things which would ''help'' the jury to understand the facts, but he may not render an opinion on the ultimate fact in issue. Mogote-Northeastern Consolidated Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1922). There are exceptions to the rule, and the law in Colorado can best be stated by quoting the following language: ''It is reversible error to allow an opinion as to ultimate facts unless the witness testifies as an expert or his testimony invokes a description or estimate of condition, value, etc. or when it is difficult or impossible to state with sufficient exactness the facts and their surroundings.'' Town of Meeker v. Fairfield, 25 Colo. App. 187, 136 P. 471 (1913).

ANNOTATION

Law reviews. For article, ''Rule 704: Ultimate Issues and Legal Conclusions'', see 24 Colo. Law. 2175 (1995). For article, ''Limits on Attorney-Expert Opinions in Jury Trials Under C.R.E. 403, 702, and 704'', see 31 Colo. Law. 53 (Mar. 2002).

A lay witness is not prohibited from testifying to an issue of ultimate fact, but the question which elicits the opinion must be phrased to ask for factual, rather than legal, opinion. People v. Collins, 730 P.2d 293 (Colo. 1986).

Admissibility under this rule cannot be determined in a vacuum. Rather, considerations of relevance, helpfulness, and potential for prejudice, confusion, or waste of time must be taken into account. Hines v. D. & R.G.W. R. Co., 829 P.2d 419 (Colo. App. 1991).

Where operation of train was outside the knowledge of the ordinary person and a crucial issue in the case was the adequacy of the warning given to a pedestrian by sounding the train's whistle, expert opinions were relevant, helpful, probative, and undergirded by sufficient facts to enable the jury to make its own evaluation. Hines v. D. & R.G.W. R. Co., 829 P.2d 419 (Colo. App. 1991).

An expert may not usurp the function of the court by expressing an opinion of the applicable law or legal standards. Quintana v. City of Westminster, 8 P.3d 527 (Colo. App. 2000).

But in bench trial, where judge is presumed to ignore incompetent and inadmissible evidence, admission of lawyer's testimony to help sort out complex business relationships and transactions was held not to be an abuse of discretion. Silverberg v. Colantuno, 991 P.2d 280 (Colo. App. 1998).

Expert witness invaded the province of the court as the giver of law when he explained the statute of limitations and described when a tort action begins to accrue. Grogan v. Taylor, 877 P.2d 1374 (Colo. App. 1993), rev'd on other grounds, 900 P.2d 60 (Colo. 1995).

Admission of laboratory supervisor's opinion that, based on defendant's blood alcohol concentration test results, defendant was under the influence of alcohol, substantially impaired by that drug, and unable to operate a motor vehicle safely did not suggest to the jury how to decide the case. The testimony was not so obviously erroneous that the trial court should have sua sponte precluded it absent an objection. Nor did the limited testimony undermine the fundamental fairness of the trial. People v. Medrano-Bustamante, 2013 COA 139, 412 P.3d 581, aff'd in part and rev'd in part on other grounds sub nom. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

No plain error or usurpation of the jury's role in police officer's testimony. The fact that police officer's testimony tracked the language of one of the elements of the crime at issue did not alone render his opinion such an obvious usurpation of the jury's role as to rise to the level of plain error. To the contrary, the jury was properly instructed on the meaning of the term at issue, that it was to follow the rules of law as explained by the court, and that it could believe all, part, or none of any witness's testimony. People v. McMinn, 2013 COA 94, 412 P.3d 551.

A doctor may testify to the fact that he or she believed a child suffered injuries consistent with medical child abuse; the doctor may not opine as to whether the injuries constituted the legal definition of child abuse. Testimony that the injuries suffered were the

result of nonaccidental trauma are admissible opinions of medical child abuse. People v. Weeks, 2015 COA 77, 369 P.3d 699.

Expert testimony comparing the force that caused the victim's injuries to that of various common accidents is logically related to the issue of whether the injuries suffered were the result of a low-impact injury or high-impact trauma. People v. Weeks, 2015 COA 77, 369 P.3d 699.

No usurpation of the court's or jury's prerogatives occurred when experts offered strong opinions, including phrases such as ''complete disregard of ... responsibility'' and ''as bad as I've seen anywhere'', that were limited to engineering practices and did not venture into legal concepts outside the witnesses' expertise or opine as to whether a legal standard, such as willful and wanton conduct, was met. Taylor Morrison of Colo., Inc. v. Terracon Consultants, Inc., 2017 COA 64, 410 P.3d 767.

Applied in People v. Diaz, 644 P.2d 71 (Colo. App. 1981); People v. Ortega, 672 P.2d 215 (Colo. App. 1983); People v. Ashley, 687 P.2d 473 (Colo. App. 1984); Zertuche v. Montgomery Ward & Co., Inc., 706 P.2d 424 (Colo. App. 1985); People v. Rivers, 727 P.2d 394 (Colo. App. 1986); People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Federal Rule Identical.)

Source: Entire rule amended and effective November 16, 1995.

COMMITTEE COMMENT

Although the present rule is contrary to Colorado case law, the Committee believes it to be the better view. The reasons for the retention of the proposed Federal rule as it is presently written are as follows. First, the rule does not disturb the requirement for a proper foundation for expert opinions. City and County of Denver v. Lyttle, 106 Colo. 157, 103 P.2d 1 (1940). Secondly, the elimination of the requirement for preliminary disclosure of underlying facts or data has the effect of reducing the need for hypothetical questions, a goal which has been sought by a number of states. Thirdly: ''If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundations requirement.'' Advisory Committee's Notes, Proposed Federal Rules. *See also,* Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957). Finally, it is clear that there is built-in safeguard in the discretionary power of the court to require prior disclosure.

ANNOTATION

Law reviews. For article, ''Opinion Testimony'', see 22 Colo. Law. 1185 (1993). For article, ''Cross-Examining and Impeaching Expert Psychiatric Witnesses'', see 26 Colo. Law. 75 (Nov. 1997).

Cross-examination concerning basis of opinion permitted. It is fundamental that an expert witness may be cross-examined concerning the basis of his opinion. People v. Alward, 654 P.2d 327 (Colo. App. 1982), cert. dismissed, 677 P.2d 948 (Colo. 1984); People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

Although this rule provides that the expert "may in any event be required to disclose the underlying facts or data on cross-examination", this principle is not absolute. When the expert has testified in summary fashion, the counsel of this rule is that the court should allow wide latitude for cross-examination. However, the trial judge may certainly impose reasonable limits upon the cross-examination, and he should cut off the attack where its purpose is to support the cross-examiner's case by bringing out inadmissible hearsay rather than simply to undermine the expert's opinion. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

Medical experts are allowed to state the bases of their opinions. Where there exist various possible causes of an injury and the burden

of proving causation rests on the plaintiffs, defendant's experts should be allowed to state their opinions and articulate the bases of their opinions in detail, as did plaintiffs' experts. Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. App. 1983).

Applied in Stone v. Caroselli, 653 P.2d 754 (Colo. App. 1982).

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, "The Use of Court Appointed Experts and Masters in Civil Cases", see 46 Colo. Law. 25 (Jan. 2017).

Court-appointed expert who expresses his professional opinion in trial is not a partisan, but is, in effect, the court's witness. Massey v. District Court, 180 Colo. 359, 506 P.2d 128 (1973); In re Lorenzo, 721 P.2d 155 (Colo. App. 1986).

ARTICLE VIII
HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him to be communicative.

COMMITTEE COMMENT

The change reflected in the Colorado rule was necessary, in the minds of the Committee members, because the Committee believed that the word "assertion" was extremely unclear; the change is felt to be more precise.

(b) Declarant. A "declarant" is a person who makes a statement.

(Federal Rule Identical.)

(c) Hearsay. "Hearsay" is a statement other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(Federal Rule Identical.)

(d) Statements which are not hearsay. A statement is not hearsay if —

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him, or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(Federal Rule Substantially Identical, Except as to Rule 801(d)(1)(A).)

COMMITTEE COMMENT

The last sentence of this Rule was added to track a corresponding change in F.R.E. 801(d)(2).

Source: (d)(2) amended and committee comment added November 25, 1998, effective January 1, 1999.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 227 (1979). For article, ''Admissibility of Prior Testimony'', see 11 Colo. Law. 398 (1982). For article, ''Confrontation and Co-conspirators in Colorado'', see 14 Colo. Law. 385 (1985). For article, ''Mythological Rules of Evidence'', see 16 Colo. Law. 1218 (1987). For article, ''Prior Inconsistent Statements'', see 17 Colo. Law. 1977 (1988). For article, ''Rules 801 and 613: Evidentiary Uses of Pleadings Filed in Other Cases'', see 21 Colo. Law. 2389 (1992). For article, ''Impeachment'', see 22 Colo. Law. 1207 (1993). For article, ''Rules 801 and 804: The Admissibility of Out-of-Court Statements Made by Present and Former Employees'', see 26 Colo. Law. 77 (Sept. 1997). For article, ''Rule 801(c): Admissibility of a Testifying Witness's Extra-Judicial Statements'', see 30 Colo. Law. 57 (May 2001). For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002). For article, ''The Admissibility of Facebook Communications'', see 44 Colo. Law. 77 (July 2015).

Purpose of hearsay rule. The constitutional right of confrontation and the hearsay rule stem from the same roots, and are designed to protect similar interests based on the premise that testimony is much more reliable when given under oath at trial, where the declarant is subject to cross-examination and the jury may observe his demeanor. People v. Dement, 661 P.2d 675 (Colo. 1983); People v. Nunez, 698 P.2d 1376 (Colo. App. 1984), aff'd, 737 P.2d 422 (Colo. 1987).

Electronically stored information on cellular telephone is not hearsay, and trial court properly admitted telephone into evidence. Stored information on cellular telephone is not considered hearsay because it is neither a ''declarant'' nor a ''statement'', as specified within the meaning of this rule. People v. Buckner, 228 P.3d 245 (Colo. App. 2009).

A person's demeanor, being upset and crying, is generally not hearsay. The court erred in excluding rebuttal testimony of a police offi-

cer that the defendant had been upset and crying. People v. Lujan, 2018 COA 95, __ P.3d __.

Testimonial hearsay is admissible only upon a showing of the unavailability of the declarant and a prior opportunity for cross-examination of the declarant by the defendant. Compan v. People, 121 P.3d 876 (Colo. 2005).

Nontestimonial statements do not implicate a defendant's state constitutional right to confrontation. In light of the U.S. supreme court's holding in Davis v. Washington, 547 U.S. 813 (2006), Colorado's confrontation clause applies only to testimonial statements. Nicholls v. People, 2017 CO 71, 396 P.3d 675.

Where statements by victim were not testimonial, Crawford v. Washington, 541 U.S. 36 (2004), does not require defendant to have an opportunity to cross-examine victim. People v. Gash, 165 P.3d 779 (Colo. App. 2006).

Translation as hearsay. An interpreter serves as a language conduit for the declarant. Hence, admission of translated testimony is appropriate when the circumstances assure its reliability. Relevant factors include: (1) Whether actions after the translated conversation were consistent with the translated statements; (2) whether the interpreter had qualifications to interpret and language skill; (3) whether the interpreter had any motive to mislead or distort; and (4) which party supplied the interpreter. People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. App. 2005), aff'd in part and rev'd in part on other grounds, 169 P.3d 662 (Colo. 2007).

Hearsay statements are presumptively unreliable since the declarant is not present to explain the statement in context nor subjected to cross examination. Blecha v. People, 962 P.2d 931 (Colo. 1998).

Statement not excluded where relevance goes to fact that statement made, not its truth. Where it is the fact that the statement was made, and not its truth or falsity, that is relevant, it is error to exclude the statement. Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); Hansen v. Lederman, 759 P.2d 810 (Colo. App. 1988).

Statements not hearsay when offered for their falsity not their truth. People v. Godinez, 2018 COA 170M, __ P.3d __.

Prior statements admissible to create fact dispute. Where the record indicates that a party would be available as a witness at the trial of the matter and would be subject to cross-examination, her prior statements would be admissible to create a fact dispute to be resolved by the trier of fact. People in Interest of K.A.J., 635 P.2d 921 (Colo. App. 1981).

Entire statement not admitted to rehabilitate testimony where only portion relevant. The trial court does not err in refusing to admit an entire tape recording of a statement made by the defendant after his arrest for the purpose of rehabilitating his testimony, when only a portion of the recording was relevant to rebut the prior inconsistent statement used by the prosecution for impeachment purposes. People v. DelGuidice, 199 Colo. 41, 606 P.2d 840 (1979).

However, when victim is impeached with respect to credibility, all prior consistent statements are admissible, not just those that are directly related to specific facts in question. People v. Tyler, 745 P.2d 257 (Colo. App. 1987); People v. Halstead, 881 P.2d 401 (Colo. App. 1994); People v. Elie, 148 P.3d 359 (Colo. App. 2006).

Colorado permits an extrajudicial identification of a defendant as substantive evidence and as an exception to the hearsay rule. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Furthermore, this exception is extended to extrajudicial identifications heard or observed by third person. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

Reasonable to expect person hearing accusatory statement to deny same. Underlying the adoptive admission exemption from normal hearsay concepts is the general assumption that it would be reasonable to expect any person who hears a statement accusing him or her of misconduct to deny such statement. People v. Green, 629 P.2d 1098 (Colo. App. 1981); People v. Pappadiakis, 705 P.2d 983 (Colo. App. 1985), aff'd sub nom. Peltz v. People, 728 P.2d 1271 (Colo. 1986); People v. Thomas, 2014 COA 64, 345 P.3d 949.

Prerequisites to admission of adoptive admission statement. Before admitting any adoptive admission statement into evidence, a trial court must determine preliminarily, normally by means of an in camera hearing, that the party offering the statement can produce evidence to support the factual conclusions that the defendant heard and understood the statement, had knowledge of the contents thereof, and was free from any emotional or physical impediment which would inhibit an immediate response. People v. Green, 629 P.2d 1098 (Colo. App. 1981).

Adoption of accusatory statement through silence closely scrutinized. The assumption that a defendant adopts an accusatory statement through his silence is a weak one, and evidence of such statements must be scrutinized with special concern in criminal cases, where there are constitutional limits to the permissible inferences from a defendant's silence. People v. Green, 629 P.2d 1098 (Colo. App. 1981).

Trial court did not abuse its discretion in admitting evidence of defendant's silence as an adoptive admission. Under the circumstances, defendant would be expected to disagree with, or object to, the statement accusing him of being the driver at the time the accident occurred. People v. Thomas, 2014 COA 64, 345 P.3d 959.

Remarks by any accomplices in presence of defendant are admissible, an analogous situation being a coconspirator's exception to the hearsay rule. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

A statement by a party's coconspirator made during the course and furtherance of the conspiracy is admissible hearsay, if it is shown the declarant and the party were members of the conspiracy and the statement was made in the course and in furtherance of the conspiracy. People v. James, 40 P.3d 36 (Colo. App. 2001).

Under section (c), if an out-of-court statement is offered solely to show its effect on the listener, it is not offered to prove the truth of the matter asserted and is not hearsay. People v. Phillips, 2012 COA 176, 315 P.3d 136.

Child's statement to coconspirator was admissible for the nonhearsay purpose of showing its effect on coconspirator as a listener, in that she called defendant to notify him of the message soon after the statement was made to her and sought advice from defendant. People v. Robinson, 226 P.3d 1145 (Colo. App. 2009); People v. Phillips, 2012 COA 176, 315 P.3d 136.

The prosecution, as the proponent of a coconspirator's statement, bears the burden of establishing by a preponderance of the evidence that there was a conspiracy, that the defendant and declarant were members of the conspiracy, and the declarant made the statement during the course and in furtherance of the conspiracy. The assistant manager's statements were in furtherance of the assistant manager's role in the conspiracy to conceal defendant's identity and, thus, admissible. People v. Dunlap, 124 P.3d 780 (Colo. App. 2004).

Codefendant's declaration made during joint adventure. A trial court may consider the statement of an alleged coconspirator in determining whether the prosecution has established the evidentiary conditions for admissibility so long as the statement itself is not the sole basis for establishing those foundational requirements. People v. Montoya, 753 P.2d 729 (Colo. 1988); People v. Esch, 786 P.2d 462 (Colo. App. 1989); People v. Taylor, 804 P.2d 196 (Colo. App. 1990); People v. Rivera, 56 P.3d 1155 (Colo. App. 2002).

Child's hearsay statements to public school employees, police officer, and caseworker were nontestimonial because the primary purpose of the questioning was not to ''establish or prove past events potentially relevant to later criminal prosecution'', but instead to (1) assess child's injury and determine whether human services should be notified and (2) ascertain the conditions of the home and of the children. Since statements were nontestimonial, the federal confrontation clause was not implicated. People v. Phillips, 2012 COA 176, 315 P.3d 136.

Child's statement ''I fell in the bathroom because it was slippery'' to police officer during welfare check was admissible for the relevant, nonhearsay purpose of showing that child had been coached to change his account. People v. Phillips, 2012 COA 176, 315 P.3d 136.

A statement made by a party is admissible hearsay when offered against the party making it. People v. James, 40 P.3d 36 (Colo. App. 2001).

Admission by a party opponent held not to be hearsay. South Carolina Ins. Co. v. Fisher, 698 P.2d 1369 (Colo. App. 1984).

Since certain of the defendant's statements regarding the rental of VCR items, the failure to return them, and the method of payment were admissions by a party-opponent and therefore not hearsay, the non-hearsay evidence in the trial court record was of sufficient quantity and strength to satisfy the prosecutor's responsibility to establish probable cause. People v. Horn, 772 P.2d 108 (Colo. 1989).

Attorney's response to a request for investigation in a disciplinary proceeding was an admission by a party-opponent and was not hearsay. The fact that part of the attorney's response was inconsistent with the attorney's testimony at trial is not a consideration under section (d)(2). People v. Meier, 954 P.2d 1068 (Colo. 1998).

Statements made by attorney concerning a matter within the course of attorney's employment may be admissible against the party who retained the attorney. In re Amich, 192 P.3d 422 (Colo. App. 2007).

Passenger's statement that juvenile had exclaimed that he intended to "outrun the cop" was not hearsay and was admissible as an admission of a party opponent. People v. T.R., 860 P.2d 559 (Colo. App. 1993).

Guidelines in insurance contract not admissible under section (d)(2). Although defendant signed an insurance contract for malpractice insurance containing risk management guidelines as a condition of obtaining coverage, such guidelines are not admissible as an adoption by defendant as the applicable legal standard of professional care owed to his patients where plaintiff sought to show that defendant did not adhere to such standards. Quigley v. Jobe, 851 P.2d 236 (Colo. App. 1992).

The documents could not have been admitted under section (d)(2). People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Statement made by defendant to expert witness offered to establish the basis for the expert's opinion is not hearsay and it is error to exclude it. People v. Drake, 748 P.2d 1237 (Colo. 1988).

Statements offered to demonstrate the defendant's state of mind rather than the truth

of the matter asserted would have substantiated defendant's affirmative defense that he had taken his daughter from the custody of his ex-wife because he believed his daughter was being abused. People v. Mossmann, 17 P.3d 165 (Colo. App. 2000).

Defendant's own statement held admissible. People v. Berger-Levy, 677 P.2d 351 (Colo. App. 1983).

Statements made on Facebook are admissible under section (d)(2)(A). People v. Glover, 2015 COA 16, 363 P.3d 736.

Former testimony admissible at subsequent trial. Defendant's testimony from prior trial at which he was acquitted does not constitute hearsay and is admissible under this rule as defendant's statement in his individual capacity. People v. Arrington, 682 P.2d 490 (Colo. App. 1983).

Under section (d)(1)(B), a statement is not hearsay if: (1) The declarant testifies at trial and is subject to cross-examination; (2) the statement is consistent with the declarant's testimony; and (3) it is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. People v. Segura, 923 P.2d 266 (Colo. App. 1995).

Section (d)(1)(B) encompasses only those statements made by the victims prior to when the opportunity to fabricate similar stories allegedly arose. People v. Segura, 923 P.2d 266 (Colo. App. 1995).

While the victims' prior consistent statements rebutted a charge of fabrication and were made before the alleged fabrication, the statements were properly admitted under section (d)(1)(B). People v. Segura, 923 P.2d 266 (Colo. App. 1995).

Section (d)(1)(B) allows admission of sexual assault victim's prior consistent statements in police report when defense is consent, thus calling into question victim's credibility. People v. Tyler, 745 P.2d 257 (Colo. App. 1987).

Section (d)(1)(B) allows admission of recalled witness's prior consistent statements to investigating officer when defendant's attorney, on cross-examination, has called into question witness's credibility. People v. Salazar, 920 P.2d 893 (Colo. App. 1996).

Section (d)(1)(B) allows admission of two statements by the defendant, where the defendant first introduced the statements and thereby waived any objection to the introduction of the rest of the statements by the prosecution as explanatory material. People v. Espinoza, 989 P.2d 178 (Colo. App. 1999).

Prior consistent statements of child-victim of sexual assault may be used for rehabilitation when a witness's credibility has been attacked, as such statements are admissible outside of this rule. Prior consistent statements were found to be admissible where they were relevant to the jury's determination of whether the impeaching statements really were inconsistent with the child-victim's trial testimony, where the defense attempted to discredit the child-victim's testimony in its entirety, where there was no evidence that the prosecution relied upon the child-victim's prior consistent statement as substantive support for its case thereby implicating section (d)(1)(B), and where the content of the witness's testimony regarding the child-victim's statement was merely repetitive of her own testimony. People v. Eppens, 979 P.2d 14 (Colo. 1999).

When trial court gave the defense extensive leeway to attack the credibility of a witness, allowing the prosecution to admit the witness's videotaped statement with police as a prior consistent statement for rehabilitation purposes was proper. People v. Clark, 2015 COA 44, 370 P.3d 197.

One requirement for admitting hearsay statement of a coconspirator is that the prosecution must first establish, by independent evidence, that a conspiracy exists and that the defendant is a participant. People v. Gable, 647 P.2d 246 (Colo. App. 1982); People v. Nunez, 698 P.2d 1376 (Colo. App. 1984), aff'd, 737 P.2d 422 (Colo. 1987); People v. Lewis, 710 P.2d 1110 (Colo. App. 1985); People v. Reyher, 728 P.2d 333 (Colo. App. 1986).

Joint participant is considered coconspirator even where no conspiracy has been charged. People v. Small, 631 P.2d 148 (Colo. 1981).

Testimony properly admissible. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

Statements by joint participants in a conspiracy are admissible against all its members if made in furtherance of and during the course of the illicit relationship. People v. Small, 631 P.2d 148 (Colo. 1981); People v. Best, 665 P.2d 644 (Colo. App. 1983).

But proponent of the evidence must establish to the trial court's satisfaction that the statement was made in furtherance of the conspiracy as well as in the course of the conspiracy. Willams v. People, 724 P.2d 1279 (Colo. 1986); People v. Esch, 786 P.2d 462 (Colo. App. 1989); People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Coconspirator exception does not apply to statements made after conspiracy has ended. People v. Armstrong, 704 P.2d 877 (Colo. App. 1985).

Court erred in prohibiting defendant, on hearsay grounds, from eliciting evidence of what he and an alleged coconspirator said to one another. Nonhearsay verbal act evidence is admissible on the issue of whether a conspiratorial agreement existed because the statement is admitted merely to show that it was actually

made, not to prove the truth of what was asserted in it. People v. Scearce, 87 P.3d 228 (Colo. App. 2003).

Adoption of section (d)(2) relating to the admissibility of defendant's confession does not supercede the corpus delicti doctrine, which is a substantive rule of law. The doctrine holds that a conviction cannot be based upon the uncorroborated confession of a defendant. People v. Robson, 80 P.3d 912 (Colo. App. 2003).

No further need under C.R.E. 901 to authenticate documentary evidence that satisfied requirements of section (d)(2)(B). Based upon witness testimony, administrative law judge (ALJ) committed no abuse of discretion in admitting record of request for purchase of political time and an agreement form for noncandidate issue advertisements as having been sufficiently authenticated under C.R.E. 901(b)(1). As to admissibility of affidavit of performance used to indicate dates, airtimes, and the district in which the advertisements were broadcast, ALJ correctly held that political committee's agent would not have authorized payment of invoices if he doubted advertisements aired during relevant time period and in relevant legislative district. There was no need to further authenticate affidavit of performance because agent's conduct manifested ''belief in its truth'' under section (d)(2)(B). Collectively, these documents support ALJ's findings that during relevant time period political committee arranged to broadcast television advertisements opposing legislative candidate to voters in candidate's district. Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream, 187 P.3d 1207 (Colo. App. 2008).

Statement admissible under section (d)(2)(D). A statement by an employee made during the term of his employment concerning a subject matter within the scope of employment is admissible. Halliburton v. Pub. Serv. Co., 804 P.2d 213 (Colo. App. 1990).

Independent insurance adjuster's statement tending to show that equipment had been vandalized, hence damage would be covered under policy, admissible notwithstanding that adjuster was not formally empowered to make coverage determinations. South Park Aggregates, Inc. v. NW. Nat. Ins. Co., 847 P.2d 218 (Colo. App. 1992).

Interrogatory response and report of subcontractor's employee on city's ventilation system was admissible under section (d)(2)(D) in city's action against contractor and subcontractor for defects in design and construction of city hall building. Response and report qualified as statement offered against a party made by that party's agent or servant concerning a matter within the scope of his agency or employment during the existence of the relationship. City of Westminster v. MOA, Inc., 867 P.2d 137 (Colo. App. 1993).

Testimony of two nurses was sufficient to show that a statement made by agent of hospital was within the scope of section (d)(2)(D). Stevens v. Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992).

Statements admissible under section (d)(2)(E) as statements of coconspirator do not satisfy confrontation rights. A showing of reliability is also required. Nunez v. People, 737 P.2d 422 (Colo. 1987); People v. Taylor, 804 P.2d 196 (Colo. App. 1990).

Evidence held properly admitted as a statement of a coconspirator. People v. Watson, 668 P.2d 965 (Colo. App. 1983).

Statements concerning the furtherance of the planned deception of the insurance companies was in furtherance of the conspiracy to commit third degree arson. People v. Peltz, 701 P.2d 98 (Colo. App. 1984), aff'd, 728 P.2d 1271 (Colo. 1986).

Statements made after the purpose of the conspiracy has been accomplished are inadmissible under section (d)(2)(E) unless they are so connected with the purpose of the conspiracy as to be a part of the res gestae. For such statements, there must be specific evidence of a plan of concealment to demonstrate that the conspiracy is pending when the statements are made. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

Coconspirator statements made after the conspirators attain the object of the conspiracy are not admissible under this hearsay exception unless the proponent demonstrated an express original agreement among the coconspirators to continue to act in concert in order to cover up, for their own self protection, traces of the crime after its commission. Blecha v. People, 962 P.2d 931 (Colo. 1998).

Secrecy plus overt acts of concealment do not establish an express agreement to act in concert in order to conceal the crime. Blecha v. People, 962 P.2d 931 (Colo. 1998).

Evidence held hearsay. People v. Mann, 646 P.2d 352 (Colo. 1982); People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982).

Defendant's inconsistent statement on relevant matter held admissible. People v. Christian, 632 P.2d 1031 (Colo. 1981).

Witness's statement to detective was not properly admitted under section (d)(1)(A) since the witness refused to answer the prosecutor's questions at trial and therefore gave no testimony with which any prior statement could be inconsistent. People v. Newton, 940 P.2d 1065 (Colo. App. 1996), aff'd, 966 P.2d 563 (Colo. 1998).

Generally, a witness's out-of-court statements cannot be used to bolster his trial testimony. However, a prior consistent state may be admitted for the purpose of rehabilitation

after a witness has been impeached by a prior inconsistent statement. People v. Andrews, 729 P.2d 997 (Colo. App. 1986).

If credibility of a witness is at issue, the jury should have access to all relevant facts, including consistent and inconsistent statements and the reasons for possible fabrications. People v. Andrews, 729 P.2d 997 (Colo. App. 1986).

Trial court properly concluded that videotaped statements were admissible under section (d)(1)(B) as non-hearsay prior consistent statements and to the extent that the evidence was cumulative, there was no abuse of the trial court's discretion under the circumstances. People v. Rodriguez, 888 P.2d 278 (Colo. App. 1994).

Admission of prior consistent statement not limited to those made prior to the inconsistent statement. People v. Andrews, 729 P.2d 997 (Colo. App. 1986).

Statements held not hearsay. Statements are admissable where such statements were not admitted for the purpose of establishing their veracity, but rather, to provide background necessary to understand conversation between witness and defendant. People v. Huckleberry, 768 P.2d 1235 (Colo. 1989).

Accident reports are admissible where they are offered to prove the manufacturer's notice of prior incidents and not for their veracity. Armentrout v. FMC Corp., 819 P.2d 522 (Colo. App. 1991).

There is no right of confrontation and no hearsay preclusion when the utterances are not offered for their truth, but are offered to provide the context in which the defendant's statements were made. People v. Arnold, 826 P.2d 365 (Colo. App. 1991); People v. Smalley, 2015 COA 140, 369 P.3d 737.

Statements in report of independent medical examiner were admissible for the purpose of establishing that an automobile insurance company had a reasonable basis for refusing to reimburse plaintiff's claimed medical expenses. Klein v. State Farm Mut. Auto. Ins. Co., 948 P.2d 43 (Colo. App. 1997).

Victim's statements to first responders and treating surgeon were not testimonial because the primary purpose of the first responders' questions was to calm the injured passenger, determine treatment, and determine whether there were other victims, and the primary purpose of the treating surgeon's questions was to assess and treat passenger's injuries, therefore defendant's federal constitutional right of confrontation was not implicated. People v. Medrano-Bustamante, 2013 COA 139, 412 P.3d 581, aff'd in part and rev'd in part on other grounds sub nom. Reyna-Abarca v. People, 2017 CO 15, 390 P.3d 816.

Taped statement of ALJ during parole hearing was not hearsay where it was offered to prove notice to defendant and not the truth of the matter asserted. People v. Taylor, 74 P.3d 396 (Colo. App. 2002).

Statement includes non-verbal conduct intended to be communicative. People v. Bowers, 773 P.2d 1093 (Colo. App. 1988), aff'd, 801 P.2d 511 (Colo. 1990).

Refusal to allow defendant to call her cellmate to testify as to statements defendant made to her during course of trial was proper where defendant was not available to prosecutor for cross-examination concerning possibility of recent fabrication or improper influence or motive. People v. Avery, 736 P.2d 1233 (Colo. App. 1986).

Child's use of anatomically correct dolls and gestures were part and parcel of hearsay statements and are inadmissible without independent corroborative evidence. People v. Bowers, 773 P.2d 1093 (Colo. App. 1988), aff'd, 801 P.2d 511 (Colo. 1990).

Use of mannequin by prosecution to demonstrate how the victim was tied was not a "statement" but was an illustration of trial testimony. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

Statement by a husband to his wife about the fraudulent nature of his personal injury claim against his employer was an admission not subject to the hearsay exclusion. Burlington N. R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

Trial court erred in denying, as hearsay, cross-examination of a wife as to her prior inconsistent statements regarding admissions by the wife's spouse as to the fraudulent nature of his personal injury claim against his employer. Burlington N. R. Co. v. Hood, 802 P.2d 458 (Colo. 1990).

Court erred in barring prior consistent statement. Wife's prior consistent statement to attorney should have been admitted to rebut prosecution's implication that defendant's wife's testimony was the result of a recent fabrication or improper influence or motive. People v. Ambrose, 907 P.2d 613 (Colo. App. 1994).

News article offered for truth of its assertions is inadmissible hearsay. People v. Morise, 859 P.2d 247 (Colo. App. 1993).

Court erred in admitting inadmissible hearsay evidence from prosecution's expert witness who bolstered her testimony by stating her work had been subject to peer review. People v. Griffin, 985 P.2d 15 (Colo. App. 1998).

Prosecution satisfies minimum requirements for use of hearsay at preliminary hearing if it: (1) Presents some competent nonhearsay evidence that addresses an essential element of the offense; and (2) presents the hearsay evidence through a witness who is connected to the offense or its investigation rather than someone merely reading from a report. In this case, the prosecution satisfied the status elements of the offense through nonhearsay tes-

timony and produced the victim's testimony (hearsay) through the investigating officer who was familiar with the case. People v. Huggins, 220 P.3d 977 (Colo. App. 2009).

Court's failure to apply correct standard for use of hearsay at preliminary hearing was abuse of discretion. Applying the correct standard, the evidence presented at the preliminary hearing established probable cause to believe the defendant committed the charged offenses. People v. Huggins, 220 P.3d 977 (Colo. App. 2009).

Applied in Sims v. Indus. Comm'n, 627 P.2d 1107 (Colo. 1981); Nat'l Sur. Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982); People v. Handy, 657 P.2d 963 (Colo. App. 1982); People in Interest of R.L., 660 P.2d 26 (Colo. App. 1983); Banek v. Thomas, 697 P.2d 743 (Colo. App. 1984), aff'd, 733 P.2d 1171 (Colo. 1986); People v. Johnson, 701 P.2d 620 (Colo. App. 1985); People v. Fueston, 717 P.2d 978 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 749 P.2d 952 (Colo. 1988); People v. Koon, 724 P.2d 1367 (Colo. App. 1986); Jacob v. Com. Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986); People v. Bowman, 738 P.2d 387 (Colo. App. 1987); People v. Pinkey, 761 P.2d 228 (Colo. App. 1988); Bayless v. Milstein, 765 P.2d 1069 (Colo. App. 1988); People v. Halstead, 881 P.2d 401 (Colo. App. 1994); People v. Mandez, 997 P.2d 1254 (Colo. App. 1999); People v. Candelaria, 107 P.3d 1080 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 148 P.3d 178 (Colo. 2006); People v. Banks, 2012 COA 157, __ P.3d __, aff'd in part and rev'd in part on other grounds sub nom. People v. Tate, 2015 CO 42, 352 P.3d 959.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979).

Rationale behind rule. Hearsay rule generally forbids evidence of out-of-court utterances to prove facts asserted in them because of the lack of opportunity to test, by cross-examination, the accuracy and truth of the statements offered. Fernandez v. People, 176 Colo. 346, 490 P.2d 690 (1971).

No case law or common law exceptions. The language of this rule does not permit any exception based upon ''case law'' or ''common law'' decisions to its prohibition against the admission of hearsay evidence. People v. Rosenthal, 670 P.2d 1254 (Colo. App. 1983).

Inadmissible hearsay evidence not transformed into competent evidence by testimony of observations. Inadmissible hearsay evidence is not transformed into competent evidence by permitting a witness to testify as to his own observations when the effect is the same as admitting inadmissible hearsay on statements or conduct which are not in evidence. People v. Botham, 629 P.2d 589 (Colo. 1981).

Burden of proof that statement falls within hearsay exception. The prosecution has the burden of showing that a statement falls within an exception to the hearsay rule. People in Interest of R.L., 660 P.2d 26 (Colo. App. 1983).

Even if it is established that defendant has forfeited his or her right to confront a witness, the reliability of the evidence must still be ensured according to the standards of the rules of evidence. Vasquez v. People, 173 P.3d 1099 (Colo. 2007).

Where defendant's counsel made a deliberate, tactical choice to introduce bystander's hearsay statement into case, defendant invited any error that may have resulted from its introduction. Therefore, hearsay admission did not violate defendant's right to confront the witnesses against him. People v. Gibson, 203 P.3d 571 (Colo. App. 2008).

Erroneous admission of hearsay evidence, without a showing by prosecution that evidence was admissible under exception to hearsay rule or that declarant was unavailable, was harmless error where there was abundant evidence upon which jury could find the defendant guilty without the hearsay testimony. Erroneous admission of hearsay evidence does not violate the defendant's right to confront witnesses against him where the utility of confrontation was extremely remote. People v. Shipman, 747 P.2d 1 (Colo. App. 1987).

Any error in admitting letters that contained inadmissable hearsay was harmless. Without examining the contents of the letters, the court presumed the jury followed the trial court's instruction not to consider the letters for the truth of their contents. When considered in light of the substantial other evidence, any error in admitting the content of the letters was harmless. People v. Manier, 197 P.3d 254 (Colo. App. 2008).

Section 13-25-129 permits hearsay testimony related to acts of mental and emotional

abuse in a child abuse case. The term "health" in § 18-6-401 (1) includes both physical and mental well-being. People v. Sherrod, 204 P.3d 472 (Colo. App. 2007), rev'd on other grounds, 204 P.3d 466 (Colo. 2009).

Officer's testimony regarding informant was not hearsay. Informant's statements regarding drug deal's arrangements, the suppliers and their street names, and identifying them when they arrived at the scene were introduced to show why the officers went to that particular location to arrest defendant, not for the truthfulness of those statements. People v. Robinson, 226 P.3d 1145 (Colo. App. 2009).

Defendant may not rely upon an affidavit at a suppression hearing without attempting to call the affiant. The affidavit is hearsay evidence and thus may not properly be admitted at a suppression hearing. The affidavit is sufficient to determine whether a hearing is necessary, but not to actually determine the matter itself. People v. Warner, 251 P.3d 567 (Colo. App. 2010).

Applied in Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980); People v. Mann, 646 P.2d 352 (Colo. 1982); Nat'l Sur. Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982); People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982); Goodboe v. Gabriella, 663 P.2d 1051 (Colo. App. 1983).

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Spontaneous present sense impression.** A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.

COMMITTEE COMMENT

The change reflected above was based on the fact that neither immediacy nor spontaneity would be guaranteed by the Federal rule. Colorado case law requires that a present sense impression be instinctive and spontaneous in order to be admissible. *See* Denver City Tramway Co. v. Brumley, 51 Colo. 251, 116 P. 1051 (1911). It was felt that the requirements set forth in that opinion constitute a greater guarantee of trustworthiness than the Federal rule, *i.e.,* spontaneity is the most important factor governing trustworthiness. This is especially true when there is no provision that the declarant be unavailable as a witness.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(Federal Rule Identical.)

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Federal Rule Identical.)

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(Federal Rule Identical.)

COMMITTEE COMMENT

See: Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931); and § 8-53-103(2)(a) & (b), C.R.S. (Workmen's Compensation Act of Colorado).

(5) **Recorded recollection.** A past recollection recorded when it appears that the witness once had knowledge concerning the matter and; (A) can identify the memorandum or record, (B) adequately recalls the making of it at or near the time of the event, either as recorded by the witness or by another, and (C) can testify to its accuracy. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

COMMITTEE COMMENT

The change reflected above was made because the Federal rule is more restrictive than the Colorado rule, which does not require absence of a present recollection to be expressly shown as a preliminary to use of recorded recollection. Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962).

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule makes no reference to any objective standard of trustworthiness, *e.g.,* regularity with which records are kept. *See* Colorado cases: Patterson v. Pitoniak, 173 Colo. 454, 480 P.2d 579 (1971); Moseley v. Smith, 170 Colo. 177, 460 P.2d 222 (1969); Seib v. Standley, 164 Colo. 394, 435 P.2d 395 (1967); Rocky Mountain Beverage v. Walter Brewing Company, 107 Colo. 63, 108 P.2d 885 (1941); Hobbs v. Breen, 74 Colo. 277, 220 P. 997 (1923); Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972).

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(Federal Rule Identical.)

(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule is somewhat broader than the provisions of § 25-2-117, C.R.S., and respecting marriage records is desirable because the evidentiary use of the book of marriages provided in § 90-1-20, C.R.S. 1963, was repealed in 1973.

(10) **Absence of a Public Record.** Testimony - or a certification under Rule 902 - that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice - unless the court sets a different time for the notice or the objection.

COMMITTEE COMMENT

The Committee recommended adoption of this amended version of C.R.E. 803(10) to follow the identical amendment to F.R.E. 803(10) which took effect on December 1, 2013.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(Federal Rule Identical.)

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
(Federal Rule Identical.)

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
(Federal Rule Identical.)

COMMITTEE COMMENT

The age of the record or regularity of keeping are immaterial to admissibility. The content of fact is not limited to pedigree or genealogy.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

COMMITTEE COMMENT

The generic term ''property'' used in the Federal rule indicates an intent that the rule apply to documents relating to interests in both real property and personal property. The term ''filed'' has been added to render the rule applicable to personal property under Colorado law:

the Uniform Commercial Code, the Colorado Rules of Civil Procedure, and § 30-10-103, C.R.S., all refer to "filing" documents affecting an interest in personal property.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule extends admissibility beyond case law and statutes. *E.g.,* McClure v. Board of Commissioners of La Plata County, 19 Colo. 122, 34 P. 763 (1893); Wright v. People in the Interest of Rowe, 131 Colo. 92, 279 P.2d 676 (1955); Michael v. John Hancock Mutual Life Insurance Co., 138 Colo. 450, 334 P.2d 1090 (1959). Statutes more restrictive than the rule are §§ 38-35-102, 38-35-104, 38-35-105, 38-35-107, and 38-35-108, C.R.S.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule liberalizes the hearsay exception for ancient documents by eliminating proof of execution (*see* general statement for this principle in 32A C.J.S., *Evidence,* Sec. 744, page 32) and, further, reduces the required age of such document to twenty years from thirty years. For Colorado authorities on the subject, *see* McGary v. Blakeley, 127 Colo. 495, 258 P.2d 770 (1953) and § 38-35-107, C.R.S.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(Federal Rule Identical.)

COMMITTEE COMMENT

Colorado authorities affecting this rule are: 4-2-724, C.R.S.; Continental Divide Mining Investment Company v. Bliley, 23 Colo. 160, 166, 46 P. 633, 635 (1896); Willard v. Mellor, 19 Colo. 534, 36 P. 148 (1894); Kansas Pacific R.R. Company v. Lundin, 3 Colo. 94 (1876); Rio Grande Southern R.R. Company v. Nichols, 52 Colo. 300, 123 P. 318 (1912); Johnson v. Cousins, 110 Colo. 540, 135 P.2d 1021 (1943).

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence and may be received as exhibits, as the court permits.

COMMITTEE COMMENT

Unlike the Federal Rule, the Colorado Rule allows the learned treatises to be admitted as exhibits in the discretion of the court. The former Colorado Rule seemed to be that only if such treatise had been relied upon by the witness in forming his opinion might it be admitted. Denver City Tramway v. Gawley, 23 Colo. App. 332, 129 P. 258 (1912); Wall v. Weaver,

145 Colo. 337, 358 P.2d 1009 (1961); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1970).

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(Federal Rule Identical.)

COMMITTEE COMMENT

The former Colorado rule limited such evidence to reputation among persons related by blood or marriage to the family in question. Epple v. First Nat'l Bank of Greeley, 143 Colo. 319, 352 P.2d 796 (1960).

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule is thought consistent with the former Colorado rule. *See* § 38-44-101, C.R.S., *re* establishing disputed boundaries.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(Federal Rule Identical.)

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty or *nolo contendere,* adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(Federal Rule Identical, Except that a Plea of Nolo Contendere was Excluded in the Federal rule.)

COMMITTEE COMMENT

The rule represents Colorado law by its inclusion of a *nolo contendere* plea. § 13-90-101, C.R.S., construed to include a *nolo contendere* plea in Lacey v. People, 166 Colo. 152, 442 P.2d 402 (1968).

(23) **Judgment as to personal, family, or general history or boundaries.** Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Federal Rule Identical.)

COMMITTEE COMMENT

A judgment, under the circumstances stated, creates the reputations, and is admissible subject to the limitations applicable to evidence of reputation.

(24) [Transferred to Rule 807]

COMMITTEE COMMENT

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Source: (24) added November 15, 1984, effective April 1, 1985; (24) transferred to Rule 807 and (24) committee comment added, effective January 1, 1999; (6) amended and adopted June 20, 2002, effective July 1, 2002; (10) amended and adopted and (10) committee comment added and adopted, effective February 18, 2014.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 227 (1979). For article, ''Admissibility of Prior Testimony'', see 11 Colo. Law. 398 (1982). For article, ''Admissibility of Governmental Studies to Prove Causation'', see 11 Colo. Law. 1822 (1982). For article, ''The Residual Exceptions to the Hearsay Rule: A Reappraisal'', see 13 Colo. Law. 1818 (1984). For article, ''Offering or Opposing Hearsay Under the Residual Exceptions — A User's Guide'', see 14 Colo. Law. 1620 (1985). For article, ''Mythological Rules of Evidence'', see 16 Colo. Law. 1218 (1987); For article, ''Hearsay as a Basis for Opinion Testimony'', see 17 Colo. Law. 2337 (1988). For article, ''The Residual Exception to the Hearsay Rule: Form Follows Substance'', see 22 Colo. Law. 1197 (1993). For article, ''Res Gestae Evidence'', see 24 Colo. Law. 1567 (1995).

Purpose of hearsay rule. The constitutional right to confrontation and the hearsay rule stem from the same roots, and are designed to protect similar interests based on the premise that testimony is much more reliable when given under oath at trial, where the declarant is subject to cross-examination and the jury may observe his demeanor. People v. Dement, 661 P.2d 675 (Colo. 1983).

Testimony found to be hearsay. Sante Fe Energy Co. v. Baca, 673 P.2d 374 (Colo. App. 1983).

Applied in Morrison v. Bradley, 622 P.2d 81 (Colo. App. 1980); Sims v. Indus. Comm'n, 627 P.2d 1107 (Colo. 1981); People in Interest of K.A.J., 635 P.2d 921 (Colo. App. 1981); Great W. Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331 (Colo. App. 1981); Scruggs v. Otteman, 640 P.2d 259 (Colo. App. 1981); Fasso v. Straten, 640 P.2d 272 (Colo. App. 1982); People v. District Court, 664 P.2d 247 (Colo. 1983); People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983).

II. EXCEPTIONS.

A. In General.

Burden of proof that statement falls within exception. The prosecution has the burden of showing that a statement falls within an exception to the hearsay rule. People in Interest of R.L., 660 P.2d 26 (Colo. App. 1983); Oldsen v. People, 732 P.2d 1132 (Colo. 1986).

The proponent of evidence carries the the burden of establishing the preliminary facts essential to satisfy a particular hearsay exception. Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980); People v. Garcia, 826 P.2d 1259 (Colo. 1992).

Both § 13-25-129 and this rule are residuary rules and apply only if hearsay is not otherwise admissible under the other hearsay exceptions. Section 13-25-129 applies only to hearsay statements not otherwise admissible by statute or court rule. Because § 13-25-129 and this rule have different requirements for the admission of hearsay statements, confusion and inconsistent results may occur if either residuary provision may be applied to the same hearsay statement of a child sexual assault victim

which is otherwise not admissible into evidence. Since the more specific provision should prevail, § 13-25-129 is the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989); People v. Bowers, 801 P.2d 511 (Colo. 1990).

Declarant must not lack testimonial qualifications. To fall within any exception to the hearsay rule, the declarant himself must not lack the testimonial qualifications that would be required for him to take the stand. People in Interest of R.L., 660 P.2d 26 (Colo. App. 1983).

Declarant's testimonial incapacity renders statement inadmissible. Where the testimonial incapacity of the declarant stems from a psychiatric disorder, and is such that the guarantees of trusworthiness implicit in the exceptions to the hearsay rule would not vitiate the incompetency, any testimony derived from that statement is not admissible. People in Interest of R.L., 660 P.2d 26 (Colo. App. 1983).

A.5. Spontaneous Present Sense Impression.

Witness's testimony that her daughter had identified an obscene phone caller as the defendant immediately after perceiving the caller's voice was properly permitted as spontaneous present sense impression exception to the hearsay exclusion. People v. Czemerynski, 786 P.2d 1100 (Colo. 1990).

Applied in People v. Franklin, 782 P.2d 1202 (Colo. App. 1989).

B. Excited Utterance.

Three requirements must be met for a statement to be admissible as an excited utterance. The event must be sufficiently startling to render normal reflective thought processes of the observer inoperative, the statement must be a spontaneous reaction to the occurrence, and direct or circumstantial evidence must exist to allow the jury to infer that the declarant had the opportunity to observe the startling event. People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001); People v. Martinez, 83 P.3d 1174 (Colo. App. 2003); People v. Garrison, 109 P.3d 1009 (Colo. App. 2004).

Excited utterance exception. What is of critical significance to res gestae, section (2), is the spontaneous character of the statement and its natural effusion from a state of excitement. Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of C.R.E.); Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Hearsay statements are admissible under the excited utterance exception if there is some occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative and if the statement of the declarant was a spontaneous reaction to the occurrence or event and not the result of reflective thought. W.C.L. v. People, 685 P.2d 176 (Colo. 1984); People v. Clements, 732 P.2d 1245 (Colo. App. 1986).

In determining whether a statement is admissible as an excited utterance, trial court is afforded wide discretion and that determination will not be disturbed on appeal if it is supported by the evidence. Here, trial court properly admitted into evidence an audiotape of a statement made by the victim during a 911 telephone call. The call was placed only 15 minutes after the victim was stabbed. Being stabbed is a startling event and, thus, it was within trial court's discretion to determine that the victim was still under the excitement or stress of the stabbing at the time the statement was made. People v. Mullins, 104 P.3d 299 (Colo. App. 2004).

Exception not restricted to statements arising directly from startling event. Although in most instances the ''startling event'' will be the act or transaction upon which the legal controversy is predicated, such as an assault or accident, the excited utterance exception is not restricted only to statements arising directly out of such events. People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982).

When the significance of a past event is revealed as a result of the startling event and is relevant, such testimony is admissible as an excited utterance exception to the hearsay rule exclusion. People v. Ojeda, 745 P.2d 274 (Colo. App. 1987).

Declarant may be witness to event. Under the hearsay exception for an ''excited utterance'', the declarant may be a bystander or witness to the event rather than an actual participant. People v. Dement, 661 P.2d 675 (Colo. 1983); People v. Green, 884 P.2d 339 (Colo. App. 1994).

Declarant must have observed startling occurrence. An implicit requirement to be met to qualify a statement as an excited utterance, admissible under the hearsay exception, is that enough direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling occurrence. People v. Dement, 661 P.2d 675 (Colo. 1983); People v. Garcia, 826 P.2d 1259 (Colo. 1992); People v. Green, 884 P.2d 339 (Colo. App. 1994).

The threshold for satisfying the requirement that a declarant observed an event is minimal, and as long as there is evidence that leads the fact finder to reasonably infer that the declarant had the opportunity to observe the event that evidence should be permitted; the credibility of the witness and the weight to be given that

evidence should be left to the fact finder. People v. Green, 884 P.2d 339 (Colo. App. 1994).

The rationale behind the excited utterance exception is founded on the general reliability attaching to statements made under the stress of excitement. People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982).

Unlike some other hearsay exceptions, excited utterance evidence is not limited to unavailable declarants. The reason is that the extrajudicial assertion is likely to be better than a statement from the witness at trial after time has permitted reflection or memory has faded. People v. Dement, 661 P.2d 675 (Colo. 1983).

Spontaneity and excitement sufficient guarantee of trustworthiness. The requirement of spontaneity and excitement subsumed by the res gestae exception furnishes a sufficient guarantee of trustworthiness implicit in the rationale of hearsay exceptions. People v. Roark, 643 P.2d 756 (Colo. 1982).

Source of trustworthiness in child's statement. The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in the lack of capacity to fabricate rather than the lack of time to fabricate. People in Interest of O.E.P., 654 P. 2d 312 (Colo. 1982); People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).

Courts look to the effect of a particular event upon a declarant and, in the case of young children, the element of trustworthiness underscoring the excited utterance exception is primarily in the lack of capacity to fabricate rather than the lack of time to fabricate. People v. Ortega, 672 P.2d 215 (Colo. App. 1983).

Automobile collision qualifies as a "startling event". Lovato v. Herrman, 685 P.2d 240 (Colo. App. 1984).

A sexual assault may constitute a sufficiently startling event to admit hearsay statements of a child-victim. People v. Bolton, 859 P.2d 311 (Colo. App. 1993).

Sexual assault and stabbing of victim constituted a startling event. Although the trial court acknowledged there was no way to know how much time had elapsed between the assault and the 911 phone call, there was substantial evidence in the record that the victim was hysterical at different times throughout the two-hour period that the victim made statements to the police officer. There was also testimony that during the two hours, the victim continually lapsed into French while speaking and repeatedly asked whether she was going to die. Furthermore, the officer testified that the victim was bleeding badly and was continually being examined and treated for injuries during the time the officer was with the victim. People v. King, 121 P.3d 234 (Colo. App. 2005).

The fact that the victim's statements were made in response to questions does not preclude them from being excited utterances. People v. Martinez, 18 P.3d 831 (Colo. App. 2000); People v. Garrison, 109 P.3d 1009 (Colo. App. 2004); People v. King, 121 P.3d 234 (Colo. App. 2005).

The totality of the circumstances, including the severity of the victim's injuries, her agitated emotional state, and the brief time between the injury and the statements, supports the trial court's determination that the statements were admissible under this rule. People v. Martinez, 18 P.3d 831 (Colo. App. 2000).

Statements by victim who was upset, crying, and in emotional and physical distress that were made in temporal proximity to defendant's yelling and assault of victim properly held to be excited utterances. Compan v. People, 121 P.3d 876 (Colo. 2005).

Contemporaneity not required. Contemporaneity of the act and the assertion is not required for the res gestae exception to the hearsay rule to be applicable. Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of C.R.E.); People v. Handy, 657 P.2d 963 (Colo. App. 1982); Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Time interval of a half-hour between the alleged assault and the hearsay declaration admitted under the res gestae exception did not constitute an impediment to the admissibility of the statement. Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980) (case decided prior to effective date of C.R.E.).

But statement made after time interval of three hours in which declarant had several independent interludes of reflective thought was not admissible as an excited utterance. People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001).

Temporal interval between event and statement not conclusive on admissibility. Although the temporal interval between the ''startling event'' and the child's statement is not without significance, it is not conclusive on the question of admissibility. People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982); People v. Sandoval, 709 P.2d 90 (Colo. App. 1985); People v. Clements, 732 P.2d 1245 (Colo. App. 1986).

Exculpatory statement of defendant made hours after arrest not part of res gestae. Where hours after the defendant is placed under arrest, he gives an exculpatory statement to the police and the district attorney objects to the admission of the statement into evidence at trial on the ground that the statement is hearsay, his objection is valid, because the defendant's explanatory statement is not so contemporaneous that it can be considered part of the res gestae. People v. Gilkey, 181 Colo. 103, 507 P.2d 855 (1973).

Trial court to determine whether statement admissible. The trial court is in a preferred position to determine whether a particular event causes sufficient excitement in the declarant to render a statement admissible as an excited utterance. People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982); People v. Bashara, 677 P.2d 1376 (Colo. App. 1983); People v. Sandoval, 709 P.2d 90 (Colo. App. 1985).

Criminal cases. Section (2), the ''excited utterance'' exception to the hearsay rule, is not unconstitutional as applied in every criminal case. People v. Dement, 661 P.2d 675 (Colo. 1983).

When declarant is unavailable, evidence admitted under this exception does not violate defendant's right to confront prosecution witnesses. People v. Mitchell, 829 P.2d 409 (Colo. App. 1991).

A declarant is unavailable in the constitutional sense when the prosecution makes a reasonable, good faith effort to produce a witness without success; however, in cases where the attempt to produce a witness would be futile, a reasonable effort by the prosecution may be no effort. People v. Green, 884 P.2d 339 (Colo. App. 1994).

Excited utterance is nontestimonial if not made under circumstances that would lead an objective witness to reasonably believe the statement would be available for use at a later trial. Compan v. People, 121 P.3d 876 (Colo. 2005).

Testimony held admissible under the excited utterance exception to the hearsay rule. People v. Jones, 665 P.2d 127 (Colo. App. 1982); Kielsmier v. Foster, 669 P.2d 630 (Colo. App. 1983); People v. Bashara, 677 P.2d 1376 (Colo. App. 1983); People v. Franklin, 683 P.2d 775 (Colo. 1984); People v. Sandoval, 709 P.2d 90 (Colo. App. 1985); People v. Clements, 732 P.2d 1245 (Colo. App. 1986); People v. Bolton, 859 P.2d 311 (Colo. App. 1993); Canape v. Peterson, 878 P.2d 83 (Colo. App. 1994); People v. Martinez, 83 P.3d 1174 (Colo. App. 2003).

Testimony held inadmissible. Although bystanders to an event may be sufficiently affected by its excitment to have their utterances rendered reliable, and thus excepted from the rule against hearsay statements, in this case there was no evidence of the emotion or spontaneity required to qualify the statement of the unknown declarant as an excited utterance. People v. Mares, 705 P.2d 1013 (Colo. App. 1985); People v. Green, 884 P.2d 339 (Colo. App. 1994).

Trial court abused its discretion in admitting testimony as an excited utterance even though the interview took place shortly after the startling event of defendant's arrest. The statements did not relate to the startling event and instead related to events that had occurred weeks previously. People v. Suazo, 87 P.3d 124 (Colo. App. 2003).

Trial court erred in admitting statements made by victim to police officer twelve hours after incident as excited utterances. Despite officer's description of the victim as distraught, traumatized, and terrified, the evidence indicated that victim had several independent interludes of reflective thought that rendered the statements less than spontaneous. People v. Pernell, 2014 COA 157, 414 P.3d 1, aff'd on other grounds, 2018 CO 13, 411 P.3d 669.

Statements held inadmissible. W.C.L. v. People, 685 P.2d 176 (Colo. 1984); People v. Koon, 724 P.2d 1367 (Colo. App. 1986); People v. Franklin, 782 P.2d 1202 (Colo. App. 1989).

C. Then Existing Mental, Emotional, or Physical Condition.

Law reviews. For article, ''Lights, Camera, Action—Video Will Executions'', see 42 Colo. Law. 45 (January 2013).

Rationale for exception. The state of mind exception to the hearsay rule is based upon the truthworthiness of such statements which is presumed due to their spontaneity. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982).

Statement must be made under circumstances indicating sincerity. The rule requires that such declarations relate to a then existing state of mind and that they must have been made under circumstances indicating sincerity. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982).

Section (3) tracks the common-law definition of the state of mind exception. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982).

Common-law rule. Under the common-law evidentiary rule, the tests applied to admit evidence of design or plan are ''a present existing state of mind, something said in the usual course of things under the circumstances, and under circumstances excluding an ulterior purpose''. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982).

Statements by an unavailable witness admitted pursuant to the state of mind hearsay exception do not violate a defendant's state or federal confrontation rights. The state of mind hearsay exception is firmly rooted. The reliability of such hearsay statements, therefore, is implied under the test set forth in Ohio v. Roberts, 448 U.S. 56 (1980), and statements bear sufficient indicia of reliability to satisfy the second part of the Dement two-part test. Accordingly, trial court's failure to make a reliability determination regarding statements by an unavailable witness did not constitute plain error. People v. Gash, 165 P.3d 779 (Colo. App. 2006).

The state of mind exception to the hearsay rule is based upon the trustworthiness of spontaneous statements. The availability of the

declarant is immaterial if the statement is made under circumstances indicating sincerity. Statements of present intent to engage in future conduct may be used as proof of the subsequent act. People v. Nunez, 698 P.2d 1376 (Colo. App. 1984), aff'd, 737 P.2d 422 (Colo. 1987).

Mental condition of sexual assault victim. Mother of sexual assault victim may testify that victim was fearful and distraught for several months after assault since such testimony is admissible under state of mind exception to the hearsay rule. People v. Haymaker, 716 P.2d 110 (Colo. 1986).

Prohibition inapplicable when hearsay offered to prove state of mind. When hearsay is offered to provide the basis for the defendant's state of mind, the truth of the statement is not the criterion for admission, and the general hearsay prohibition does not apply. People v., Burress, 183 Colo. 146, 515 P.2d 460 (1973); People v. Spring, 713 P.2d 865 (Colo. 1985), rev'd on other grounds, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 809 (1987).

When state of mind exception applicable. The state of mind exception to the hearsay rule, section (3), is not applicable to statements purportedly made by the victim in a case where the state of mind of the victim is not a material issue. People v. Borrelli, 624 P.2d 900 (Colo. App. 1980).

The more recent and better-reasoned cases allow hearsay expressions of a victim's fear of a defendant only where the state of mind of the victim is clearly relevant to a material issue in the case. People v. Borrelli, 624 P.2d 900 (Colo. App. 1980).

Out of court statements regarding the victim's fear of the defendant are admissible to explain the victim's state of mind. People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000).

Assertion must depict declarant's, not another's, state of mind. Since the state of mind exception admits the assertion for the truth of the matter asserted, it is basic to admissibility that the assertion essentially depict the declarant's then existing state of mind, as distinguished from a description of the acts or state of mind of another. People v. Madson, 638 P.2d 18 (Colo. 1981); People v. Franklin, 782 P.2d 1202 (Colo. App. 1989).

Statements of memory or belief are excluded from the state of mind exception. People v. Madson, 638 P.2d 18 (Colo. 1981).

Rule permits the introduction of statements of memory or belief to prove the fact remembered or believed as to the execution, revocation, identification, or terms of a declarant's will. Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

Statements of present intent of future conduct included. The state of mind exception encompasses statements of the declarant's present intent to engage in future conduct as proof of the subsequent act. People v. Madson, 638 P.2d 18 (Colo. 1981).

Victim's statement to police officer describing physical injuries within the scope of admissible evidence under the "then existing mental, emotional, or physical condition" exception. Pena v. People, 173 P.3d 1107 (Colo. 2007).

Child's wordless pointing to head when police officer asked child if he had any ''owies'' was admissible becuase child was addresssing his then existing physical condition. People v. Phillips, 2012 COA 176, 315 P.3d 136.

Statements inadmissible because they related to a past state of mind, not a then existing state of mind. People v. Manyik, 2016 COA 42, 383 P.3d 77.

Applied in Stephen Equipment Co. v. Baca, 703 P.2d 1332 (Colo. App. 1985); People v. Avery, 736 P.2d 1233 (Colo. App. 1986); People v. McGrath, 793 P.2d 664 (Colo. App. 1989).

D. Statements for Purposes of Medical Diagnosis or Treatment.

Statements made for the purpose of medical diagnosis or treatment are exempted under section (4). For this type of evidence to be admissible, it must (1) be made for purposes of medical diagnosis or treatment; (2) describe medical history, symptoms, or the inception or cause of symptoms; and (3) be reasonably pertinent to diagnosis or treatment. Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Statements ascribing fault are generally not admissible under section (4) unless the statements of fault are necessary for diagnosis and treatment. Statements expressing dissatisfaction with the care received do not fall under exception in section (4). Statements ascribing fault are not necessary to assist in diagnosis and treatment. Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Admission of nontreating physician's recital of a defendant's statements. Nontreating physician's recital of a defendant's statements is admissible for the truth of the matters they contain. The test for admission reflects a trustworthiness rationale and is: First, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment. People v. Stiles, 692 P.2d 1124 (Colo. App. 1984).

Statements made by defendant to a non-treating physician should be admitted once it is established that the statements were made for the purpose of diagnosis or treatment, and were reasonably pertinent to diagnosis or treatment, and were relied upon by the physician in arriving at an expert opinion, without regard to any independent demonstration of trustworthiness. King v. People, 785 P.2d 596 (Colo. 1990).

However, even admission of testimony that is not pertinent to medical treatment or diagnosis may not be harmful error if it is merely cumulative of other evidence. People v. Galloway, 726 P.2d 249 (Colo. App. 1986).

Victim's statements to a paramedic admissible where statements were made in response to standard questions designed to elicit facts necessary for medical diagnosis and treatment and where all circumstances show that the victim's motive in making the statements was to obtain treatment. People v. Martinez, 18 P.3d 831 (Colo. App. 2000); People v. Joyce, 68 P.3d 521 (Colo. App. 2002).

Testimony of social worker, psychologist, and physician as to child's statements concerning sexual contact with her father were not admissible under the ''medical exception'' to the hearsay rule absent any evidence that the child was capable of recognizing, at the time of such statements, the need to provide accurate information for purposes of medical diagnosis or treatment. Oldsen v. People, 732 P.2d 1132 (Colo. 1986).

Evidence of patient's past cocaine use admissible in medical malpractice case because it was used for the purpose of diagnosis. The rule does not require that the evidence be used prospectively for treatment purposes. Kelly v. Haralampopoulos by Haralampopoulos, 2014 CO 46, 327 P.3d 255.

Doctors' diagnoses, recited and summarized in administrative law judge decision, did not come within the exception provided in section (4) because they did not constitute the patient's recitation of information necessary for diagnosis or treatment. Leiting v. Mutha, 58 P.3d 1049 (Colo. App. 2002).

Self-serving statements of defendant concerning drug use upon being booked for murder did not qualify under this rule. Such statements were not made for the purpose of obtaining diagnosis from a health care professional, but as part of jail's routine procedures. People v. Thomas, 962 P.2d 263 (Colo. App. 1997).

Victim's statements to nurse practitioner were inadmissible hearsay where the type of dispute or identity of the assailant was not necessary for or pertinent to the nurse practitioner's diagnosis or treatment. The record showed the challenged statements were cumulative of testimony by the victim and an investigating officer, therefore, any error in the admission of the challenged statements was harmless. People v. Jaramillo, 183 P.3d 665 (Colo. App. 2008).

Trial court did not commit reversible error in admitting hearsay statements made by victim to physician who examined her. The statements included the victim's description of the defendant's actions that had caused her pain and bleeding, to assist with his medical diagnosis. Moreover, the physician's testimony was cumulative of testimony provided by the victim, the woman with whom the victim was residing, and the caseworker. People v. Perez, 972 P.2d 1072 (Colo. App. 1998).

Testimony of sexual assault nurse practitioner (SANE) regarding statement elicited from victim during a SANE exam is admissible if: (1) The statement is reasonably pertinent to treatment or diagnosis, and (2) the content of the statement is such as is reasonably relied upon by a physician in treatment or diagnosis. However, statement is not admissible if statement is not trustworthy because the facts and circumstances surrounding the statement create the inference that the forensic examination or interview was purely investigative and had no medical or diagnostic characteristic. People v. Tyme, 2013 COA 59, 315 P.3d 1270.

E. Recorded Recollection.

This exception is inapplicable where a notation on a document refreshed a witness of his actions taken six weeks before trial and not so that he independently recalled the date of his conversation with the defendant that had taken place just before the accident for which defendant was on trial. People v. Clary, 950 P.2d 654 (Colo. App. 1997).

F. Records of Regularly Conducted Activity.

Law reviews. For article, ''C.R.E. 803(6): Applying the Business Records Exception to Third-Party Information'', see 29 Colo. Law. 55 (May 2000). For article, ''C.R.E. 803(6): Admissibility of Customer-Supplied Information Under Business Records Hearsay Exception'', see 32 Colo. Law. 89 (Sept. 2003).

Business record exception justified by trustworthiness. Where sufficient guarantees of trustworthiness and accuracy are present, application of the business record exception to hearsay evidence is justified. People v. Holder, 632 P.2d 607 (Colo. App. 1981); Ford v. Bd. of County Comm'rs, 677 P.2d 358 (Colo. App. 1983), cert. dismissed, 679 P.2d 579 (Colo. 1984).

Contractor's invoices are business records. Contractor's invoices, based on employee time sheets, are admissible as records kept in the regular course of business. Herman v. Steamboat Springs Super 8 Motel, Inc., 634 P.2d 1005 (Colo. App. 1981).

Activities of government agencies may be considered business records for the purposes of Crim. P. 26.2, if the other requirements of the rule are met and the proper foundation is laid. People v. Stribel, 199 Colo. 377, 609 P.2d 113 (1980) (case decided prior to effective date of C.R.E.).

Assessments made by condominium association on a quarterly basis admissible. Chateau Chaumont Condo. v. Aspen Title Co., 676 P.2d 1246 (Colo. App. 1983).

Records prepared by another source, if adopted and integrated in the regular course of established business procedures into the records sought to be introduced are admissible even if the identity of the person whose first hand knowledge was the basis of a particular entry is not established. Teac Corp. of Am. v. Bauer, 678 P.2d 3 (Colo. App. 1984); In re Estate of Fritzler, 2017 COA 4, 413 P.3d 163.

Fraud investigator's records for credit processing association are records of regularly conducted activity justifying admissibility of calculations based thereon. People v. Burger-Levy, 677 P.2d 351 (Colo. App. 1983).

Complaints filed by third parties with the Colorado attorney general's consumer fraud office do not qualify as business records because they are not part of the work product generated by that office. Tincombe v. Colo. Const. & Supply Corp. 681 P.2d 533 (Colo. App. 1984).

Doctors' diagnoses, recited and summarized in administrative law judge decision, did not qualify as medical records because they constituted a summary and interpretation of the records, not the records themselves, and in any event were not authenticated by the custodian or other qualified witness. Leiting v. Mutha, 58 P.3d 1049 (Colo. App. 2002).

Police reports may qualify as business records because the drafters of the federal rule of evidence 803(6), identical to this rule, contemplated including police reports in the business records exception when the other requirements of the rule are met. Lannon v. Taco Bell, Inc., 708 P.2d 1370 (Colo. App. 1985), aff'd on other grounds, 744 P.2d 43 (Colo. 1987).

But statements of defendant concerning his own drug use, upon being booked for murder, did not qualify under this rule. The business records exception requires that the source of the proffered information does not indicate lack of trustworthiness, and in the context of the case, the defendant's statements might properly be characterized as self-serving. People v. Thomas, 962 P.2d 263 (Colo. App. 1997).

Specific requirement in § 16-3-309 (5) that laboratory testing technician be made available at trial upon timely request overrides general hearsay exception of section (6) of this rule. When timely request had been made, trial court erred in admitting laboratory report without technician's testimony as a business record. People v. Williams, 183 P.3d 577 (Colo. App. 2007).

Relevant and material business records, including computer records, qualify for the business records exception when supported by an adequate foundation showing that: (1) The records were made in the regular course of business; (2) those participating in the record making were acting in the routine of business; (3) the input procedures were accurate; (4) the entries were made within a reasonable time after the occurrence in question; and (5) the information was transmitted by a reliable person with knowledge of the event reported. Benham v. Pryke, 703 P.2d 644 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 67 (Colo. 1987); Downing v. Overhead Door Corp., 707 P.2d 1027 (Colo. App. 1985); Schmutz v. Bolles, 800 P.2d 1307 (Colo. 1990); Stevens v. Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993); People v. Huehn, 53 P.3d 733 (Colo. App. 2002); People v. Marciano, 2014 COA 92M, 411 P.3d 831.

The information contained in business records may be transmitted through a number of individuals as long as the chain of transmission begins with the individual who has actual knowledge of each person in the chain is acting in ordinary course of business. Schmutz v. Bolles, 800 P.2d 1307 (Colo. 1990).

The trial court erred in refusing to admit an investigative report of insurance adjuster because the report was prepared as part of the normal routine business practice necessary for each insurance file, the adjuster prepared the report using information he received from one in knowledge, and the report was prepared within a brief time after the adjuster received the information. Downing v. Overhead Door Corp., 707 P.2d 1027 (Colo. App. 1985).

Bank statements provided by defendant directly to law enforcement officials that defendant averred were her statements admissible under section (6). The nature of bank records and their trustworthiness, due to the fastidious nature of record keeping in financial institutions, which is often required by governmental regulation, along with the records as a whole, can establish a sufficient foundation for the bank records' admission. Because of the particular nature of bank statements and the fact that defendant obtained them and personally delivered them to a detective, the trial court could have taken judicial notice of the statements as business records. People v. Marciano, 2014 COA 92M, 411 P.3d 831.

Trial court abused its discretion when it admitted records without the testimony of a foundational witness. People v. Marciano, 2014 COA 92M, 411 P.3d 831.

Trial court did not abuse discretion in admitting computer records as business records even though the records were not authenticated pursuant to C.R.E. 901. Although C.R.E. 901(b)(9) may be used to authenticate computer records, there is no requirement that computer records be authenticated only in this way.

People v. Huehn, 53 P.3d 733 (Colo. App. 2002).

Computer business records have a greater level of trustworthiness than an individually generated computer document. People v. Huehn, 53 P.3d 733 (Colo. App. 2002).

Trial court did not abuse its discretion in admitting as a business record a spreadsheet prepared by the director of loss prevention, which contained data generated by the company's point-of-sale system that was copied and pasted into the document. People v. Flores-Lozano, 2016 COA 149, 410 P.3d 684.

Business records containing statements by an outsider are admissible when the information is provided as part of a business relationship between a business and the outsider and there is evidence that the business substantially relied upon the information contained in the records. Trial court did not abuse its discretion in admitting such records. People in Interest of R.D.H., 944 P.2d 660 (Colo. App. 1997).

It was unnecessary to establish that document admitted under this rule was prepared by defendant's employee where defendant's chief financial officer testified that the document was received in the ordinary course of defendant's business, that the document was the type of document defendant routinely received from supplier, and that supplier did not inform defendant that document was inaccurate. Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

Trial court did not err in admitting certain documents offered in support of plaintiff's damage claim on grounds that documents constituted inadmissible heresay where jury was instructed that documents were not being admitted for truth of matter asserted and counsel for defendant confirmed that no additional jury instruction was required. Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

Security company's incident report inadmissible where there was no evidence as to: who recorded the report; whether the report was kept in the ordinary course of business; whether the security guard had knowledge of the truthfulness of the recorded information; whether a third party's statement in the report was sworn; or whether the statement was accurately translated by an interpreter in the regular course of business. Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003).

Industrial commission files are business records. Industrial commission file used in good cause determination of untimely requests for review of referee's decision, pursuant to commission regulations enacted under an express grant of legislative authority, is admissible as a business records exception to the hearsay rule. Kriegel v. Indus. Comm'n, 702 P.2d 290 (Colo. App. 1985).

Accident reports may be admissible as business records. Armentrout v. FMC Corp., 819 P.2d 522 (Colo. App. 1991).

Evidence provided an adequate basis for admission under section (6) of a medical record entry made by nurse. Stevens v. Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992).

Admission of transport note entered by nurse in transport team was not error. Stevens v. Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992).

Applied in Ed Hackstaff Concrete, Inc. v. Powder Ridge Condo, 679 P.2d 1112 (Colo. App. 1984); Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. App. 1983); People v. Lagunas, 710 P.2d 1145 (Colo. App. 1985); Adams County Dept. of Soc. Servs. ex rel. Tyler v. Tyler, 714 P.2d 1333 (Colo. App. 1986); Kelln v. Colo. Dept. of Rev., 719 P.2d 358 (Colo. App. 1986); Jacob v. Com. Highland Theatres, Inc., 738 P.2d 6 (Colo. App. 1986); Columbia Sav. & Loan Ass'n v. Zelinger, 794 P.2d 231 (Colo. 1990); Lorenz v. Martin Marietta Corp., Inc., 802 P.2d 1146 (Colo. App. 1990), aff'd, 823 P.2d 100 (Colo. 1992); State v. Robert J. Hopp & Assocs., 2018 COA 69M, __ P.3d __.

G. Records of Vital Statistics.

Coroner's reports and death certificates. Coroner's reports qualify as public records, and death certificates are records of vital statistics. Bernstein v. Rosenthal, 671 P.2d 979 (Colo. App. 1983).

Admitting death certificate containing hearsay not error where jury instructed to ignore hearsay. The admission of a death certificate containing the statement that the victim was ''helping neighbor investigate burglary of neighbor's store and shot by one of the burglars during this investigation'', was not reversible error, particularly when the court later instructed the jury to ignore that portion of the certificate, although it would be much better to practice to delete such as included hearsay. Kurtz v. People, 177 Colo. 306, 494 P.2d 97 (1972).

H. Learned Treatises.

Law reviews. For article, ''C.R.E. 803(18): The Learned Treatise Exception to the Hearsay Rule'', see 38 Colo. Law. 39 (Mar. 2009).

Expert may be cross-examined using learned treatises even though he did not rely upon them in reaching his conclusions. People v. Beasley, 43 Colo. App. 488, 608 P.2d 835 (1979).

Hearsay evidence held properly admitted. Trial court held not to have erred in a sanity trial in admitting alleged hearsay testimony under the exception in section (18). People v. Clark, 662 P.2d 1100 (Colo. App. 1982).

Colorado driver handbook not a learned treatise under section (18). Garcia v. Mekonnen, 156 P.3d 1171 (Colo. App. 2007).

I. Public Records and Reports.

Complaints filed by third parties with the state attorney general's consumer fraud office do not qualify as public records because they comprise unsubstantiated allegations, rather than ''factual findings''. Tincombe v. Colo. Const. & Supply Corp. 681 P.2d 533 (Colo. App. 1984).

Administrative law judge decision reciting doctors' testimony did not qualify as a public record because the recitations were not factual findings or conclusions of the agency, but merely summaries of the doctors' own statements. Leiting v. Mutha, 58 P.3d 1049 (Colo. App. 2002).

Police booking reports fall outside of the exclusion contained in section (8)(B) for documents in criminal cases relating to matters observed by police or law enforcement and are thus admissible as public records. Unlike police investigative reports, booking reports do not raise concerns of trustworthiness or potential bias. Rather, they are documents routinely prepared in a non-adversarial setting by officials whose only motivation is to accurately and efficiently record uncontroversial information relating to the fact that an arrest was made, and not the facts leading to the arrest. People v. Warrick, 284 P.3d 139 (Colo. App. 2011).

Applied in People v. Fueston, 717 P.2d 978 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 749 P.2d 952 (Colo. 1988).

J. Other Exceptions.

Rule permits hearsay statement which has circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions to be admitted if the court determines that it is offered as evidence of a material fact and if it is more probative on the point for which it is offered than any other evidence which its proponent could reasonably produce. Abdelsamed v. N.Y. Life Ins. Co., 875 P.2d 421 (Colo. App. 1992), rev'd sub nom. Hock v. N.Y. Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Factors to be used to determine trustworthiness are: (1) The nature and character of the statement; (2) the relationship of the parties; (3) the motivation of the declarant; (4) the circumstances under which the statement was made; (5) the knowledge and qualifications of the declarant; (6) the existence or lack of corroboration; and (7) the availability of the declarant at trial for cross-examination. Abdelsamed v. N.Y. Life Ins. Co., 857 P.2d 421 (Colo. App. 1992), rev'd sub nom. Hock v. N.Y. Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Test applied in Abdelsamed v. N.Y. Life Ins. Co., 857 P.2d 421 (Colo. App. 1992), rev'd sub nom. Hock v. N.Y. Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Statement admissible under residual hearsay exception if: (1) The statement has equivalent circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of a material fact; (3) the statement is more probative than any other evidence that can be procured through reasonable efforts; (4) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence, and (5) the proponent of the statement must give the adverse party notice of the intent to offer the statement, including the name and address of the declarant. Hock v. N.Y. Life Ins. Co., 876 P.2d 1242 (Colo. 1994).

Statements of three deceased witnesses properly read into record under residual hearsay exception when all parties agreed to what would be read. People v. Melanson, 937 P.2d 826 (Colo. App. 1996).

Residual hearsay exception not adopted. The supreme court declined to adopt the residual exception without an opportunity for public comment and an effective date which would allow for uniform application. W.C.L. v. People, 685 P.2d 176 (Colo. 1984) (decided prior to adoption of section (24)).

Reputation among family members concerning a person's date of birth is admissible hearsay. People v. Buhrle, 744 P.2d 747 (Colo. 1987).

Hearsay statements of child concerning sexual contact with her father which were testified to by a social worker, psychologist, and physician were sufficiently trustworthy to qualify as an exception to the hearsay rule and were admissible. Oldsen v. People, 732 P.2d 1132 (Colo. 1986).

Exception for judgment of previous conviction applied in Banek v. Thomas, 733 P.2d 1171 (Colo. 1986).

Evidence in a packet pertaining to one conviction admitted under § 16-13-102 that also is evidence of another separate and distinct conviction is admissible to prove the other separate and distinct conviction for habitual offender purposes. People v. Tafoya, 985 P.2d 26 (Colo. App. 1999).

Medical records have long been considered the prototype of business records for which admission as an exception to the hearsay rule is appropriate. Stevens v. Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992).

Admission of transport note entered by nurse in transport team was not error. The trial court correctly determined that the entry met the requirements of section (24). Stevens v.

Humana of Del., Inc., 832 P.2d 1076 (Colo. App. 1992).

Kelley Blue Book may be admitted under the market reports exception to the hearsay rule since the blue book is a market report generally used and relied upon by the public. People v. Thornton, 251 P.3d 1147 (Colo. App. 2010).

Information from a drug website does not meet the requisite criteria of necessity and reliability for admissibility under the hearsay exception for market reports. People v. Hard, 2014 COA 132, 342 P.3d 572.

Applied in People v. Guilbeaux, 761 P.2d 255 (Colo. App. 1988).

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(3) or (4) his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

COMMITTEE COMMENT

The Federal Rule is substantially the same as the Colorado Rule; except there is no reference to subsection (b) (2) in the Colorado Rule, as there is no Colorado subsection (b) (2). As to testimony given at a preliminary hearing, *see* People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979). This rule expands upon the former rule of evidence in Colorado. For authorities on the use of such evidence in Colorado, *see:* Rule 32 of Colorado Rules of Civil Procedure; Emerson v. Burnett, 11 Colo. App. 86, 52 P. 752 (1898); Daniels v. Stock, 23 Colo. App. 529, 130 P. 1031 (1913); Woodworth v. Gorsline, 30 Colo. 186, 69 P. 705 (1902); Henwood v. People, 57 Colo. 544, 143 P. 373 (1914); Gibson v. Gagnon, 82 Colo. 108, 257 P. 348 (1927); Duran v. People, 156 Colo. 385, 399 P.2d 412 (1965); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502 (10th Cir. 1949).

(2) (No Colorado Rule Codified)

COMMITTEE COMMENT

The Federal rule relates to a statement under belief of impending death. The admissibility of the dying declarations of a deceased person is governed by § 13-25-119, C.R.S.

(3) **Statement against interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary

or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(Federal Rule Identical.)

COMMITTEE COMMENT

The rule was revised, consistent with recent amendments to FRE 804(b)(3), only to clarify that corroborating circumstances are required regardless of whether a statement is offered to inculpate or exculpate an accused. See People v. Newton, 966 P.2d 563 (Colo. 1998) (prosecutors seeking to admit statements against the accused must satisfy the corroboration requirement solely by reference to the circumstances surrounding its making).

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule expanded the former Colorado rule to admit statements of unrelated associates. Some independent proof of relationship under (B) will continue to be required.

(5) [Transferred to Rule 807]

COMMITTEE COMMENT

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Source: (b)(5) added November 15, 1984, effective April 1, 1985; (b)(5) transferred to Rule 807 and (b)(5) committee comment added, effective January 1, 1999; (b)(3) and (b)(3) committee comment amended and effective January 13, 2011.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For comment, ''Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse'', see 60 Colo. L. Rev. 659 (1989). For article, ''The Residual Exception to the Hearsay Rule: Form Follows Substance'', see 22 Colo. Law. 1197 (1993). For article, ''Rules 801 and 804: The Admissibility of Out-of-Court Statements Made by Present and Former Employees'', see 26 Colo. Law. 77 (Sept. 1997). For article, ''Lights, Camera, Action—Video Will Executions'', see 42 Colo. Law. 45 (Jan. 2013).

Admitted hearsay statements against interest were sufficiently corroborated, satisfying the state confrontation clause requirement. People v. Beller, 2016 COA 184, 411 P.3d 1145.

Unavailability under section (a)(1). In order for a declarant to be considered ''unavailable'' under section (a)(1), the declarant must actually invoke the privilege before the trial court, and the trial court must rule that the privilege is available. People v. Rosenthal, 670 P.2d 1254 (Colo. App. 1983).

Previous assertion of the privilege against self-incrimination by a witness for the defendant in an earlier proceeding was insufficient as a matter of law to satisfy the requirement of unavailability under section (a)(1). People v. Barnum, 23 P.3d 1237 (Colo. App. 2001), aff'd by an equally divided court, 53 P.3d 646 (Colo. 2002).

Declarant-codefendant in a criminal proceeding must be presumed unavailable for purposes of section (a) even if present in court. Otherwise, declarant who is a codefendant could create error by becoming "available" by deciding to testify only after hearsay statements against interest were admitted into evidence pursuant to this rule. People v. Reed, 216 P.3d 55 (Colo. App. 2008).

To satisfy the requirements of constitutional confrontation, a party offering a witness's former testimony must establish the present unavailability of the witness. Also, there must have been a sufficient opportunity for the accused to cross-examine the witness at the former hearing so as to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. People v. Madonna, 651 P.2d 378 (Colo. 1982).

C.R.C.P. 32 is an independent and alternative vehicle to section (b)(1) of this rule for admitting deposition testimony into evidence in civil cases. Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000).

The determinative inquiry of the availability of the declarant is not his or her availability at the time of the pretrial hearing but his or her availability at the time of trial. Blecha v. People, 962 P.2d 931 (Colo. 1998); People v. Barnum, 23 P.3d 1237 (Colo. App. 2001), aff'd by an equally divided court, 53 P.3d 646 (Colo. 2002).

Inability to remember prior testimony tantamount to denial. For the purpose of introducing the prior testimony of a witness, the witness' inability to remember a statement is tantamount to a denial that he made the statement. People v. Baca, 633 P.2d 528 (Colo. App. 1981).

Extrinsic evidence admissible to prove prior statement. Where a witness does not remember making a prior statement, extrinsic evidence is admissible to prove that the witness made the prior statement. People v. Baca, 633 P.2d 528 (Colo. App. 1981).

Where age is issue, party or witness may testify as to his age, and such testimony is competent evidence, being a generally recognized exception to the hearsay rule. Maddox v. People, 178 Colo. 366, 497 P.2d 1263 (1972).

Prior trial testimony admissible when party against whom it is offered had opportunity to cross-examine the witness fully at the prior proceeding. The scope and limits of cross-examination lie within sound discretion of trial court and absent showing of abuse of discretion does not constitute reversible error. People v. Bowman, 738 P.2d 387 (Colo. App. 1987).

Whether declarant's statement was a statement against interest is applied in People v. Shields, 701 P.2d 133 (Colo. App. 1985).

Statement was not against the declarant's penal interest where the version of the declarant's statement proffered at hearing did not expose the declarant to criminal liability. People v. Thompson, 950 P.2d 608 (Colo. App. 1997).

Statements of criminal liability made by defendant offered for purposes of mitigation inadmissible under section (b)(4) because they were in favor of rather than against defendant's penal interest. People v. Atkins, 844 P.2d 1196 (Colo. App. 1992); People v. Orona, 907 P.2d 659 (Colo. App. 1995).

Reliability of custodial statements. Whether a declarant who makes a statement against penal interest was in police custody when the statement was given is but one factor to be considered in determining whether the attendant circumstances confirm the statement's trustworthiness. People v. Moore, 693 P.2d 388 (Colo. App. 1984).

Section (b)(3) is identical to the federal rule and federal interpretation is persuasive authority of its meaning. People v. Lupton, 652 P.2d 1080 (Colo. App. 1982); People v. Nyberg, 711 P.2d 719 (Colo. App. 1985).

Section (b)(3) did not apply since the declarant was acquitted before the defendant's trial began and was therefore available to testify at that trial. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

Examination of corroborative circumstances within trial court's discretion. The examination of corroborative circumstances, in section (b)(3), is a matter of discretion for the trial court. People v. Lupton, 652 P.2d 1080 (Colo. App. 1982).

In addressing the question of corroboration, the trial court must balance all the evidence available. People v. Nyberg, 711 P.2d 719 (Colo. App. 1985).

In balancing whether sufficient corroborating circumstances exist, the examination focuses on when and to whom the statement was made, the presence or absence of corroborating evidence of the statement, the availability of the declarant to testify and, in the very real sense, whether the declarant's statement is truly against his penal interest, considering the likelihood of him being actually prosecuted. People v. Lupton, 652 P.2d 1080 (Colo. App. 1982).

In determining whether sufficient corroborating circumstances exist to permit introduction of a statement against interest into evidence, the trial court must examine, among other circum-

stances, when and to whom the statement is made and determine whether other independent evidence corroborates the contents of the statement. People v. Harding, 671 P.2d 975 (Colo. App. 1983).

The "unavailability" of a declarant for purposes of determining the admissibility of hearsay testimony rests on the good faith efforts made to produce such declarant, which efforts are based on a standard of reasonableness. People v. Walters, 765 P.2d 616 (Colo. App. 1988).

Test of good faith by prosecution in securing witness's attendance was shown where witness had been deported to Mexico despite protests by prosecution, was under orders to return for trial, had been subpoenaed by the defense, and was notified by the prosecution via a letter shortly before trial. People v. Hernandez, 899 P.2d 297 (Colo. App. 1995).

Statements are not admissable pursuant to this rule where prosecution failed to prove the declarant's unavailability. People v. Franklin, 782 P.2d 1202 (Colo. App. 1989).

A witness with a physical or mental disability is unavailable in the constitutional sense only if the disability is of a nature that requiring the witness to testify would result in further physical or mental injury to the witness and is of such a permanency that the witness would continue to be unavailable even if a reasonable continuance of the trial were to be granted. People v. Lyons, 907 P.2d 708 (Colo. App. 1995).

Whether the declarant was unavailable is applied in People v. Arguello, 737 P.2d 436 (Colo. App. 1987).

Trial court was correct in refusing to treat witness as "unavailable" where witness testified extensively and, although her memory was selective, witness's selective memory lapses benefited defendant. People v. Aguirre, 839 P.2d 483 (Colo. App. 1992).

Court need not make specific findings to support conclusions that child is medically unavailable to testify due to emotional trauma pursuant to § 18-3-413 (4) when courts findings are based upon uncontradicted testimony of experts who had interviewed the children. People v. Thomas, 803 P.2d 144 (Colo. 1990).

Statement clearly against penal interest that happens also to implicate defendant was properly admitted under section (b)(3) as an exception to the hearsay rule. People v. Blecha, 940 P.2d 1070 (Colo. App. 1996), aff'd, 962 P.2d 931 (Colo. 1998).

For the purpose of limiting application of the "residual exception" to the hearsay rule, a trial court should make on-the-record findings that a hearsay statement satisfies the prerequisites for admissibility under section (b)(5). People v. Fuller, 788 P.2d 741 (Colo. 1990).

Grand jury testimony of deceased must satisfy foundational requirements of section (b)(1) in order to be admissible. Party seeking admission of testimony must show a prior opportunity by the party against whom the testimony is offered to develop such testimony, and a similar motive to do so. In re Lynde, 922 F.2d 1448 (10th Cir. 1991).

In murder trial, victim's prior statements in verified complaint to obtain a restraining order were supported by circumstantial guaranties of trustworthiness and were properly admissible. People v. Meyer, 952 P.2d 774 (Colo. App. 1997).

Harmless error. Trial court's failure to establish that a hearsay statement satisfied the prerequisites for admissibility under section (b)(5) proved harmless error because the record revealed that the statements were supported by circumstantial guarantees of trustworthiness and that the statements were cumulative and did not substantially influence the verdict or affect the fairness of the trial proceedings. People v. Fuller, 788 P.2d 741 (Colo. 1990).

In determining whether an error was harmless beyond a reasonable doubt, a reviewing court should consider factors including: The importance of witness' testimony to the prosecution's case; whether the testimony is cumulative; the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony; the extent of the cross-examination otherwise permitted; and the overall strength of the prosecution's case. Merritt v. People, 842 P.2d 162 (Colo. 1992); People v. Barnum, 23 P.3d 1237 (Colo. App. 2001), aff'd by an equally divided court, 53 P.3d 646 (Colo. 2002); People v. Harris, 43 P.3d 221 (Colo. 2002).

Considering the independent evidence linking the defendant to the crime, the persuasive corroborative evidence substantiating the victim's account of the assault, and the lack of importance of the hearsay statements to the prosecution's case, the impact these inadmissible statements had on the jury was insignificant, and this error appears to be ''so unimportant and insignificant'' that it is to be deemed harmless since the admission of the hearsay statements did not contribute to the defendant's guilty verdict. People v. Harris, 43 P.3d 221 (Colo. 2002).

Trial court committed no reversible error in admitting the transcribed testimony of three police officers in retrial of defendant whose previous conviction was overturned because defendant did not waive his right to be present during trial conducted in his absence. The officers did not present identification testimony, their testimony was cumulative and corroborative of eyewitness testimony concerning line-up procedures and the preparation of a composite drawing, and eyewitness testimony was over-

whelming evidence of guilt. People v. Campbell, 885 P.2d 327 (Colo. App. 1994).

No per se rule that out-of-court inculpatory statements made by complicitors in custody are inadmissible against criminal defendants, but rather the court should have applied the two-part test established in Ohio v. Roberts, 448 U.S. 56 (1980) on a case by case basis. People v. Drake, 785 P.2d 1253 (Colo. 1989).

The hearsay exception for declarations against interest by an unavailable witness is not well-established; however, while a confession by a hired hit man was not admissible on this ground against the defendant who hired him, it was admissible because, considering the totality of the circumstances, it contained adequate guarantees of trustworthiness since it was genuinely self-inculpatory and was not coerced or motivated by expectations of leniency. Stevens v. People, 29 P.3d 305 (Colo. 2001) (applying Lilly v. Virginia, 527 U.S. 116 (1999), and Ohio v. Roberts, 448 U.S. 56 (1980)).

When a statement is offered to exculpate an accused under section (b)(3), the court must first determine whether the statement complies with the rule and secondly must determine whether the admission of the statement violates the defendant's right to confrontation. In determining whether the statement complies with the rule, the people must show by a preponderance of the evidence that corroborating circumstances demonstrate the trustworthiness of the statement. People v. Newton, 966 P.2d 563 (Colo. 1998).

When admissible the trial court should admit all statements related to the precise statement against penal interest subject to two limits: Statements that are so self-serving as to be unreliable and statements made to curry favorable treatment should be excluded. People v. Newton, 966 P.2d 563 (Colo. 1998).

When a statement is offered to inculpate an accused under section (b)(3), three elements must be satisfied. First, the witness must be unavailable; second, the statement must tend to subject the declarant to criminal liability; and, third, the people must show by a preponderance of evidence that corroborating circumstances demonstrate the trustworthiness of the statement. In assessing the third criteria, the court should limit its inquiry to the circumstances surrounding the making of the statement and not rely on other independent evidence. Appropriate factors for the court to consider are: Where and when the statement was made; to whom the statement was made; what prompted the statement; how the statement was made; what the statement contained; the nature and character of the statement; the relationship between the parties to the statement; the declarant's probable motivations for making the statement; and the circumstances under which the statement was made. The most important determination is whether the statement is genuinely self-inculpatory or whether it shifts the blame to the defendant. Bernal v. People, 44 P.3d 184 (Colo. 2002).

There is a three-part test to determine whether a statement inculpating a defendant may be admitted under section (b)(3) and will satisfy the Colorado and United States Constitutions: (1) The witness must be unavailable; (2) the statement must tend to subject the declarant to criminal liability and be of a kind that a reasonable person in the declarant's position would not have made unless the person believed it to be true; and (3) corroborating circumstances at the time the statement was made must demonstrate the trustworthiness of the statement. People v. Jensen, 55 P.3d 135 (Colo. App. 2001).

In the third part of the test, the court should consider when and where the statement was made, what prompted the statement, how the statement was made, and the substance of the statement. People v. Jensen, 55 P.3d 135 (Colo. App. 2001).

Statements against penal interest made by a codefendant to an accomplice are admissible where the accomplice testifies about such statements in court and is subject to cross-examination, and whose own credibility was a question for the jury to determine. People v. Jensen, 55 P.3d 135 (Colo. App. 2001).

Child victims were found medically unavailable to testify at sexual abuse trial; therefore, videotapes of their depositions were admitted pursuant to § 18-3-413 (4). Thomas v. Guenther, 754 F. Supp. 833 (D. Colo. 1990).

Both § 13-25-129 and this rule are residuary rules and apply only if hearsay is not otherwise admissible under other hearsay exceptions. Section 13-25-129 is the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. People v. Bowers, 801 P.2d 511 (Colo. 1990).

Defendant's right to cross-examination at trial was not violated where, although defendant could not cross-examine the witness at trial because the witness died shortly after direct examination, the witness' deposition, at which he was cross-examined by the defendant, was read into the trial record and the direct examination did not raise any issues which were not covered in the deposition. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

It is neither appropriate nor necessary for the attorney making the objection to hearsay to identify and describe every hearsay exception and to argue against their applicability. The proponent of the hearsay statements has the burden to establish the foundation for admitting the statements under an exception to the hearsay

rule. Blecha v. People, 962 P.2d 931 (Colo. 1998).

Failure to include the transcript of grand jury testimony on appeal makes the appellate record insufficient to determine whether the trial court abused its discretion in not admitting the grand jury testimony. People v. Clark, 2015 COA 44, 370 P.3d 197.

Applied in People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); People v. Raffaelli, 701 P.2d 881 (Colo. App. 1985); People v. Buhrle, 744 P.2d 747 (Colo. 1987); People v. Chambers, 749 P.2d 984 (Colo. App. 1987).

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979).

This rule does not apply to defendant's interview admission because, as a party opponent, defendant's statement does not require firsthand knowledge to be admissible. People v. Sparks, 2018 COA 1, 434 P.3d 713.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801 (d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

(Federal Rule Identical.)

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Attacking the Credibility of a Non-testifying Hearsay Declarant'', see 29 Colo. Law. 51 (Mar. 2000).

General rule, prior to adoption of this rule, was that inconsistent statements used to impeach a witness were not admissible unless the witness had been asked about the time and place and to whom the statement was made. People v. Madonna, 651 P.2d 378 (Colo. 1982).

Trial court properly concluded that this rule allowed the prosecution to impeach defendant with evidence of his prior felony convictions, even though the defendant did not testify. Where defendant does not testify at trial, but he or she elicits his or her own hearsay statements through another witness, this rule authorizes the jury to hear impeachment evidence that would have been admissible if the defendant had testified. Prior felony convictions are admissible for this purpose. People v. Dore, 997 P.2d 1214 (Colo. App. 1999).

This rule creates a specific exception to the foundational requirements of C.R.E. 613. Thus, where a transcript of a witness' testimony at the first trial was admitted into evidence at the second trial, testimony of a police detective as to inconsistent statements made by the witness were admissible without the witness first having opportunity to explain the prior inconsistent statements. People v. Ball, 821 P.2d 905 (Colo. App. 1991).

Prosecution's reliance on this rule for use of testimony regarding defendant's silence was misplaced. People v. Welsh, 80 P.3d 296 (Colo. 2003).

Defendant's exculpatory statement to the police, admissible under the rule of completeness, is not subject to impeachment. If the prosecution wants to admit part of a statement,

it ought to, in fairness, ''pay the costs'' of admitting it in its relevant entirety. People v. Short, 2018 COA 47, 425 P.3d 1208.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Source: Entire rule amended and adopted November 25, 1998, effective January 1, 1999.

Editor's note: This rule was relocated from Rule 803(24) and Rule 804(b)(5).

ANNOTATION

Law reviews. For article, ''Tips for Working With Evidence in Domestic Relations Cases'', see 31 Colo. Law. 87 (June 2002). For article, ''Lights, Camera, Action—Video Will Executions'', see 42 Colo. Law. 45 (Jan. 2013).

To admit evidence under the residual hearsay exception, the court must determine that the statement is more probative on the points it is offered for than any other evidence the proponent could procure through reasonable efforts. Through reasonable efforts the prosecution could have obtained more probative evidence, so the court's admission of the documents under the residual exception was improper. People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

In considering the trustworthiness of statements to determine if they should be admissible under this rule, courts should examine the nature and character of the statements, the relationship of the parties, the probable motivation of the declarant in making the statements, and the circumstances under which the statements were made. People v. Jensen, 55 P.3d 135 (Colo. App. 2001); People v. Brown, 2014 COA 155M-2, 360 P.3d 167; People v. McFee, 2016 COA 97, 412 P.3d 848.

The reliability of a statement should be determined by the circumstances that existed at the time the statement was made. Corroborating evidence is not an appropriate ''circumstantial guarantee'' supporting a hearsay statement. Vasquez v. People, 173 P.3d 1099 (Colo. 2007).

Court did not abuse its discretion when it concluded that unavailable witness's testimony lacked sufficient circumstantial guarantees of trustworthiness and refused to admit the transcript of the witness's police interview. The witness could not clearly recall the basic and crucial fact of the date and time that an alternative suspect was at another location. People v. Sandoval-Candelaria, 328 P.3d 193 (Colo. App. 2011), rev'd on other grounds, 2014 CO 21, 321 P.3d 487.

Trial court did not abuse its discretion when it refused to admit an emissions test report under the residual hearsay exception. The court found the vehicle identification number on the emissions test report and the testimony of a Colorado motor vehicles division emissions section employee verifying that the document was an emissions test report an insufficient guarantee of trustworthiness since the defendant did not present evidence of who conducted the test, whether the test was performed accurately, and whether the test was actually conducted on the car sold to the victim. People v. Carlson, 72 P.3d 411 (Colo. App. 2003).

Trial court properly admitted nonverbal statement of deceased victim where: (1) Victim had no motivation to lie; (2) victim was capable of understanding and responding to questions; (3) victim's perception and identification of perpetrator were not in question; and (4) the utility of cross-examination was remote. People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

Trial court properly admitted identification statement by victim under the residual hearsay exception. The trial court determined

in a pretrial hearing that, based on the circumstances of the statement, there was no substantial probability that the identification was unreliable. Pena v. People, 173 P.3d 1107 (Colo. 2007).

Trial court did not err in admitting statements made by the victim to twowitnesses prior to her death. There was sufficient indicia of reliability for the victim's statement, the statements were nontestimonial, not motivated by police investigation, and were prompted by questions based on personal observations of the victim's bodily injuries. People v. Lujan, 2018 COA 95, __ P.3d __.

Trial court improperly admitted preliminary hearing testimony of deceased witness at trial because preliminary hearing testimony does not possess requisite trustworthiness. People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

A preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the confrontation clause requirements. Consequently, the use of a preliminary hearing transcript at trial is improper. People v. Fry, 92 P.3d 970 (Colo. 2004).

Trial court did not abuse its discretion by excluding testimony of defendant's sister because there were not sufficient guarantees of trustworthiness. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Statements victim made to her sister, her mother, and two co-workers sufficiently trustworthy under exception. People v. Brown, 2014 COA 155M-2, 360 P.3d 167.

Statements victim made to her family members in which she communicated defendant's threats satisfy the requirements of this rule. People v. McFee, 2016 COA 97, 412 P.3d 848.

Trial court properly admitted testimonial hearsay statements under the doctrine of forfeiture by wrongdoing. The prosecution proved by a preponderance of the evidence that defendant forfeited his right to confront the evidence since he persuaded the witness not to testify against him. The trial court did not abuse its discretion in admitting the statements. People v. Jackson, 2018 COA 79, __ P.3d __.

ARTICLE IX
AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(Federal Rule Identical.)

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Non-expert opinion on handwriting.** Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(Federal Rule Identical.)

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Colorado Rules of Procedure, or by statute of the State of Colorado.

ANNOTATION

Law reviews. For article, ''Hearsay in Criminal Cases Under the Colorado Rules of Evidence: An Overview'', see 50 U. Colo. L. Rev. 277 (1979). For article, ''Authentication of Private Documents By Nonexpert Witnesses'', see 22 Colo. 2241 (1993). For article, ''Authentication'', see 25 Colo. Law. 55 (Sept. 1996). For article, ''Lights, Camera, Action—Video Will Executions'', see 42 Colo. Law. 45 (Jan. 2013). For article, ''The Admissibility of Facebook Communications'', see 44 Colo. Law. 77 (July 2015).

To admit a recorded phone call, the proponent must establish it is an accurate recording of the call, or, if no witness with independent knowledge of the call's content can verify the accuracy, the proponent must present witness who can verify the reliability of the recording process. People v. Baca, 2015 COA 153, 378 P.3d 780.

Because the defense investigator could neither verify the accuracy of a recorded call's content nor the reliability of the recording process, the court did not abuse its discretion in refusing to admit the recording. People v. Baca, 2015 COA 153, 378 P.3d 780.

Taped telephone call by the defendant in which he identified himself to a detective was properly admitted under this rule and the court correctly determined that the recorded call was not included in prosecution's stipulation that it did not intend to introduce any statements by the defendant. People v. Czemerynski, 786 P.2d 1100 (Colo. 1990).

Mere fact that a document is authentic does not mean the document is admissible as competent evidence if the document constitutes otherwise inadmissible hearsay. People v. Morise, 859 P.2d 247 (Colo. App. 1993).

Trial court abused its discretion in allowing expert's testimony respecting the results of her tests because the items tested by the expert were not introduced and because the expert did not describe how the items she tested were marked. Thus there was no proper evidence establishing that the tested items came from either defendant or the victim, save for the expert's unexplained conclusory statements. People v. Valencia, 257 P.3d 1203 (Colo. App. 2011).

This rule merely establishes the requirements for admitting an item of physical evidence. However, even if the item itself is not admissible under this rule, the proponent may use other methods of proof to identify the item. People ex rel. J.G., 97 P.3d 300 (Colo. App. 2004).

Testimony identifying items sufficient for admission. Testimony by the investigating officer identifying items seized at the scene of a crime is sufficient basis to support the admission of such items into evidence, even if the officer did not initial or mark the item when it was seized, if at trial the officer identifies the exhibit as appearing to be the same, or to look like, the evidence found at the scene. People v. Beltran, 634 P.2d 1003 (Colo. App. 1981).

Physical evidence is authenticated if evidence supports a finding the item is what its proponent claims. This can be satisfied by testimony the evidence is what it is claimed to be. People v. Grace, 55 P.3d 165 (Colo. App. 2001).

If a reasonable jury could decide that physical evidence is what its proponent claims it to be, trial court should allow the evidence to be presented to the jury. Any question as to the authenticity of the evidence is properly decided by the jury. People v. Crespi, 155 P.3d 570 (Colo. App. 2006).

Satisfaction of authentication or identification as condition precedent to admissibility satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Testimony of a witness with knowledge that a matter is what it is claimed to be conforms to the requirements of this rule. People v. Esch, 786 P.2d 462 (Colo. App. 1989); People v. Lesslie, 939 P.2d 443 (Colo. App. 1996).

Properly authenticated text messages are admissible as evidence. People v. Heisler, 2017 COA 58, __ P.3d __.

Authentication of text messages has two components. First, a witness with personal knowledge must testify that printouts of text messages accurately reflect the content of the

messages. Second, a witness with personal knowledge must provide testimony establishing the identity of the purported sender of the text messages. Identity may be established through a combination of at least two of the following: (1) the phone number was assigned to or associated with the purported sender; (2) the substance of the text messages was recognizable as being from the purported sender; (3) the purported sender responded to an exchange in such a way as to indicate circumstantially that he or she was in fact the author of the communication; or (4) any other corroborative evidence under the circumstances. People v. Heisler, 2017 COA 58, __ P.3d __.

There are two separate showings to authenticate printouts of Facebook communications to and from a defendant: (1) The records were those of Facebook, and (2) the communications recorded therein were made by the defendant. The first showing is analogous to authenticating phone records or emails. The second showing to corroborate evidence of authorship is necessary because a profile may be fictitious or accessed by another person other than the profile owner. People v. Glover, 2015 COA 16, 363 P.3d 736.

Based on testimony related to the defendant's profile and the absence of evidence that anyone other than defendant ever used his account, the trial court did not abuse its discretion by permitting the jury to conclude that a Facebook account belonged to defendant and he sent the messages contained in the printouts. People v. Glover, 2015 COA 16, 363 P.3d 736.

Authentication was satisfied when prosecution stated that it intended to use video animation to show the types of injuries generated by shaking a baby and that, because prosecution's expert would testify regarding the types of injuries discussed in the video, such video would assist the jury. People v. Cauley, 32 P.3d 602 (Colo. App. 2001).

Record of defendant's conviction of forgery maintained by the Kansas bureau of investigation was admissible as a public record under section (b)(7). People v. Deskins, 904 P.2d 1358 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 927 P.2d 368 (Colo. 1996).

Sheriff's office booking reports containing certification and signature of custodian of records were admissible as public records under section (b)(7). People v. Warrick, 284 P.3d 139 (Colo. App. 2011).

Although section (b)(9) may be used to authenticate computer records, there is no requirement that computer records be authenticated only in this way. People v. Huehn, 53 P.3d 733 (Colo. App. 2002).

Administrative law judge (ALJ) did not abuse his discretion by admitting documentary evidence under section (b)(1). Based upon witness testimony, ALJ committed no abuse of discretion in admitting record of request for purchase of political time and an agreement form for non-candidate issue advertisements as having been sufficiently authenticated under section (b)(1). As to admissibility of affidavit of performance used to indicate dates, airtimes, and the district in which the advertisements were broadcast, ALJ correctly held that political committee's agent would not have authorized payment of invoices if he doubted advertisements aired during relevant time period and in relevant legislative district. There was no need to further authenticate affidavit of performance because agent's conduct manifested ''belief in its truth'' under C.R.E. 801(d)(2)(B). Collectively, these documents support ALJ's findings that during relevant time period political committee arranged to broadcast television advertisements opposing legislative candidate to voters in candidate's district. Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream, 187 P.3d 1207 (Colo. App. 2008).

E-mails may be authenticated through testimony explaining that they are what they purport to be or through consideration of distinctive characteristics shown by an examination of their contents and substance in light of the circumstances of the case. People v. Bernard, 2013 COA 79, 305 P.3d 433.

Applied in People v. Fueston, 717 P.2d 978 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 749 P.2d 952 (Colo. 1988); People v. Gilmore, 97 P.3d 123 (Colo. App. 2003).

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(Federal Rule Identical.)

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
(Federal Rule Identical.)

(3) **Foreign public documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
(Federal Rule Identical.)

(4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Federal or Colorado Rule of Procedure, or with any Act of the United States Congress, or any statute of the State of Colorado.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
(Federal Rule Identical.)

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.
(Federal Rule Identical.)

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
(Federal Rule Identical.)

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
(Federal Rule Identical.)

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
(Federal Rule Identical.)

(10) **Presumptions under legislative Act.** Any signature, document, or other matter declared by Act of the Congress of the United States, or by any statute of the State of Colorado to be presumptively or *prima facie* genuine or authentic.

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person,

in a manner complying with any Colorado statute or rule prescribed by the Colorado Supreme Court, certifying that the record—

(a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(b) was kept in the course of the regularly conducted activity; and

(c) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and affidavit available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(b) was kept in the course of the regularly conducted activity; and

(c) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Source: (11) and (12) added and adopted June 20, 2002, effective July 1, 2002.

ANNOTATION

Law reviews. For article, ''Authentication'', see 25 Colo. Law. 55 (Sept. 1996).

Out-of-state affidavit acknowledged by notary. An out-of-state affidavit of indigency, once sworn before and acknowledged by a notary, requires no further evidence of authenticity as a condition precedent to its admissibility. Otani v. District Court, 662 P.2d 1088 (Colo. 1983).

An administrative rule that does not satisfy the public notice requirements of § 24-4-103 may not be introduced as evidence in criminal proceedings. People v. More, 668 P.2d 968 (Colo. App. 1983).

Certified copies of public records provide sufficient authentication for purposes of proof under the habitual criminal statute. People v. Johnson, 699 P.2d 5 (Colo. App. 1984); People v. Shepherd, 43 P.3d 693 (Colo. App. 2001).

This rule does not require that each and every signature contained within an otherwise properly authenticated set of public documents be certified or embossed with a seal. People v. Martinez, 51 P.3d 1029 (Colo. App. 2001), aff'd in part and rev'd in part on other grounds, 69 P.3d 1029 (Colo. 2003).

Promissory note is self-authenticating when produced in a suit to collect deficiency and constitutes prima facie evidence of nonpayment unless the defendant establishes a defense. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

Certification in accordance with this rule makes the document self-authenticating and eliminates the need that a copy of the record be authenticated by testimony. People v. Vasquez, 155 P.3d 588 (Colo. App. 2006).

Interrogatory response and report of subcontractor's employee on city's ventilation system in city's action against contractor and subcontractor was self-authenticating and required no further evidence of authenticity as a condition precedent to its admissibility. Interrogatory response was a document accompanied by certificate of acknowledgment executed as provided by law by notary public or other officer authorized to take acknowledgments. City of Westminster v. MOA, Inc., 867 P.2d 137 (Colo. App. 1993).

Record of defendant's conviction of forgery maintained by the Kansas bureau of investigation that bore the state seal was not self-authenticating because it did not contain a signature purporting to be an attestation or execution as required by subsection (1). People v. Deskins, 904 P.2d 1358 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 927 P.2d 368 (Colo. 1996).

Facebook printouts are not a self-authenticating business record because there was no evidence presented that Facebook substantially

relies for any business purpose on information contained in its users' profiles and communications. People v. Glover, 2015 COA 16, 363 P.3d 736.

Applied in People v. Wiedemer, 641 P.2d 289 (Colo. App. 1981); People v. Jenkins, 717 P.2d 994 (Colo. App. 1985).

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

(Federal Rule Identical.)

COMMITTEE COMMENT

The Committee finds that the Federal rules in this area are for the most part an accurate representation of Colorado case law, statutes, and the Rules of Procedure. The Committee opinion is that the rules as adopted provide a more flexible guide to evidentiary problems relating to authentication and identification and thereby avoid the necessity of the search for a ''case in point.'' The rules would cover a number of cases and situations arising in trial, not currently reported in case law.

ARTICLE X
CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''.

(4) **Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(Federal Rule Identical.)

Cross references: For the uniform law on photographic records, see article 26 of title 13, C.R.S.

ANNOTATION

Law reviews. For article, ''Admissibility of Imaging Systems'', see 25 Colo. Law. 61 (September 1996).

Accurate transcriptions of sound recordings are admissible to assist the jury in following the recordings while they are played. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

Ordinarily, photographs are admissible to depict graphically anything a witness may describe in words, provided that the prejudicial effect of the photographs does not far outweigh their probative value. People v. Roark, 643 P.2d 756 (Colo. 1982).

Photographs may be introduced to show any matter which a witness could describe in words, including the appearance of the victim. People v. Mattas, 645 P.2d 254 (Colo. 1982).

Trial court has broad discretion in determining the admissibility of photographs. People v. Crespin, 631 P.2d 1144 (Colo. App.

1981).

Court's ruling not disturbed, absent abuse. Unless an abuse of discretion is shown, the trial court's ruling on the admissibility of photographs into evidence will not be disturbed on review. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Trial judge to weigh inflammatory effect of photographs against value. When photographs are determined to have probative value, the trial judge's task is to determine whether their potential inflammatory effect far outweighs that value. The trial judge's determination will not be disturbed on review absent an abuse of discretion. People v. Dillon, 633 P.2d 504 (Colo. App. 1981); People v. Loscutoff, 661 P.2d 274 (Colo. 1983).

The admissibility of photographs into evidence in a homicide prosecution is a matter within the discretion of a trial judge, who must weigh the probative value against the potential inflammatory effect on the jury. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. Dillon, 633 P.2d 504 (Colo. App. 1981).

It is within the trial court's discretion to decide whether photographs are unnecessarily gruesome or inflammatory, and the court's decision will be reversed only upon abuse of that discretion. People v. Mattas, 645 P.2d 254 (Colo. 1982).

Photographs are not inadmissible merely because they reveal shocking details of a crime. People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981).

Cumulative effect of photographs held not to incite the jurors to passion or prejudice. People v. Scherrer, 670 P.2d 18 (Colo. App. 1983).

Photocopies constitute duplicates. Fasso v. Straten, 640 P.2d 272 (Colo. App. 1982).

Carbon copies are duplicate originals. Equico Lessors, Inc. v. Tak's Automotive Serv., 680 P.2d 854 (Colo. App. 1984).

Photographs may be introduced which graphically portray the scene of the crime, appearance of the victim, and other facts which are competent for a witness to describe in words. In determining which photographs should be admitted, the trial court must exercise its discretion and weight the probative value of the evidence against its inflammatory effect. People v. Zekany, 833 P.2d 774 (Colo. App. 1991).

Applied in People v. Weese, 753 P.2d 778 (Colo. App. 1987).

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute of the State of Colorado or of the United States.

ANNOTATION

Law reviews. For article, ''Lights, Camera, Action—Video Will Executions'', see 42 Colo. Law. 45 (Jan. 2013).

Where disputed evidence is both a chattel and a writing, trial court has wide discretion in determining whether to require production of the original. In exercising this discretion, the trial court should consider the complexity of the writing, the danger of mistransmission of its contents, the difficulty of producing the original, and whether a bona fide dispute exists as to its contents. People v. Wortham, 690 P.2d 876 (Colo. App. 1984).

Summary evidence admissible under C.R.E. 1006 is not objectionable on the ground that it violates the best evidence rule. If proper foundation has been established, questions concerning the authenticity of the evidence or the credibility of the testimony go to the weight of the evidence, not its admissibility. Airborne, Inc. v. Denver Air Ctr., Inc., 832 P. 2d 1086 (Colo. App. 1992).

Where original videotape was admitted, the videotape constituted best evidence and it was not plain error to allow further testimony regarding the contents of the videotape. People v. Robinson, 908 P.2d 1152 (Colo. App. 1995), aff'd on other grounds, 927 P.2d 381 (Colo. 1996).

For an online registration process that requires a registrant to enter into an exculpatory agreement, this rule does not require production of a copy of the electronically executed agreement to the exclusion of all other proof of agreement to its terms to prove registrant executed the agreement. Berenson v. USA Hockey, Inc., 2013 COA 138, 338 P.3d 379.

Applied in People v. Williams, 654 P.2d 319 (Colo. App. 1982).

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(Federal Rule Identical.)

COMMITTEE COMMENT

The Committee notes the desirability of requiring, in pretrial procedures, that any genuine questions as to the authenticity of the original, or of circumstances that it would be unfair to admit the duplicate, be raised, so that the offering party may take appropriate steps under Rule 1004 to obtain the original.

ANNOTATION

Law reviews. For article, ''Admissibility of Imaging Systems'', see 25 Colo. Law. 61 (Sept. 1996). For article, ''The Admissibility of Secondary Evidence: C.R.E. 1003 and 1004'', see 31 Colo. Law. 77 (May 2002).

Duplicates admitted in lieu of originals. Where the defendants were in possession of the copies for more than eight months prior to the trial and knew at that time that the originals were in the hands of third parties, it was proper for the court to admit the duplicates in lieu of the originals. Fasso v. Straten, 640 P.2d 272 (Colo. App. 1982).

When altered duplicates admissible. If alterations in the duplicates and/or the originals of otherwise admissible documents have been made, such documents are still admissible provided a full and satisfactory explanation of such alterations is made prior to their admission. People v. Wolfe, 662 P.2d 502 (Colo. App. 1983).

If the content of a videotape has not been altered, playing the tape at real-time speed, or in an enhanced or enlarged form that does not alter the original images, is generally permissible. People v. Armijo, 179 P.3d 134 (Colo. App. 2007).

Where there is no evidence of a discrepancy between the original and the duplicate, the unsupported supposition that the original may have been altered will not prevent introduction of the duplicate. Equico Lessors, Inc. v. Tak's Automotive Serv., 680 P.2d 854 (Colo. App. 1984).

Where defendant did not object to use of photocopy, its use did not so undermine the fundamental fairness of trial as to cast serious doubt on the reliability of conviction. People v. Chavez, 764 P.2d 371 (Colo. App. 1988).

While this rule and C.R.E. 1004 may allow for admission of a duplicate will into evidence in lieu of the original, in the case of a lost or missing will, the standards specified in §15-12-402 will control whether the will can be admitted to probate. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(Federal Rule Identical.)

COMMITTEE COMMENT

Subparagraph (1) of the rule will be in lieu of Rule 43(g)(1) of the Colorado Rules of Civil Procedure; subparagraph (2) will be in lieu of Rule 43(g)(6); subparagraph (3) will be in lieu of Rule 43(g)(2). With respect to subparagraph (2), the adoption of this provision has a direct correlation with the comments appended to Rule 1003 regarding pretrial procedure. The Committee suggests that subparagraph (2) be viewed in terms of available judicial process or procedure that is reasonable in the circumstances considering time and expense. For example, the FRE Committee's Advisory Notes refer to procedure including subpoena *duces tecum* as an incident to the taking of a deposition in another jurisdiction. Such time and expense would often appear to be unjustified, and should in part be taken care of by the pretrial procedures recommended in comments under Rule 1003.

ANNOTATION

Law reviews. For article, ''The Admissibility of Secondary Evidence: C.R.E. 1003 and 1004'', see 31 Colo. Law. 77 (May 2002).

This rule provides that the original of a written document is not required, and other evidence of its contents is admissible if the originals have been lost or destroyed, unless the proponent lost or destroyed them in bad faith; therefore, when the proponent cannot produce the original of a written document, because of its loss or destruction, the trial court should admit secondary evidence. Rodriguez v. Schutt, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

This rule requires exclusion of evidence only when the proponent's bad faith causes the loss or destruction of the original document. The proponent must prove, to the satisfaction of the court, the absence of bad faith. Rodriguez v. Schutt, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

In the event the original of a document is lost, destroyed or is not obtainable, or is in the possession of the opponent, other evidence of the contents of the writing is admissible. Decker v. Browning-Ferris Indus. of Colorado, Inc., 903 P.2d 1150 (Colo. App. 1995); Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

Same rationale for admissibility or exclusion of evidence under this rule applies to evidence other than written documents. Rodriguez v. Schutt, 896 P.2d 881 (Colo. App. 1994), rev'd on other grounds, 914 P.2d 921 (Colo. 1996).

Court erred in not applying the exception in subsection (1) to allow evidence of indemnification contract, allegedly lost or destroyed, and such error constituted clear evidence of mistake amounting to error of law. United Cable Television of Jeffco, Inc. v. Montgomery LC, Inc., 942 P.2d 1230 (Colo. App. 1996).

While this rule and C.R.E. 1003 may allow for admission of a duplicate will into evidence in lieu of the original, in the case of a lost or missing will, the standards specified in §15-12-402 will control whether the will can be admitted to probate. In re Estate of Perry, 33 P.3d 1235 (Colo. App. 2001).

Applied in People v. Banks, 655 P.2d 1384 (Colo. App. 1982), aff'd, 696 P.2d 293 (Colo. 1985).

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded, or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Federal Rule Identical.)

COMMITTEE COMMENT

This provision is in lieu of Rule 43(g)(3) of the Colorado Rules of Civil Procedure. The Committee does not recommend any changes in the language, but this is based upon the assumption that Rule 902 would be amended to provide for certification in accordance with Colorado statute.

ANNOTATION

Certified copies of public records provide sufficient authentication for purposes of proof under the habitual criminal statute. People v. Johnson, 699 P.2d 5 (Colo. App. 1984).

Testimony of expert. Any question concerning the expert's ability to make a dependable comparison from photocopies goes to weight to be given his testimony rather than to the admissibility of the copies. People v. Weese, 753 P.2d 778 (Colo. App. 1987).

Certification in accordance with C.R.E. 902 makes the document self-authenticating and eliminates the need that a copy of the record be authenticated by testimony. People v. Vasquez, 155 P.3d 588 (Colo. App. 2006).

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule will replace Rule 43(g)(5) of the Colorado Rules of Civil Procedure.

ANNOTATION

Law reviews. For article, ''Summaries as Evidence'', see 16 Colo. Law. 1836 (1987). For article, ''Rule 1006: Admissibility of Summary Evidence'', see 22 Colo. Law. 35 (1993).

The most important considerations in determining whether summary charts are admissible are whether the summaries are sufficiently accurate and nonprejudicial and whether they would be helpful to the jury. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Trial courts abuse their discretion when they admit summary charts that characterize evidence in an argumentative fashion rather than simply organize it in a manner helpful to the trier of fact. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Failure by a party to seek discovery of underlying materials does not affect his right to examine and inspect the documents or records from which the summary is prepared. Int'l Tech. Instruments v. Eng'g Measurements, Inc., 678 P.2d 558 (Colo. App. 1983); People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

This rule does not require that the records be delivered to the opposing party, provided the records are made available at a reasonable time and place. People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

Prosecution's use of summary records pursuant to this rule requires the prosecution to be responsible for the cost of redacting confidential information in the underlying voluminous records so that the records can be available for examination and copying by the defendant. People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

Summary evidence does not violate "best evidence" rule. Metro Nat. Bank v. Parker, 773 P.2d 633 (Colo. App. 1989); Airborne, Inc. v. Denver Air Ctr., Inc., 832 P.2d 1086 (Colo. App. 1992).

Evidence admissible under this rule not objectionable on ground that it violates the "best evidence rule". If proper foundation has been established, questions concerning the authenticity of the evidence or the credibility of the testimony go to the weight of the evidence, not the admissibility. Airborne, Inc. v. Denver Air Ctr., Inc., 832 P.2d 1086 (Colo. App. 1992).

Rule requires prosecution to be responsible for redacting patient names so underlying hospital records could be available for examination and copying by the defendant. Here, prosecution did not cause redaction to be done so records could be examined by defendant. Accordingly, trial court erred in placing that burden on the defendant. People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

By permitting the admission of summaries into evidence, rule relieves the proponent of voluminous evidence from the burden of introducing each part of the voluminous record. However, in order to utilize this rule, the proponent must provide the opposing party an opportunity to examine the records from which the summaries were taken. If the content of records is such that an opposing party cannot

examine them, the records cannot be said to be available. Therefore, if the records can be examined only after redaction of certain portions, then the proponent must be responsible for that process. This is part of the proponent's burden of making the records available to the opposing party. People v. McDonald, 15 P.3d 788 (Colo. App. 2000).

Trial court properly admitted summary chart that organized relevant facts chronologically but abused its discretion in admitting chart that included argument. Murray v. Just In Case Bus. Lighthouse, 2016 CO 47M, 374 P.3d 443.

Applied in Airborne, Inc. v. Denver Air Ctr., Inc., 832 P.2d 1086 (Colo. App. 1992).

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

(Federal Rule Identical.)

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Federal Rule Identical.)

ARTICLE XI
MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts. These rules apply to all courts in the State of Colorado.

(b) Proceedings generally. These rules apply generally to civil actions, to criminal proceedings, and to contempt proceedings, except those in which the court may act summarily.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(Federal Rule Identical.)

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) **Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) **Grand jury.** Proceedings before grand juries.

(3) **Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(Federal Rule Identical.)

(e) Rules applicable in part. In any special statutory proceedings, these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein.

Editor's note: The Colorado Rules of Evidence do not apply to hearings under the Colorado Rules for Traffic Infractions. See Rule 11, C.R.T.I.

COMMITTEE COMMENT

The Colorado rule is culled from Rule 81 of the Colorado Rules of Civil Procedure and Rule 1101(e) of the Federal Rules of Evidence.

ANNOTATION

Grand jury or preliminary hearing. Hearsay, and other evidence which would be incompetent if offered at trial, is admissible and may well be the bulk of evidence offered to the grand jury or at the preliminary hearing. People v. Gable, 647 P.2d 246 (Colo. App. 1982); People v. Buhrle, 744 P.2d 747 (Colo. 1987).

The rules of evidence do not apply to a restitution hearing because restitution is part of the sentencing proceeding, not part of the trial. People v. Vasseur, 2016 COA 107, 409 P.3d 516.

Applied in Sherman v. District Court, 637 P.2d 378 (Colo. 1981); People v. Bowers, 801 P.2d 511 (Colo. 1990).

Rule 1102. (No Colorado Rule Codified)

Rule 1103. Title

These rules shall be known and cited as the Colorado Rules of Evidence, or CRE.

INDEX TO
COLORADO RULES OF EVIDENCE

CHAPTER 34

The Colorado Rules for Reapportionment Commission Proceedings

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Adopted by the

SUPREME COURT OF COLORADO

Effective October 22, 1981

CHAPTER 34

RULES FOR REAPPORTIONMENT COMMISSION PROCEEDINGS

1. These rules are adopted by the Supreme Court of Colorado pursuant to Article V, Section 48(1)(e) of the Colorado Constitution and apply to the revision and alteration of legislative districts after the federal census of 2010.

2. Upon submission of the Reapportionment Commission's plan for reapportionment of the members of the General Assembly to the Supreme Court, the review and determination of the plan's compliance with the requirements of Article V, Sections 46 and 47 of the Colorado Constitution shall take precedence over all regular docket matters before the Court.

3. No later than October 7, 2011, the Commission shall file the plan with the Court. The plan shall include a comprehensive map or maps of the proposed senatorial and representative districts, together with any statements describing the proposed plan and its implementation.

4. On or before ten (10) days following the Commission's filing of the plan to the Court, the Commission, and any other proponent of the submitted plan, shall file with the Court appropriate explanatory materials and legal memoranda in support of the plan.

5. Any opponent to the plan filed by the Commission may file a statement of opposition, a proposed alternate plan or plans, appropriate maps, and comprehensive explanatory, descriptive, and legal memoranda. Such materials shall be filed with the Court on or before 20 calendar days following the Commission's filing of the plan to the Court.

6. The Commission and any proponent shall have up to and including five (5) calendar days from the filing of any statement of opposition, to file with the Court a reply to such statement of opposition, if the Commission or proponent so desires.

7. The Court may request supplementary materials or legal memoranda from the Commission or any party appearing before the Court in this matter to be furnished within ten (10) days of the request.

8. The Court may require oral argument upon any issue raised by the Commission, other proponents, or opponents. Notice of the time and date of any oral argument and the procedures to be followed shall be mailed to the Commission and other parties.

9. The final submission of legal arguments or evidence concerning the plan shall be filed no later than November 9, 2011.

10. The Court may approve the plan without giving written reasons for such approval, but the Court shall give its reasons in writing for disapproval of the plan. If the plan is returned to the Commission, the Court shall specify to the Commission the time period in which the Commission shall revise and modify the plan to conform to the Court's requirements and to resubmit the plan to the Court. Petitions for rehearing must be filed within five (5) days of the announcement of any decision.

11. The Court shall approve a plan for the redrawing of the districts by a date that will allow sufficient time for such plan to be filed with the secretary of state but no later than December 14, 2011. The Court shall order that such plan be filed with secretary of state no later than such date.

12. An original and nine (9) copies of all materials and pleadings shall be filed with the Court. In addition, and where possible, an electronic version of all materials and pleadings shall be submitted to the Court in text searchable Portable Document Format (PDF), that exactly duplicates the appearance of the paper original, including the order and pagination of all the components.

13. All periods of time prescribed or allowed by this rule shall be computed in accordance with C.A.R. 26(a), except that intermediate Saturdays, Sundays and legal holidays shall be included in the computation. Regardless of the provisions of C.A.R. 25(a)

to the contrary, filing under this rule may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, with no exceptions.

14. The Court shall provide notice of all filings with the Court by posting such filings on the Colorado Judicial website: http://www.courts.state.co.us/

15. These rules are effective upon adoption.

Source: 1, 3, 4, and 5 amended and adopted June 21, 2001, effective July 1, 2001; entire chapter amended and effective June 2, 2011.

ANNOTATION

Role of supreme court in review proceeding is a narrow one: To measure the proposed reapportionment plan against the constitutional standards. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 191 (Colo. 1982); In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 209 (Colo. 1982).

Court's review proceedinging is meant to be swift and limited in scope so that elections from the new districts may proceed on schedule. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 191 (Colo. 1982).

Choice among plans for commission, not court. The choice among alternative plans, each consistent with constitutional requirements, is for the reapportionment commission and not the supreme court. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 191 (Colo. 1982); In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 209 (Colo. 1982).

Political considerations may not outweigh constitutional criteria. Although reapportionment is not without political considerations, these considerations are not among the constitutional criteria, and the commission may not allow them to outweigh the constitutional criteria. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 209 (Colo. 1982).

While it is not improper for the reapportionment commission to attempt to resolve political conflicts engendered by the supreme court's disapproval of the original plan, problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 209 (Colo. 1982).

Plan held unconstitutional. Where a reapportionment plan's districts are not as compact as possible, nor does the plan preserve communities of interest wherever possible, it violates the clear constitutional criteria of sections 47(1) and (3) of art. V, Colo. Const. In re Reapportionment of Colo. Gen. Ass'y, 647 P.2d 209 (Colo. 1982).

CHAPTER 35

The Colorado Rules for Magistrates

Amended and Adopted by the

SUPREME COURT OF COLORADO

September 30, 1999,

Effective January 1, 2000

ANALYSIS BY RULE

CHAPTER 35

COLORADO RULES FOR MAGISTRATES

Editor's note: Amendments made to the Colorado Rules for Referees, effective January 1, 1989, resulted in renumbering and retitling for rules 4 through 12. Amendments to these rules, effective September 12, 1991, resulted in retitling of chapter and retitling of rules 5 through 10 and rule 13.

Rule 1. Scope and Purpose

These rules are designed to govern the selection, assignment and conduct of magistrates in civil and criminal proceedings in the Colorado court system. Although magistrates may perform functions which judges also perform, a magistrate at all times is subject to the direction and supervision of the chief judge or presiding judge.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

ANNOTATION

Magistrates exercise authority only at the discretion of the judges who appoint them. Therefore no impropriety in the provision of a court memorandum prohibiting magistrates from conducting bond hearings. Wiegand v. Larimer County Court Magistrate, 937 P.2d 880 (Colo. App. 1996).

Rule 2. Application

These rules apply to all proceedings conducted by magistrates in district courts, county courts, small claims courts, Denver Juvenile Court and Denver Probate Court, as authorized by law, except for proceedings conducted by water referees, as defined in Title 37, Article 92, C.R.S., and proceedings conducted by masters governed by C.R.C.P. 53.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

ANNOTATION

When magistrates act in probate matters. The powers of magistrates and appellate review of their orders are governed, in the first instance, by these rules. When magistrates are acting in probate matters, their powers are additionally controlled by the Colorado Rules of Probate Procedure. Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995).

When magistrates act in juvenile matters. The procedural powers of a juvenile court after reviewing a juvenile magistrate's findings are governed by these rules and by relevant provisions of the Children's Code. People in Interest of R.A., 937 P.2d 731 (Colo. 1997).

Rule 3. Definitions

The following definitions shall apply:

(a) Magistrate: Any person other than a judge authorized by statute or by these rules to enter orders or judgments in judicial proceedings.

(b) Chief Judge: The chief judge of a judicial district.

(c) Presiding Judge: The presiding judge of the Denver Juvenile Court, the Denver Probate Court, or the Denver County Court.

(d) Reviewing Judge: A judge designated by a chief judge or a presiding judge to review the orders or judgments of magistrates in proceedings to which the Rules for Magistrates apply.

(e) Order or Judgment: All rulings, decrees or other decisions of a judge or a magistrate made in the course of judicial proceedings.

(f) Consent:

(1) Consent in District Court:

(A) For the purposes of the rules, where consent is necessary a party is deemed to have consented to a proceeding before a magistrate if:

(i) The party has affirmatively consented in writing or on the record; or

(ii) The party has been provided notice of the referral, setting, or hearing of a proceeding before a magistrate and failed to file a written objection within 14 days of such notice; or

(iii) The party failed to appear at a proceeding after having been provided notice of that proceeding.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(2) Consent in County Court:

(A) When the exercise of authority by a magistrate in any proceeding is statutorily conditioned upon a waiver of a party pursuant to C.R.S. section 13-6-501, such waiver shall be executed in writing or given orally in open court by the party or the party's attorney of record, and shall state specifically that the party has waived the right to proceed before a judge and shall be filed with the court.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(3) Consent in Small Claims Court:

(A) A party will be deemed to accept the jurisdiction of the Small Claims Court unless the party objects pursuant to C.R.S. section 13-6-405 and C.R.C.P. 511(b).

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (a), (d), and (e) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005; (f)(1)(A)(ii) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 4. Qualifications, Appointment, Evaluation and Discipline

The following rules shall apply to all magistrates and proceedings before magistrates:

(a) To be appointed, a magistrate must be a licensed Colorado attorney with at least five years of experience, except in Class ''C'' or ''D'' counties the chief judge shall have the discretion to appoint a qualified licensed attorney with less than 5 years experience to perform all magistrate functions.

(b) All magistrates shall be attorneys-at-law licensed to practice law in the State of Colorado, except that in the following circumstances a magistrate need not be an attorney:

(1) A magistrate appointed to hear only Class A and Class B traffic infractions in a county court;

(2) A county court judge authorized to act as a magistrate in a small claims court;

(3) A county court judge authorized to act as a county court magistrate.

(c) All magistrates shall be appointed, evaluated, retained, discharged, and disciplined, if necessary, by the chief or presiding judge of the district, with the concurrence of the chief justice.

(d) Any person appointed pursuant to these rules as a district court, county court, probate court, juvenile court, or small claims court magistrate may, if qualified, and in the discretion of the chief or presiding judge, exercise any of the magistrate functions authorized by these rules.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

Rule 5. General Provisions

(a) An order or judgment of a magistrate in any judicial proceeding shall be effective upon the date of the order or judgment and shall remain in effect pending review by a reviewing judge unless stayed by the magistrate or by the reviewing judge. Except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has no authority to consider a petition for rehearing.

(b) A magistrate may issue citations for contempt, conduct contempt proceedings, and enter orders for contempt for conduct occurring either in the presence or out of the presence of the magistrate, in any civil or criminal matter, without consent. Any order of a magistrate finding a person in contempt shall upon request be reviewed in accordance with the procedures for review set forth in rule 7 or rule 9 herein.

(c) A magistrate shall have the power to issue bench warrants for the arrest of non-appearing persons, to set bonds in connection therewith, and to conduct bond forfeiture proceedings.

(d) A magistrate shall have the power to administer oaths and affirmations to witnesses and others concerning any matter, thing, process, or proceeding, which is pending, commenced, or to be commenced before the magistrate.

(e) A magistrate shall have the power to issue all writs and orders necessary for the exercise of their jurisdiction established by statute or rule, and as provided in section 13-1-115, C.R.S.

(f) No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.

(g) For any proceeding in which a district court magistrate may perform a function only with consent under C.R.M. 6, the notice — which must be written except to the extent given orally to parties who are present in court — shall state that all parties must consent to the function being performed by the magistrate.

(1) If the notice is given in open court, then all parties who are present and do not then object shall be deemed to have consented to the function being performed by the magistrate.

(2) Any party who is not present when the notice is given and who fails to file a written objection within 7 days of the date of written notice shall be deemed to have consented.

(h) All magistrates in the performance of their duties shall conduct themselves in accord with the provisions of the Colorado Code of Judicial Conduct. Any complaint alleging that a magistrate, who is an attorney, has violated the provisions of the Colorado Code of Judicial Conduct may be filed with the Office of Attorney Regulation Counsel for proceedings pursuant to C.R.C.P. 251.1, et seq. Such proceedings shall be conducted to determine whether any violation of the Code of Judicial Conduct has occurred and what discipline, if any, is appropriate. These proceedings shall in no way affect the supervision of the Chief Judge over magistrates as provided in C.R.M. 1.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (a) amended September 6, 1990, effective January 1, 1991; entire rule (including rule title) amended and effective September 12, 1991; (f) added and effective February 3, 1994; entire chapter amended September 30, 1999, effective January 1, 2000; (a)(3)(A) corrected and effective

November 9, 1999; (g) added June 1, 2000, and corrected to (h) June 27, 2000, effective July 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005; (g) added and former (g) redesignated as (h), May 25, 2017, effective July 1, 2017.

Rule 6. Functions of District Court Magistrates

(a) Functions in Criminal Cases: A district court magistrate may perform any or all of the following functions in criminal proceedings:

(1) No consent necessary:

(A) Conduct initial appearance proceedings, including advisement of rights, admission to bail, and imposition of conditions of release pending further proceedings.

(B) Appoint attorneys for indigent defendants and approve attorney expense vouchers.

(C) Conduct bond review hearings.

(D) Conduct preliminary and dispositional hearings pursuant to C.R.S. sections 16-5-301(1) and 18-1-404(1).

(E) Schedule and conduct arraignments on indictments, informations, or complaints.

(F) Order presentence investigations.

(G) Set cases for disposition, trial, or sentencing before a district court judge.

(H) Issue arrest and search warrants, including nontestimonial identifications under Rule 41.1.

(I) Conduct probable cause hearings pursuant to rules promulgated under the Interstate Compact for Adult Offender Supervision, C.R.S. sections 24-60-2801 to 2803.

(J) Any other function authorized by statute or rule.

(2) Consent necessary:

(A) Enter pleas of guilty.

(B) Enter deferred prosecution and deferred sentence pleas.

(C) Modify the terms and conditions of probation or deferred prosecutions and deferred sentences.

(D) Impose stipulated sentences to probation in cases assigned to problem solving courts.

(b) Functions in Matters Filed Pursuant to Colorado Revised Statutes Title 14 and Title 26:

(1) No Consent Necessary

(A) A district court magistrate shall have the power to preside over all proceedings arising under Title 14, except as described in section 6(b)(2) of this Rule.

(B) A district court magistrate shall have the power to preside over all motions to modify permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities, except petitions to review as defined in C.R.M. 7.

(C) A district court magistrate shall have the power to determine an order concerning child support filed pursuant to Section 26-13-101 et seq.

(D) Any other function authorized by statute.

(2) Consent Necessary: With the consent of the parties, a district court magistrate may preside over contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities.

(c) Functions in Civil Cases: A district court magistrate may perform any or all of the following functions in civil proceedings:

(1) No consent necessary

(A) Conduct settlement conferences.

(B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 55, and conduct post-judgment proceedings.

(C) Conduct hearings and enter orders authorizing sale, pursuant to C.R.C.P. 120.

(D) Conduct hearings as a master pursuant to C.R.C.P. 53.

(E) Hear and rule upon all motions relating to disclosure, discovery, and all C.R.C.P. 16 and 16.1 matters.

(F) Conduct proceedings involving protection orders pursuant to C.R.S. Section 13-14-101 et seq.

(G) Any other function authorized by statute.

(2) Consent Necessary: A magistrate may perform any function in a civil case except that a magistrate may not preside over jury trials.

(d) Functions in Juvenile Cases: A juvenile court magistrate shall have all of the powers and be subject to the limitations prescribed for juvenile court magistrates by the provisions of Title 19, Article 1, C.R.S. Unless otherwise set forth in Title 19, Article 1, C.R.S., consent in any juvenile matter shall be as set forth in C.R.M. 3(f)(1).

(e) Functions in Probate and Mental Health Cases:

(1) No consent necessary:

(A) Perform any or all of the duties which may be delegated to or performed by a probate registrar, magistrate, or clerk, pursuant to C.R.P.P. 4 and C.R.P.P. 5.

(B) Hear and rule upon petitions for emergency protective orders and petitions for temporary orders.

(C) Any other function authorized by statute.

(2) Consent Necessary

(A) Hear and rule upon all matters filed pursuant to C.R.S. Title 15.

(B) Hear and rule upon all matters filed pursuant to C.R.S. Title 25 and Title 27.

(f) A district court magistrate shall not perform any function for which consent is required under any provision of this Rule unless the oral or written notice complied with Rule 5(g).

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (c)(1), (d)(2), and (d)(3) amended and (12) added September 6, 1990, effective January 1, 1991; (rule title), (a), IP(b), IP(c), IP(d), (d)(11), and (e) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; (6)(b) amended and adopted, effective November 6, 2003; entire rule amended and adopted May 12, 2005, effective July 1, 2005; (d) amended and effective January 11, 2007; (a)(2)(D) added and effective October 14, 2010; (a)(1)(I) amended and (f) added May 25, 2017, effective July 1, 2017; (e)(1)(A) amended and effective September 11, 2018.

ANNOTATION

Law reviews. For article, ''Family Law Magistrates: An Overview of Review and Appeal Procedures'', see 32 Colo. Law. 91 (Sept. 2003). For article, ''Appeals of County Court, Municipal Court, and Magistrate Rulings'', see 47 Colo. Law. 32 (Oct. 2018).

For purposes of applying these rules, a motion filed in a dissolution of marriage case that seeks interpretation and clarification of a prior stipulation filed in the same case does not change the character of the action from a family law matter to a civil matter. People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

Family law magistrate lacks jurisdiction to act on a motion regarding parenting time under the Uniform Dissolution of Marriage Act once decision-making responsibilities are at issue. In re Ferris, 75 P.3d 1170 (Colo. App. 2003).

Characterization of a common law marriage determination hinges on context in which the issue is raised. When the common law marriage issue is related to an effort to dissolve a marriage, it constitutes a ''family law case'', thereby implicating section (b) of this rule and § 13-5-301 (3). In re Phelps, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

Determination of the sequence of death is not a power that may be delegated by the probate court and exercised by a magistrate under subsection (d)(11). Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995).

Determination of the intent of the decedent is not a power that may be delegated by the probate court and exercised by a magistrate under subsection (d)(11). In re Estate of Hillebrandt, 979 P.2d 36 (Colo. App. 1999).

Section (c) of this rule allows a magistrate to conduct pre-trial discovery proceedings with the consent of the parties, but does not allow a magistrate to enter a default judgment against a party as a sanction for a discovery violation. Goderstad v. Dillon Cos., Inc., 971 P.2d 693 (Colo. App. 1998).

Subject matter jurisdiction for proceedings to determine parentage and related issues is conferred on the magistrate by § 19-1-108 (1). In re A.P.H., 98 P.3d 955 (Colo. App. 2004).

Requirement in § 19-1-108 (3)(a) that a magistrate inform the parties of their right to a hearing before a judge in the first instance is mandatory. In re R.G.B., 98 P.3d 958 (Colo. App. 2004).

Applied in Petition of Heostis v. Dept. of Educ., 2016 COA 6, 375 P.3d 1232.

Rule 7. Review of District Court Magistrate Orders or Judgments

(a) Orders or judgments entered when consent not necessary. Magistrates shall include in any order or judgment entered in a proceeding in which consent is not necessary a written notice that the order or judgment was issued in a proceeding where no consent was necessary, and that any appeal must be taken within 21 days pursuant to Rule 7(a).

(1) Unless otherwise provided by statute, this Rule is the exclusive method to obtain review of a district court magistrate's order or judgment issued in a proceeding in which consent of the parties is not necessary.

(2) The chief judge shall designate one or more district judges to review orders or judgments of district court magistrates entered when consent is not necessary.

(3) Only a final order or judgment of a magistrate is reviewable under this Rule. A final order or judgment is that which fully resolves an issue or claim.

(4) A final order or judgment is not reviewable until it is written, dated, and signed by the magistrate. A Minute Order which is signed by a magistrate will constitute a final written order or judgment.

(5) A party may obtain review of a magistrate's final order or judgment by filing a petition to review such final order or judgment with the reviewing judge no later than 14 days subsequent to the final order or judgment if the parties are present when the magistrate's order is entered, or 21 days from the date the final order or judgment is mailed or otherwise transmitted to the parties.

(6) A request for extension of time to file a petition for review must be made to the reviewing judge within the 21 day time limit within which to file a petition for review. A motion to correct clerical errors filed with the magistrate pursuant to C.R.C.P. 60(a) does not constitute a petition for review and will not operate to extend the time for filing a petition for review.

(7) A petition for review shall state with particularity the alleged errors in the magistrate's order or judgment and may be accompanied by a memorandum brief discussing the authorities relied upon to support the petition. Copies of the petition and any supporting brief shall be served on all parties by the party seeking review. Within 14 days after being served with a petition for review, a party may file a memorandum brief in opposition.

(8) The reviewing judge shall consider the petition for review on the basis of the petition and briefs filed, together with such review of the record as is necessary. The reviewing judge also may conduct further proceedings, take additional evidence, or order a trial de novo in the district court. An order entered under 6(c)(1) which effectively ends a case shall be subject to de novo review.

(9) Findings of fact made by the magistrate may not be altered unless clearly erroneous. The failure of the petitioner to file a transcript of the proceedings before the magistrate is not grounds to deny a petition for review but, under those circumstances, the reviewing judge shall presume that the record would support the magistrate's order.

(10) The reviewing judge shall adopt, reject, or modify the initial order or judgment of the magistrate by written order, which order shall be the order or judgment of the district court.

(11) Appeal of an order or judgment of a district court magistrate may not be taken to the appellate court unless a timely petition for review has been filed and decided by a reviewing court in accordance with these Rules.

(12) If timely review in the district court is not requested, the order or judgment of the magistrate shall become the order or judgment of the district court. Appeal of such district court order or judgment to the appellate court is barred.

(b) Orders or judgments entered when consent is necessary. Any order or judgment entered with consent of the parties in a proceeding in which such consent is necessary is not subject to review under Rule 7(a), but shall be appealed pursuant to the Colorado Rules of Appellate Procedure in the same manner as an order or judgment of a district court. Magistrates shall include in any order or judgment entered in a proceeding in which consent is necessary a written notice that the order or judgment was issued with consent, and that any appeal must be taken pursuant to Rule 7(b).

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (rule title), (a), IP(b), IP(c), IP(d), (d)(5), IP(e), and (f) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005; IP(a), (a)(5), (a)(6), and (a)(7) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (a)(8) amended and effective December 31, 2013.

ANNOTATION

Law reviews. For article, ''Family Law Magistrates: An Overview of Review and Appeal Procedures'', see 32 Colo. Law. 91 (Sept. 2003). For article, ''Appeals of County Court, Municipal Court, and Magistrate Rulings'', see 47 Colo. Law. 32 (Oct. 2018).

Section (a) of this rule, rather than former rule, applies to a motion filed after the effective date of this rule concerning 1996 child support stipulation. People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

The consent distinctions in this rule relate to the ''with consent'' and ''without consent'' categories established in C.R.M. 6. Thus, review of matters that may be heard by a magistrate without consent of the parties is governed by section (a) of this rule. Conversely, review of those matters that, by rule or statute, required the consent of the parties is governed by section (b). People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

Parties' consent in family law cases does not make the order subject to expedited appellate procedure prescribed in C.R.M. 7(b). In re Phelps, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

Characterization of a common law marriage determination hinges on context in which the issue is raised. When the common law marriage issue is related to an effort to dissolve a marriage, it constitutes a ''family law case'', thereby implicating C.R.M. 6(b) and § 13-5-301 (3). In re Phelps, 74 P.3d 506 (Colo. App. 2003) (decided prior to 2004 repeal of § 13-5-301).

A magistrate may, without the consent of the parties, act upon an inmate's in forma pauperis request and dispose of the case in accordance with its ruling thereon. Therefore, it is appropriate for such action to be governed by section (a), which sets out procedures for review of a magistrate's orders and judgments that have been entered without consent of the parties. Bryan v. Neet, 85 P.3d 556 (Colo. App. 2003).

A magistrate's order must fully resolve an issue before it may be reviewed by the district court or appealed to the court of appeals. In re Roosa, 89 P.3d 524 (Colo. App. 2004).

Failure to file motion for review with the reviewing judge justifies dismissal of appeal with prejudice. Matter of Estate of Burnford, 746 P.2d 51 (Colo. App. 1987); Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995); In re Estate of Hillebrandt, 979 P.2d 36 (Colo. App. 1999).

A party is not entitled to appellate review unless the party has first filed a timely motion for district court review of the magistrate's order. Such a motion for review must be filed within 15 days after the date of the magistrate's order. In re McCord, 910 P.2d 85 (Colo. App. 1995); In re Tonn, 53 P.3d 1185 (Colo. App. 2002); In re Moore, 107 P.3d 1150 (Colo. App. 2005).

A party must present an issue to the district court in a petition for review before that issue may be raised in the court of appeals. A party seeking review of a magistrate's decision must raise a particular issue in the district court so that the district court may have an opportunity to correct any error that may have been made by the magistrate. If a party does not raise an issue before the district court in a petition for review, but raises the issue on appeal for the first time, such party seeks to have the court of appeals correct an error that could have been corrected by the district court in a petition for review. People ex rel. K.L-P., 148 P.3d 402 (Colo. App. 2006).

A magistrate's order or judgment entered without the consent of the parties is not a decree and order to or from which an appeal lies, as envisioned in C.R.C.P. 54(a). Therefore, C.R.C.P. 59 is inapplicable to motions for review of a magistrate's order. In re Moore, 107 P.3d 1150 (Colo. App. 2005).

District court erred in denying appellant's motion for review based on the failure timely to provide a transcript. The Colorado rules for magistrates do not contain a separate section on procedure or any procedural rules specifying any time limits for filing a transcript of a hearing before a magistrate. There is no requirement that a transcript be filed at all in a review proceeding, and there is no requirement that the district court must consider a transcript, if one is provided, when reviewing a magistrate's order. In re Schmidt, 42 P.3d 81 (Colo. App. 2002).

A party seeking review of a magistrate's order shoulders the burden of providing a record justifying the rejection or modifica-

tion of that order even though this rule does not require that a transcript be filed at all in a review proceeding and it provides no guidance on the procedures for filing a transcript. Absent such a record, the district court may presume that the magistrate's findings were supported by the evidence. In re Rivera, 91 P.3d 464 (Colo. App. 2004).

A magistrate has authority under § 13-5-301 to hear a C.R.C.P. 60(b)(2) motion without the consent of the parties. As a result, a district court has jurisdiction to review the motion. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

The rules governing magistrates do not authorize any motion except a motion for review. Thus, a magistrate's order issued in response to a motion for reconsideration is void. In re Roosa, 89 P.3d 524 (Colo. App. 2004).

Previous courts have concluded that a motion for reconsideration may be deemed a motion for review; therefore, a motion for extension of time to file a motion for reconsideration may also be construed to allow the late filing of a motion for review. In re Cooprider, 140 P.3d 312 (Colo. App. 2006).

When a magistrate enters an order outside the presence of the parties, the 15 days to file for review of the order begins to run on the date the order is mailed, not the date the order is made. In re Talbott, 43 P.3d 734 (Colo. App. 2002); In re Tonn, 53 P.3d 1185 (Colo. App. 2002).

In paternity action where grandmother sought to intervene for visitation rights, § 19-1-108 of the Colorado Children's Code is properly applied, not this rule, if parents have waived the right to a hearing before a judge. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

Magistrate has no authority to reconsider its own order, sua sponte, or to hear a motion for reconsideration made by a party. Once a magistrate has entered a written and signed order on a matter without consent, a party must file a motion for review of the magistrate's order with the district court judge. In re M.B.-M., 252 P.3d 506 (Colo. App. 2011).

Applied in Petition of Heostis v. Dept. of Educ., 2016 COA 6, 375 P.3d 1232.

Rule 8. Functions of County Court Magistrates

(a) Functions in Criminal Cases: A county court magistrate may perform any or all of the following functions in a criminal proceeding:

(1) No consent necessary:

(A) Appoint attorneys for indigent defendants and approve attorney expense vouchers.

(B) Conduct proceedings in traffic infraction matters.

(C) Conduct advisements and set bail in criminal and traffic cases.

(D) Issue mandatory protection orders pursuant to C.R.S. section 18-1-1001.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct hearings on motions, conduct trials to court, accept pleas of guilty, and impose sentences in misdemeanor, petty offense, and traffic offense matters.

(B) Conduct deferred prosecution and deferred sentence proceedings in misdemeanor, petty offense, and traffic offense matters.

(C) Conduct misdemeanor and petty offense proceedings pertaining to wildlife, parks and outdoor recreation, as defined in Title 33, C.R.S.

(D) Conduct all proceedings pertaining to recreational facilities districts, control and licensing of dogs, campfires, and general regulations, as defined in Title 29, Article 7, C.R.S. and Title 30, Article 15, C.R.S.

(b) Functions in Civil Cases: A county court magistrate may perform any or all of the following functions in a civil proceeding:

(1) No consent necessary:

(A) Conduct proceedings with regard to petitions for name change, pursuant to C.R.S. section 13-15-101.

(B) Perform the duties which a county court clerk may be authorized to perform, pursuant to C.R.S. section 13-6-212.

(C) Serve as a small claims court magistrate, pursuant to C.R.S. section 13-6-405.

(D) Conduct proceedings involving protection orders, pursuant to C.R.S. sections 13-14-101 et seq. and conduct proceedings pursuant to C.R.C.P. 365.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct civil trials to court and hearings on motions.

(B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 355, and conduct post-judgment proceedings.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005.

ANNOTATION

Magistrates exercise authority only at the discretion of the judges who appoint them. Therefore no impropriety in the provision of a court memorandum prohibiting magistrates from conducting bond hearings. Wiegand v. Larimer County Court Magistrate, 937 P.2d 880 (Colo. App. 1996).

Rule 9. Review of County Court and Small Claims Court Magistrate Orders or Judgments

(a) An order or judgment of a county or small claims court magistrate shall be the order or judgment of the county or small claims court.

(b) Any party to a proceeding before a county court magistrate shall appeal an order or judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the county court.

(c) Any party to a proceeding before a small claims court magistrate shall appeal an order or judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the small claims court.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire rule amended December 5, 1996, effective January 1, 1997; entire chapter amended September 30, 1999, effective January 1, 2000.

Rule 10. Preparation, Use, and Retention of Record

(a) Record of Proceedings: Except as provided in C.R.C.P. 16.2 (c)(2)(e), a verbatim record of all proceedings and trials conducted by magistrates shall be maintained by either electronic devices or by stenographic means. The magistrate shall be responsible for maintaining such record and, in the event of subsequent review, for certifying its authenticity.

(b) Use of the Record: If otherwise admissible, a certified transcript of the testimony of a witness at a trial or other proceeding before a magistrate may be admitted as evidence in a later trial or proceeding.

(c) Custody and Retention of Record: A reporter's notes or the electronic recordings of trial or other proceedings conducted by a magistrate shall be the property of the state, and shall be retained by the appropriate court for a period prescribed in the Colorado Judicial Department Records Management manual. During the period of retention, notes and recordings shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes and recordings shall be considered the property of the state, even though in custody of the reporter, judge, or clerk. After the trial and review or appeal period, the reporter shall list, date and index all notes and recordings and shall properly pack them for storage. Where no reporter is used, the clerk of the court shall perform this function. The court shall provide storage containers and space.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; entire rule (including title) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000; entire rule amended and adopted May 12, 2005, effective July 1, 2005.

Rule 11. Title of Rules and Abbreviation

The title to these rules shall be Colorado Rules for Magistrates and may be abbreviated as C.R.M.

Source: Amended June 16, 1988, effective January 1, 1989; entire rule amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

INDEX TO
COLORADO RULES FOR MAGISTRATES

CHAPTER 36

Uniform Local Rules for all State Water Court Divisions

Adopted by the

SUPREME COURT OF COLORADO

August 13, 1990,

Effective September 1, 1990

ANALYSIS BY RULE

CHAPTER 36

UNIFORM LOCAL RULES FOR ALL STATE WATER COURT DIVISIONS

NOTE: Except as expressly provided in these rules, the Colorado Rules of Civil Procedure, including the state-wide practice standards set out in C.R.C.P. 121, shall apply to water court practice and procedure. All prior water court local rules are repealed.

Law reviews: For article, ''Statutory and Rule Changes to Water Court Practice'', see 38 Colo. Law. 53 (June 2009).

Rule 1. Appearances

A party that is a corporation may act through its corporate officers or other nonlawyer agents for the purpose of filing applications and statements of opposition when a case is before the referee (or before the water judge acting as a referee); however, if a pleading supporting or protesting a referee's ruling is filed, except as otherwise provided by C.R.S. 13-1-127, a corporate applicant shall be represented by and the pleadings shall be signed by, an attorney licensed to practice law in the State of Colorado.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 2. Filing and Service Procedure

(a) For all cases filed pursuant to C.R.C.P. 90 after July 1, 2009, applicants and opposers represented by counsel shall electronically file and serve through the approved judicial branch e-filing service provider all applications, pleadings, motions, briefs, exhibits, and other documents on all parties and on the state and division engineer. C.R.C.P. Rule 121, Section 1-26, Electronic Filing, applies to water court filings. The state or division engineer shall also electronically file and serve upon applicants and opposers in the proceedings their consultation reports described in §§ 37-92-302(2)(a) & (4). Applicants and other parties who are not represented by an attorney shall file with the water clerk a single copy of the application and all other documents in original paper format. The water clerk on behalf of persons not represented by an attorney shall scan and upload such paper-filed documents to the approved judicial branch e-filing system. All documents and correspondence filed after the initial application shall contain the case number. Proof of service of documents, orders, and rulings shall occur through the e-filing system.

(b) An applicant shall file and serve upon all parties at least 21 days prior to hearing on any application before the water judge, a proposed order that sets forth any necessary findings, terms or conditions that the applicant reasonably believes the court should incorporate into the decree.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; entire rule amended and effective February 19, 2009; (b) amended and adopted November 3, 2011, effective January 1, 2012.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 3. Applications for Water Rights

(a) Applications filed under C.R.C.P. 90 for determination of a water right, determination of a conditional water right, a change of water right, a determination that a conditional

water right has become a water right, approval of a plan for augmentation, a finding of reasonable diligence, approval of a proposed or existing exchange of water, approval to use water outside of the state, and any other matter for which such a standard form exists shall be filed using the standard forms adopted by the water judges, or a format patterned after the standard form containing the information required by the applicable standard form. The applicant shall be responsible for providing all information required by the forms and this Rule 3.

(b) (1) More than one water right, claim or structure may be incorporated in any one application under one caption, provided that the required information is given for each water right, claim, or structure.

(2) Persons alone or in concert may file applications for approval of plans for augmentation, including water exchange projects, and subsequent changes thereto.

(3) In applications for determinations of rights to groundwater described in C.R.S. § 37-90-137(4):

(A) If the applicant claims consent of the owner(s) of the overlying land as the basis for such a determination, the application must include one or more of the following documents as applicable:

(i) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(A), the application must include (1) recorded copies of the written consent from the owner(s) of the overlying land to the applicant, which consent includes a legal description of the land and identification of the aquifers for which consent has been given, and (2) an instrument evidencing ownership of such land by such consenting owner(s) at the time such consent was granted.

(ii) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(C), the application must include a certified copy of (1) the ordinance or resolution described in C.R.S. § 37-90-137(8) that incorporates groundwater, and (2) the part of the detailed map described in C.R.S. § 37-90-137(8) that shows the land area as to which consent is deemed to have been given.

(B) Two or more overlying land owners may file a joint application for determinations or changes of rights to such groundwater to be withdrawn through a ''well field,'' provided that the application must contain sufficient information to demonstrate that lands subject to the application meet the requirements of a ''well field'' as defined in the ''rules and regulations applying to applications for well permits to withdraw groundwater pursuant to section 37-90-137(4), C.R.S.'' 2 C.C.R. 402-7. Such joint application may include only claims for determinations or changes of rights to groundwater described in C.R.S. § 37-90-137(4) and plans for augmentation (with or without exchanges) related thereto.

(4) Nothing contained in this rule 3(b) shall prevent the consolidation or bifurcation of applications or portions thereof under other applicable rules or law, or affect or discourage applications involving a single applicant or single water right, claim or structure.

(c) Where more than one water right was conditionally decreed under one case number, each water right so decreed may, but need not be, incorporated again in a single application for a finding of reasonable diligence or to make absolute, regardless of whether such rights remain in common ownership; however, such an application shall not be combined with any other case or application except by leave of court and the owner of each such right shall be an applicant in such application.

(d) The following guidelines shall apply in filing applications:

(1) Every application shall include the legal description of the location of the point of diversion and of the place of storage, if any, of the subject water right, and a general description of the place of use.

(2) In areas having generally recognized street addresses, the street address and also the lot and block number, if applicable, shall be set forth in the application in addition to the legal description of the point of diversion or place of storage.

(3) Every application shall state the name and address of the owner or reputed owner of the land upon which any new diversion or storage structure or modification to any existing diversion or storage structure is or will be constructed, or upon which water is or will be stored, including any modification to the existing storage pool. The applicant may rely upon the real estate records of the county assessor for the county or counties in which the land is located to determine the owner or reputed owner of potentially affected land.

(4) The actual address of the applicant and the mailing address, if different, shall be given in all cases. An address in care of an attorney is not acceptable in the absence of special circumstances which must be set out fully in an accompanying statement and approved by the water judge.

(e) An application for determination of matters relating to underground water rights shall be governed by the following additional requirements:

(1) Such application shall designate each well, using the state engineer's well permit registration or recording number, if one exists. If a permit required by law has been issued by the state engineer, copies of the permit and the well completion and pump installation report, if completed, shall be attached to the application. If the permit was denied, a copy of the order of denial containing the denial number shall be attached. If this documentation is not available at the time of filing of the application, it shall be supplied as soon as practicable.

(2) If the name of the applicant is not the same as the name appearing on the well permit, then prima facie evidence of ownership of the well site must be submitted to the court. Copies of recorded deeds are preferred for this purpose.

(f) An application for approval of a change of water right or plan for augmentation shall include a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; entire rule amended and effective February 19, 2009; (b) and (c) amended and adopted November 3, 2011, effective January 1, 2012.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

ANNOTATION

Law reviews. For article, ''Heightened Notice Requirements for Water Rights Applications'', see 32 Colo. Law. 93 (June 2003).

Rule 4. Amendments or Corrections

(a) For purposes of the application of C.R.C.P. 15, the application shall be considered to be a complaint, and a statement of opposition shall be considered to be a responsive pleading. An amendment to an application shall contain a legal description of the structures to which the amendment applies.

(b) When an application is amended, or a petition for correction of a ruling or decree is filed, republication shall be required at the expense of the applicant for the following changes:

(1) A change of over 200 feet in structure location;

(2) A change causing the well to come within 600 feet of an existing decreed well;

(3) A change or moving of a structure to a different quarter section;

(4) An increase in amount of use or addition of type of use, but not a decrease in amount of use or deletion of a type of use;

(5) A request for an earlier date of appropriation;

(6) A change in the source of water; or

(7) Any other change not specifically described that the court in its discretion deems material.

(c) Upon a showing that no person will be injured, the water judge or referee may determine that republication is unnecessary.

(d) If the water judge or referee determines republication is necessary for an amended application, the consultation and recommendation procedures (as supplemented by Water Court Rule 6(e) and (n)) and state engineer determination of facts procedures described in C.R.S. §§ 37-92-302(2)(a) and -302(4) shall apply to the amended application. If the water judge's order for republication provides for the water judge to retain the application as amended, then the division engineer shall file a written recommendation in the proceedings as required by C.R.S. § 37-92-302(4) within thirty-five days of the order requiring republication of the amended application and, in the case of an amendment to an application for determinations of rights to groundwater from wells described in C.R.S. § 37-90-137(4), the state engineer shall file any determination as to the facts of such amended application as required by C.R.S. § 37-92-302(2)(a) within four months of the order requiring republication or shall promptly file a notice that no such determination is necessary.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; (d) added and effective December 13, 2018.

ANNOTATION

Even though an application for the enlargement of a specifically-identified dam placed the location of the dam in the incorrect quarter section, there was no need to amend the application because the application correctly identified the name of the reservoir and none of the parties would be injured by not republishing the application. City of Black Hawk v. City of Central, 97 P.3d 951 (Colo. 2004).

Rule 5. Withdrawal of Application or Other Pleading

(a) An application against which no statement of opposition has been filed may be withdrawn upon written notice to the court and without a court order prior to the entry of a decree.

(b) An application against which a statement of opposition has been filed shall not be withdrawn or dismissed except by order of the court.

(c) A statement of opposition may be withdrawn without order of the court if the opposer files a withdrawal of the statement of opposition certifying that the applicant has consented to the withdrawal. In the absence of consent of the applicant, the withdrawal of a statement of opposition must be approved by order of the court.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 6. Referral to Referee, Case Management, Rulings, and Decrees

(a) The water judge shall promptly refer to the water referee all applications. The referee upon referral by the water judge has the authority and duty in the first instance to promptly begin investigating and to rule upon applications for determinations of water rights, determinations of conditional water rights, changes of water rights, approval of plans for augmentation, findings of reasonable diligence in the development of conditional water rights, approval of a proposed or existing exchange of water, approval to use water outside of the state, and other water matters, in accordance with the applicable constitutional, statutory, and case law.

(b) The referee's authorities and duties include: assisting potential applicants to understand what information is required to be included in an application; in accordance with C.R.C.P. 90, consulting with the water clerk to ascertain whether applications substantially contain the information required by Water Court Rule 3 and the standard forms approved by the water judges and, if not, providing the applicant through the water clerk a list of the required information that was not included in the application; investigating each application to determine whether or not the statements in the application and statements of opposition are true and becoming fully advised with respect to the subject matter of the applications and statements of opposition; conferring with the division engineer and the

parties concerning applications and working with the division engineer and the parties to obtain additional information that will assist in narrowing the issues and obtaining agreements; and issuing the referee's ruling and proposed decree in the case. The referee's ruling and proposed decree shall set forth appropriate findings and conditions as required by C.R.S. §§ 37-92-303 & 305, and shall be in an editable format acceptable to the water judge.

(c) The referee shall work promptly to identify applications that will require water judge adjudication of the facts and/or rulings of law and re-refer those applications to the water judge. The referee may re-refer a case to the water judge without first holding a status conference described in Water Court Rule 6(h). In the event that a matter is re-referred within three months after filing of an application that will require construction of a well, other than applications for determinations of rights to groundwater from wells described in C.R.S. § 37-90-137(4), the water judge may extend the time for the division engineer to file the type of written consultation report or recommendation required by C.R.S. § 37-92-302(2)(a) and (4) upon the division engineer having filed a notice showing good cause for such an extension.

(d) The applicant shall have the burden of sustaining the application and, in the case of a change of water right, a proposed or existing exchange of water, or a plan for augmentation, the burden of showing the absence of injurious effect. If any expert reports, disclosures, or opinions are presented to the referee, they shall be filed and include the signed Declaration of Expert set forth in the applicable water court form.

(e) To promote the just, speedy, and cost efficient disposition of water court cases, the goals of the referee, as contemplated by C.R.S. § 37-92-303(1), shall include a ruling on each unopposed application within 63 days after the last day on which statements of opposition may be filed, and all other applications as promptly as possible. In pursuit of this goal, the referee shall initiate consultation with the division engineer in every case promptly after the last day for filing statements of opposition. The division engineer's written summary report of the consultation is due within 35 days of the date the referee initiates consultation in accordance with C.R.S. § 37-92-302(4), except that for applications that require construction of a well, the summary of consultation report is due within 4 months after the filing of the application in accordance with C.R.S. § 37-92-302(2)(a). Upon request, the referee may extend the time for filing the summary of consultation report. If the referee determines that the summary of consultation report requires a response, the applicant shall file a written response within the time specified by the referee either in the case management plan adopted under section (l) of this rule 6 or by a separate order under section (n) of this rule 6. The referee shall not enter a ruling on applications for determination of rights to groundwater from wells described in C.R.S. § 37-90-137(4) until the state engineer's office has had the opportunity to issue a determination of facts concerning the application in accordance with C.R.S. § 37-92-302(2)(a). The referee and the division engineer may confer and jointly agree to forego consultation in a particular case because it is not needed; and, if so, the referee shall enter a minute order as provided in section (o) of this Rule 6.

(f) For good cause, upon agreement of the parties, or sua sponte, the referee may extend the time for ruling on the application beyond 63 days after the last day on which statements of opposition may be filed but not to exceed a total of 1 year following the deadline for filing statements of opposition, except that the referee may extend the time for entering a ruling to a specified date that is not more than 182 days after the expiration of the one year period, upon finding that there is a substantial likelihood that the remaining issues in the case can be resolved, without trial before the water judge, in front of the referee.

(g) If no statements of opposition to an application have been filed, the applicant's attorney shall promptly provide the referee with a proposed ruling and decree for consideration by the referee. The referee will prepare the ruling and decree for pro se applicants, and in all cases may convene such conferences or hearings as will assist in performance of the referee's duties.

(h) For all applications in which statements of opposition are filed, the attorney for the applicant, or the referee if the applicant is not represented by counsel, shall set a status

conference with the referee and all parties. The status conference shall occur within 63 days after the deadline for filing of statements of opposition, unless the deadline is extended by the referee for good cause. The status conference may be conducted in person or by telephone. All parties must attend the status conference unless excused by the referee. The referee shall advise the division engineer of the status conference and invite or require the division engineer's participation. To assist discussion at the status conference, applicants are encouraged to prepare and circulate a proposed ruling and proposed decree to the referee, the division engineer, and the parties in advance of the conference.

(i) During the status conference, the referee and the parties will discuss the issues raised by the application and any statements of opposition, what additional information or investigations will be necessary to assist the parties and the referee to understand and resolve disputed issues and to assist the referee's preparation of a proposed ruling and proposed decree, and determine whether it will be possible to resolve the application and any objections without re-referring the application to the water judge for adjudication.

(1) If it is unlikely that the application and objections can be resolved without adjudication by the water judge, then the referee shall promptly re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

(2) If the applicant or another party does not believe that the application can be resolved without water judge adjudication and so notifies the other parties and the referee at the status conference, then the party shall promptly file a motion to refer the application to the water judge in accordance with C.R.S. § 37-92-303(2).

(3) The provisions of Water Court Rule 6 (j)-(l) apply to applications that remain before the referee upon agreement of the parties as a result of the status conference.

(4) As a condition for remaining before the referee instead of referring the application to the water judge for adjudication, the parties shall waive their statutory right to re-refer the application to the water judge for the period established in the case management plan. During such period the application may be referred to the water judge only with the consent of all parties or the consent of the referee.

(j) The parties shall discuss at the status conference whether expert investigations will be needed. If expert investigations are needed, the referee and the parties will discuss whether it would be appropriate for the parties to engage a single expert to make the necessary investigation and report the results of the investigation to the parties. The use of a single expert is not mandatory, and any party may choose to utilize its own expert. If all parties agree that the use of a single expert is desirable, the single expert shall be chosen by mutual agreement among the parties. If all parties agree that the use of a single expert is desirable, but the parties cannot agree on who should be selected, the referee may appoint a single consulting expert. The parties shall divide the costs of a single consulting expert equally among themselves unless a different cost allocation is agreed upon by the parties. If the parties agree to use a single expert in proceedings before the referee, then, absent the consent of all parties, that expert shall not be permitted to testify as an expert for a party in the same proceeding if the application is re-referred to the water judge or if a protest is filed by a party to the ruling of the referee.

(k) In consultation with the parties, the referee shall establish a case management plan for obtaining the necessary information and preparing a proposed ruling and proposed decree. The case management plan shall set forth a timetable for disposition of the application.

(l) Regardless of whether any expert is involved in the proceedings before the referee, the referee shall not be bound by the opinions and report of the expert, may make investigations without conducting a formal hearing, including site visits, and may enter a ruling supported by the facts and the law. The case management plan shall contain a listing of the disputed issues to the extent known, the additional information needed to assist in resolution of the disputed issues, additional investigations needed to assist in resolving the disputed issues, an estimate of the time required to complete the tasks, the time for filing a proposed ruling and proposed decree, the time for opposers to provide comments to the applicant on the proposed ruling and proposed decree, the time for the applicant to file status reports, and a schedule for further proceedings. The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to

the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and proposed decree. The proceedings before the referee shall be completed and the proposed ruling and proposed decree issued no later than 1 year following the deadline for filing of statements of opposition, except that the referee may extend the time as specified in subsection (f) above.

(m) If the parties are able to reach a resolution of the application, and the referee finds it to be supported by the facts and the law, the referee shall work with the parties to fashion an appropriate proposed ruling and proposed decree for filing with the water judge for approval. If such a resolution cannot be reached within the time period allowed by the case management plan, the referee shall enter a ruling on the application, which may be protested to the water judge as provided in C.R.S. § 37-92-304(2), or the referee may re-refer the application to the water judge, or any party may file a motion to re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

(n) At any time after the status conference on applications to which statements of opposition have been filed, or after the filing of applications to which no statements of oppositions have been filed, if some further information is reasonably necessary for the disposition of the application, the referee may require the applicant to supply the information in writing, by affidavit or at an informal conference or hearing. The referee may ask the division engineer for information as part of the referee's ongoing informal investigation, but shall discontinue making such requests if the state or division engineer has become a party to the case. In response to such requests, the division engineer may file supplemental written summary of consultation reports. The division engineer also may file a written report in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee. If the referee determines any written report filed by the division engineer requires a response by the applicant, the applicant shall file a written response within the time specified by the referee.

(o) The referee shall enter minute orders summarizing all conferences with the parties or the division or state engineers.

(p) The referee shall have the authority to dismiss for failure to prosecute applications of parties who fail to comply with the requirements of the Water Court Rules or any case management plan, and to dismiss statements of opposition of parties who fail to comply with the requirements of the water court rules or any case management plan. Such dismissal may be protested to the water judge by any party within 21 days from the date of the order of dismissal.

(q) Any time period contained in the water court rules, or the applicable rules of civil procedure, for an action by the referee or a party may be extended by the water judge for good cause. At any time the water judge determines that an application can be resolved without adjudication by the water judge, the water judge may refer the application back to the referee for disposition. To assist in the adjudication of water matters that are before the water judge, the water judge may direct the referee to perform identified tasks.

COMMITTEE COMMENT

Rule 6(d), (e), (f), (h), (l) & (n)

Effective July 1, 2014, Rules 6(d), (e), (f), (h), (l) & (n) are amended to clarify the role of the division engineer during the water referee's investigation of each application and to ensure that the participation by the division engineer is clear, meaningful, transparent, and timely.

Prior to these amendments, Rule 6(e) allowed the division engineer, upon the receipt of new information, to submit to the referee and the parties additional written reports after the division engineer's initial written report on the referee's consultation with the division engineer. The amendments move this provision to Rule 6(n) and modify it to clarify that the division engineer may file such written reports in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee.

To provide a more clear record of consultations between the referee and the division engineer, the amendments describe and permit the division engineer's filing of the initial written summary of consultation report as well as supplemental written summary of consultation reports in response to the referee's subsequent requests for information as part of the referee's ongoing informal investigation. The amendments further clarify which documents must be filed with the court so that they are provided to and received by the parties and the division engineer and, in Rules 6(e) and 6(n), affirm the

referee's ability to require the applicant to file a written response to any of the division engineer's written reports to aid in the referee's investigation. To the extent practicable, the case management plan should be written or revised to include time schedules for the division engineer filing of all written reports and responses thereto.

The amendments to Rule 6(e) and 6(n) are intended to further implement the primary purpose of the referee's role in water court proceedings: to fashion a proposed decree that, with water judge approval, can be entered as a final decree if no protest to the referee's ruling is filed with the water court within the time the statute specifies. To this end, the General Assembly has authorized the referee to consult with the division engineer without the state or division engineer having to file a statement of opposition to the application. Rule 6 is also amended to adopt the ''rule of 7'' numbering for procedural time periods specified in this water court rule.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and effective February 19, 2009; (e), (f), (h), (l), and (p) amended and adopted November 3, 2011, effective January 1, 2012; (d), (e), (f), (h), (l), and (n) amended and committee comment added and adopted June 26, 2014, effective July 1, 2014; (a) and (c) amended and effective December 13, 2018.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 7. Intervention

A Motion to Intervene shall be in accordance with C.R.S. 37-92-304 (3). A failure to file a timely objection may be considered a confession of the Motion.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 8. Briefs

Briefs shall be filed and served in accordance with Water Court Rule 2. A brief shall not exceed thirty pages, double-spaced, without permission of the court. Counsel are encouraged to include a table of contents and a table of cases cited, which shall not be counted as part of the thirty-page limit.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and effective February 19, 2009.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

Rule 9. Transfer of Conditional Water Right and Change of Address

(a) Upon the sale or other transfer of a conditional water right, the transferee shall file with the water court having jurisdiction a notice of transfer which shall state:

(1) The title and case number of the case in which the conditional decree was issued;

(2) The description of the conditional water right transferred;

(3) The name of the transferor;

(4) The name and mailing address of the transferee; and

(5) A copy of the recorded deed.

(b) The owner of any conditional water right shall notify the clerk of the water court having jurisdiction of any change in mailing address.

(c) The clerk shall place any notice of transfer or change of address in the case file in which the conditional decree was entered and in the case file in which the court first made a finding of reasonable diligence.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 10. Exhibits

All exhibits offered in evidence shall be marked for identification by the reporter during the trial, unless previously marked at the court status conference or pursuant to a case management order, and shall remain in the custody of the clerk or reporter as designated by the judge, unless withdrawn by order of the court.

Source: Entire chapter added August 13, 1990, effective September 1, 1990.

Rule 11. Pre-Trial Procedure, Case Management, Disclosure, and Simplification of Issues

The provisions of C.R.C.P. 16 and 26 through 37 shall apply except that they shall be modified as follows:

(a) C.R.C.P. 16(b)-(e), C.R.C.P. 16(f)(3)(VI)(C), C.R.C.P. 16(g), and C.R.C.P. 26(a)(2)(B)(I)(g) shall not apply to water court proceedings.

(b) **Presumptive Case Management Order.** Except as provided in section (c) of this Rule, the parties shall not file a Case Management Order and subsections (1)-(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue, unless the water court orders otherwise for good cause shown. The time periods specified in this Case Management Order are provided to take into account protested or re-referred cases that involve computer modeling or detailed technical analysis. Parties and counsel are encouraged to request a Modified Case Management Order, pursuant to section (c), to shorten time periods whenever possible, unless the water court orders otherwise for good cause shown.

(1) **At Issue Date.** Water matters shall be considered to be at issue for purposes of this Rule and C.R.C.P. 26 49 days (7 weeks) after the earlier of either of the following: entry of an order of re-referral or the filing of a protest to the ruling of the referee, unless the water court directs otherwise. Unless the water court directs otherwise, the time period for filing a Certificate of Compliance under subsection (b)(7) of this Rule shall be no later than 77 days (11 weeks) after a case is at issue.

(2) **Responsible Attorney.** For purposes of this Rule and C.R.C.P. 16(f), the responsible attorney shall mean applicant's counsel, if the applicant is represented by counsel, or, if not, a counsel chosen by opposers, or the water court may choose the responsible attorney. The responsible attorney shall schedule conferences among the parties, prepare and file the Certificate of Compliance, and prepare and submit the proposed trial management order.

(3) **Confer and Exchange Information.** No later than 14 days after the case is at issue, the lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses, the matters to be disclosed pursuant to C.R.C.P. 26(a)(1), the development of a Certificate of Compliance, and the issues that are in dispute.

(4) **Trial Setting.** No later than 63 days (9 weeks) after the case is at issue, the responsible attorney shall arrange to set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the water court.

(5) **Disclosures.**

(A) The time for providing mandatory disclosures pursuant to C.R.C.P. 26(a)(1) shall be as follows:

(I) Applicant's disclosure shall be made 35 days after the case is at issue;

(II) An opposing party's disclosure shall be made 35 days after applicant's disclosures are made.

(B) The time periods for disclosure of expert testimony pursuant to C.R.C.P. 26(a)(2) shall be as follows:

(I) The applicant's expert disclosure shall be made at least 280 days (40 weeks) before trial;

(II) The applicant's supplemental expert disclosure, if any, shall be made after the first meeting of the experts held pursuant to subsection (b)(5)(D)(I) of this Rule, and served at least 217 days (31 weeks) before trial;

(III) An opposer's expert disclosure shall be made at least 161 days (23 weeks) before trial;

(IV) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(5)(B)(III) of this Rule, such expert disclosure shall be made no later than 119 days (17 weeks) before trial.

(C) **Additional Expert Disclosures.** In addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I), the expert's disclosure shall include:

(I) A list of all expert reports authored by the expert in the preceding 4 years; and

(II) An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions. The court may require the party to whom this information is disclosed to pay the reasonable cost to convert the data from the electronic format in which it is maintained in the expert's normal course of business to a format that can be used by the expert for the opposing party(ies).

(D) **Meeting of Experts to Identify Undisputed Matters of Fact and Expert Opinion and to Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**

(I) The expert witness(es) for the applicant and the opposer(s) shall meet within 49 days (7 weeks) after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.

(II) The expert witness(es) for the applicant and the opposer(s) shall meet within 28 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.

(III) The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. In addition, the content of the meetings, including notes taken by the experts or other records of the discussion during these meetings, are not discoverable, and can only be used for purposes of the preparation of the written statements and reports required or permitted by Water Court Rule 11(b)(5)(D). The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).

(E) **Declaration by Expert.** Expert reports, disclosures, and opinions are rendered to the water court under professional standards of conduct and duty to the court. No person, including a party's attorney, shall instruct an expert to alter an expert's report, disclosures, or opinion. This does not preclude suggestions regarding the factual basis, accuracy, clarity, or understandability of the report, disclosure, or opinion, or proofreading or other editorial corrections, or an attorney communication of legal opinion to the expert of the attorney's client. The expert shall not include anything in his or her expert report, disclosure, or opinion that has been suggested by any other person, including the attorney for the expert's client, without forming his or her own independent judgment about the correctness, accuracy, and validity of the suggested matter. Matters of legal opinion

pertinent to formulation of the expert's report, disclosure, or opinion are within the professional province and duty to the court of the attorney who represents the client who has retained the expert. Each expert witness's written disclosure, report, or opinion shall contain a declaration by the expert as set forth in the applicable water court form.

(F) **Proposed Decree.** Applicant shall provide proposed findings of fact, conclusions of law and decree at the time of its initial C.R.C.P. 26(a)(2) disclosures. All opposers shall provide comments on the proposed decree, including the language of specific decree provisions deemed necessary by the opposers, at the time of opposers initial C.R.C.P. 26(a)(2) disclosures. Applicant shall respond to opposers' suggested decree language by providing an additional draft decree at the time of its rebuttal C.R.C.P. 26(a)(2) disclosures. In circumstances where, as a result of identification of witnesses and documents within the time frame for such identification set forth in this Presumptive Case Management Order but with insufficient time to allow responsive discovery or supplementation by an opposing party, then modification of this Presumptive Case Management Order shall be freely granted.

(6) **Settlement Discussions.**

(A) No later than 35 days after the case is at issue, the parties shall explore possibilities of a prompt settlement or resolution of the case.

(B) No later than 84 days (12 weeks) before trial the parties shall jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial.

(7) **Certificate of Compliance.** No later than 77 days (11 weeks) after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(7) (except (b)(5)(B) through (F) and (b)(6)(B)), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply. A request for a Case Management Conference shall be made at the time for filing the Certificate of Compliance.

(8) **Time to Join Additional Parties and Amend Pleadings.** The time to join additional parties and amend pleadings shall be no later than 119 days (17 weeks) after the case is at issue.

(9) **Pretrial Motions.** Unless otherwise ordered by the court, the time for filing pretrial motions shall be no later than 35 days before the trial date, except that motions pursuant to C.R.C.P. 56 shall be filed at least 91 days (13 weeks) before the trial date.

(10) **Discovery Schedule.** Until a case is at issue, formal discovery pursuant to C.R.C.P. 26 through 37 shall not be allowed. Informal discovery, including discussions among the parties, disclosure of facts, documents, witnesses, and other material information, field inspections and other reviews, is encouraged prior to the time a water case is at issue. Unless otherwise directed by the water court or agreed to by the parties, the schedule and scope of discovery shall be as set forth in C.R.C.P. 26(b), except that depositions of expert witnesses shall not be allowed until 28 days after the time for filing of the opposers' C.R.C.P. 26(a)(2) disclosures. The date for completion of all discovery shall be 49 days (7 weeks) before the trial date.

(c) **Modified Case Management Order.** Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section.

(1) **Stipulated Modified Case Management Order.** No later than 77 days (11 weeks) after the case is at issue, the parties may file a Stipulated Proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed Order need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a Case Management Conference.

(2) **Disputed Motions for Modified Case Management Orders.** Subsection (c)(4) of this Rule shall apply to any disputes concerning a Proposed Modified Case Management Order. If any party wishes to move for a Modified Case Management Order, lead counsel

and any unrepresented parties shall confer and cooperate in the development of a Proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 77 days (11 weeks) after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the Proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as ''disputed'' in the Proposed Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The motion for a Modified Case Management Order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(3) **Court Ordered Modified Case Management Order.** The water court may order implementation of a Modified Case Management Order if the Court determines that the Presumptive Case Management Order is not appropriate for the specific case. The Court shall not enter a Court Ordered Modified Case Management Order without first holding a Case Management Conference pursuant to subsection (c)(4) of this Rule.

(4) **Case Management Conference.** If there is a disputed Case Management Order or if counsel or unrepresented party believes that it would be helpful to conduct a Case Management Conference, a Notice to Set Case Management Conference shall be filed stating the reasons why such a conference is required. If a Notice to Set Case Management Conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The Court shall promptly enter a Modified Case Management Order containing such modifications as approved by the Court.

(5) **Amendment of the Case Management Order.** At any time following the entry of the Case Management Order, a party wishing to amend the presumptive Case Management Order or a Modified Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2).

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule repealed and readopted January 26, 1995, effective immediately for cases filed on or after January 1, 1995; (a) corrected July 21, 1995, effective January 26, 1995; entire rule repealed and replaced November 18, 2004, effective January 1, 2005; entire rule amended and effective February 19, 2009; (b)(5)(D)(III) amended and committee comment added June 23, 2011, effective July 1, 2011, nunc pro tunc on and after July 1, 2009; (b) and (c) amended and adopted November 3, 2011, effective January 1, 2012; (b)(5), (b)(9), and committee comment amended and adopted June 26, 2014, effective July 1, 2014; entire rule amended and effective July 12, 2016; (b)(5)(B)(I), (b)(5)(B)(II), (b)(5)(B)(III), (b)(5)(B)(IV), (b)(6)(B), and (b)(9) amended and adopted November 16, 2017, effective for cases filed or re-referred on or after January 1, 2018; committee comment amended and effective May 31, 2018; committee comment amended and effective December 13, 2018.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

COMMITTEE COMMENT

Rule 11(b)(5)(D)(III)

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11(b)(5)(D)(III) was amended, nunc pro tunc on and after July 1, 2009, to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and the experts' written statement prepared in accor-

dance with Rule 11(b)(5)(D)(II). In response to arguments that this provision does not prohibit use of such material in pretrial proceedings, Rule 11(b)(5)(D)(III) is further amended to clarify the original intent of the rule that the only permissible use of information from the expert meetings is for purposes of the preparation of the written statements and reports required or permitted by Rule 11(b)(5)(D). This clarifying change applies nunc pro tunc on and after July 1, 2009.

Rule 11(b)(5) and (9)

Effective January 1, 2018, Rule 11(b)(5) was amended to require expert disclosures to be made earlier than deadlines under the previous rule. For the applicant's expert disclosure, supplemental expert disclosure, and opposer's expert disclosure, the new deadline is five weeks earlier than the previous rule. For rebuttal expert disclosures, the new deadline is four weeks earlier than the previous rule. This change was to allow more time after expert disclosures for settlement discussions, mediation, and preparation of pretrial motions pursuant to C.R.C.P. 56. At the same time, Rule 11(b)(9) was amended to require that pretrial motions pursuant to C.R.C.P. 56 be filed 91 days before trial instead of the previous rule requiring such motions to be filed 84 days before trial.

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11 is further amended in subsection (b)(5)(D)(III) to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and written statement prepared by the experts in accordance with the rule, and, further, to clarify that the meetings of the experts exclude attorneys for the parties or the parties themselves unless they are designated experts. These clarifying changes apply nunc pro tunc on and after July 1, 2009.

In addition, the following Suggested Guide is included in this Comment by way of example for conduct of the meetings of the experts and preparation of the joint written statement of the experts.

Suggested Guide for Conducting Meetings of the Experts in Water Court Proceedings and Preparing Written Statement

Introduction

The purpose of this guide is to assist experts engaged in water court cases to efficiently conduct the first and second meetings of the experts described in Water Court Rule 11 and prepare the written statement of the experts. As the title above indicates, this guide provides suggested procedures and guidelines in conducting these meetings and preparing the written statement. The experts in each case may adapt these guidelines for their own specific circumstances.

Conduct of the Two Meetings

Meeting Notes:

Water Court Rule 11(b)(5)(D)(III), as amended effective July 1, 2011 nunc pro tunc on and after July 1, 2009 reads:

- "The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s)."

Tips for Conducting the Meetings of Experts:

- Applicant's expert is the chair and therefore controls the flow of the meetings. If the Applicant has more than one expert in the case, one of its experts should be designated to run the meeting.
- Pass a signup sheet for names, phone numbers and email addresses.
- Prepare an agenda and stick to it.
- Limit protracted discussions and arguing.
- Don't become entangled in difficult issues and fail to cover others.
- OK to identify legal issues, but don't argue and discuss in detail.
- Try to keep meetings to a reasonable length.
- Participation in person is encouraged.

Scheduling the Meetings of the Experts:

Scheduling of the meetings of the experts is to be initiated by counsel for the parties, led by the attorney for the Applicant. The selected date should involve the largest number of participating experts possible. If scheduling does not permit one or more experts to attend, they have the option of submitting initial comments to the group via email prior to the meeting.

First Meeting of the Experts

Excerpt from Rule 11(b)(5)(D)(I):

> **"Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**
>
> The expert witness(es) for the applicant and the opposer(s) shall meet within 49 days (7 weeks) after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts."

Timing of First Meeting:

Within 49 days following Applicant's initial expert disclosures.

Goals:

- Allow Applicant's experts to explain the engineering approach in the application.
- Identify and screen issues pertaining to facts and expert opinions.
- Discuss Applicant's draft decree provisions dealing with issues of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable issues of fact and expert opinion in a supplemental report prior to the opposers' disclosures.
- Clarify issues of fact and expert opinion and clear up misunderstandings relating to the case.
- Exchange information, such as additional backup data and calculations relating to the expert disclosures.

Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

Suggested Sample Agenda for First Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals of expert meeting.
- Applicant's experts give a brief overview of the application.
- Applicant's experts walk through facets of case, one at a time.
  - Poll opposers' experts for whether or not they have issues for each facet.
  - Note and put aside contested issues for later discussion.
  - Opposers' experts discuss concerns regarding Applicant's initial disclosures.
  - Go around table, each opposer's expert provides brief discussion of areas of disagreement.
  - Provide alternative approaches if applicable.
- Applicant's experts verbally summarize issues discussed in meeting.
  - Categorize issues into areas of agreement and disagreement.
- Q & A Session
  - Exchange of information, arrange to provide additional backup information, if necessary.
- Schedule second meeting of the experts, if appropriate.
- Adjourn

Second Meeting of the Experts

Excerpt from Rule 11(b)(5)(D)(II):

> "The expert witness(es) for the applicant and the opposer(s) shall meet within 28 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures."

Timing of Second Meeting:
Within 28 days following Opposers' expert disclosures.

Goals:

- Identify and screen remaining disputed matters of facts and expert opinion.
- Discuss decree provisions dealing with matters of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable matters of fact and ex-

pert opinion in their forthcoming rebuttal reports.
- Organize a plan and schedule for preparing joint written statement setting forth disputed and undisputed matters of fact and expert opinion.

Not Goals:
- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

Suggested Sample Agenda for Second Meeting of the Experts:
- Introductions, roll call, pass signup sheet.
- Set ground rules and goals for meeting.
- Applicant's experts walk through matters of fact and expert opinion identified in objectors' expert disclosures. Applicant's experts do the following for each issue:
  - Summarize the matter.
  - Identify which parties' experts raised the matter.
  - Ask objectors' experts for additional explanation or clarification, if necessary.
  - Indicate whether issue appears to be resolvable, not resolvable, or if there may be common ground to limit the issue.
  - Call on objectors' experts to comment on matter, and possible common ground.
  - Repeat for each matter.
- Objectors' experts indicate if there are other matters of fact and expert opinion that were not discussed by the Applicant's experts.
- Discuss process and schedule to prepare joint written statement.
- One of the Applicant's experts prepares first draft and emails to objectors' experts. This should be done quickly while contents of meeting are fresh.
- Objectors' experts email comments on draft written statement to all experts.
  - One of Applicant's experts prepares final joint written statement, considering comments from objectors' experts. If, based on the comments from objectors' experts, any disagreement exists as to how an issue is summarized, then this disagreement should be set forth in the final joint written statement.
  - One of Applicant's experts submits final joint written statement to all experts and to Applicant's attorney for distribution to parties.
- Adjourn meeting

Purpose of Joint Written Statement:
Excerpt from Rule 11(b)(5)(D)(II):

> "Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures."

The written statement is not admissible at trial. The statement will be provided to all the parties and will be used by the attorneys when preparing a statement that will be filed with the court setting forth the undisputed matters of fact and expert opinion and the disputed matters of fact and expert opinion that remain for trial.

Suggested Process to Prepare Joint Written Statement:
One of the last agenda items for the second meeting of the experts should be discussion of the process, schedule and content of the joint written statement. One of the Applicant's experts should take the lead and prepare the first draft of the statement and send it to the other experts in the case. This should be done immediately after the meeting. Opposers' experts should promptly provide comments to Applicant's experts. If the experts cannot agree on specific language in the statement, this disagreement should be noted in the document. For guidance only, the following is a suggested outline of a sample written statement of the experts.

Suggested Outline of Sample Written Statement of the Experts

Case No. [xxCWxxx]

Applicant: [name of applicant]

Joint Statement of Undisputed Matters of Fact and Expert Opinion and Remaining Disputed Matters of Fact and Expert Opinion

[Date]

In accordance with Water Court Rule 11(b)(5)(D)(II) and the Case Management Order in Case No. [xxCWxxx], the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures. The first meeting of the experts working

on this case was held at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. The second meeting of the experts in this application met at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. A draft of the joint written statement was prepared by [expert for applicant] and was delivered to the experts for objectors [objector No. 1, name of expert(s)], [objector No. 2, name of expert(s)], [objector No. 3, name of expert(s)] on [date]. Written comments were received via email from [name of expert] on [date] and [name of expert] on [date]. The following summarizes the undisputed the disputed matters of fact and expert opinion.

Undisputed Matters of Fact and Expert Opinion

[The following is a small sample list of possible matters, depending on the case involved]

1. Use of the Glover bounded alluvial aquifer method with the input parameters included in Table x of the Applicant's Supplemental Expert Report is an appropriate method to determine the lagging of stream depletions from the subject wells included in the application.
2. A study period of 1950 through 2003 is an acceptable period of analysis for historical use of the xyz Ditch.
3. The historically irrigated area for the XYZ Ditch was 120 acres.
4. The historical cropping pattern for the XYZ Ditch was 50% corn and 50% alfalfa.
5. There is sufficient unappropriated water available in the Hopeful River Basin to justify the junior conditional storage right for the ABC Reservoir.
6. Use of a Modflow-based numerical ground water model is an appropriate method for estimating lagging of recharge accretions.

Remaining Disputed Issues of Fact and Expert Opinion.

[The following is a small sample list of possible matters, depending on the case involved]

1. Whether or not the assumed 60 percent maximum irrigation field efficiency is appropriate for the subject irrigated lands under the xyz Ditch
2. Whether or not the 120 acres will dry up following the cessation of irrigation, or will evapotranspiration occur from shallow ground water.
3. Whether or not separate flow meters are needed to measure water pumped to each separate use under the wells.
4. Whether or not a 5 year projection tool for the plan for augmentation is sufficiently long to prevent injury.
5. Whether or not the Applicant has established a specific plan to use the water stored in the ABC Reservoir for industrial uses.
6. Whether or not the method of calculating future evaporation from the ABC Reservoir proposed by the Applicant is sufficient to prevent injury.
7. Whether the GGG Ditch historically irrigated 100 acres of land. Some of the objectors feel that there is insufficient factual basis to support the claimed 100 acres, and assert that additional investigation is needed.
8. Whether the river conductance value used by the Applicant in its Modflow River Package is correct.

Signed,

_____ _____

[Expert No. 1] [Expert No. 2]

_____ _____

[Expert No. 3] [Expert No. 4]

Rule 12. Procedure Regarding Decennial Abandonment Lists

For all decennial abandonment lists filed by the Division Engineers pursuant to C.R.S. § 37-92-401(4), the following procedures apply:

a. The water clerk shall cause notice of the availability of the final decennial abandonment list to be included in the resume and published in accordance with C.R.S. § 37-92-401(4)(d). In addition, the water clerk shall include the revised or unrevised final decennial abandonment list in its entirety in the copy of the resume described in C.R.S. § 37-92-302(3)(a) posted on the water court's web site in accordance with C.R.S. § 37-92-302(3)(c)(I)(D). Neither the water clerk nor the Division Engineer is required to publish the final decennial abandonment list in any newspaper. The published notice and resume for the final decennial abandonment list shall include notice of the deadline for filing any protest.

b. Any protest filed pursuant to C.R.S. § 37-92-401(5) shall automatically trigger a bifurcation from the original case in which the decennial abandonment list was filed without the necessity of a motion to bifurcate or any bifurcation order by the court. Each

bifurcated protest case shall be assigned a new case number by the water clerk, shall include a reference to the original abandonment case number, and shall be published in the water court resume and newspapers in accordance with C.R.C.P. Rule 90 and C.R.S. § 37-92-302(3) and with notice of the deadline for any entry of appearance under Water Court Rule 12(d). The protestor shall be responsible for the costs of publication. Parties to the bifurcated protest cases shall not be considered parties to the original abandonment case for the purpose of filings and service in the original abandonment case, except as provided in Water Court Rule 12(j).

c. All other Water Court Rules, with the exception of Water Court Rules 3, 6 and 9, apply to the bifurcated protest cases. For the purposes of the applicable Water Court Rules, the final decennial abandonment list shall be considered an application, the Division Engineer shall be considered the applicant, any protest shall be considered a statement of opposition, and any protestant shall be considered an opposer.

d. Any person who may be affected by the subject matter of a protest or by any ruling thereon and desiring to participate in any hearing pursuant to C.R.S. § 37-92-401(6) must file an entry of appearance by August 31, 2022, or the respective tenth anniversary thereafter. If the water judge permits additional protests after June 30, 2022, or the respective tenth anniversary thereafter, as will serve the ends of justice pursuant to C.R.S. § 37-92-401(6), then any entry of appearance under this Water Court Rule 12(d) must be filed by the last day of the second month following the month in which an additional protest is filed. An entry of appearance must identify: (1) the portion of the decennial abandonment list with respect to which the appearance is being made; (2) whether the person is participating in support or in opposition to abandonment of the subject water right(s); (3) any factual and legal basis for any allegation that the person may be affected by the subject matter of the protest or by a ruling on the protest; and (4) any claim of ownership in the subject water right(s).

e. The at-issue date for a bifurcated protest case shall be 49 days after the deadlines for filing an entry of appearance by any potentially affected persons under Water Court Rule 12(d).

f. For the purpose of the proceedings within the bifurcated protest case, any person entering an appearance under Water Court Rule 12(d) in support of abandonment of the subject water right(s) shall have the same case management deadlines and order of presentation at hearing as the Division Engineer unless otherwise ordered by the water judge. Any person entering such an appearance in opposition to abandonment of the subject water right(s) shall have the same case management deadlines and order of presentation at hearing as the protestant(s) unless otherwise ordered by the water judge.

g. Any person who wishes to participate in a bifurcated protest case after the deadline for filing an entry of appearance must intervene pursuant to Water Court Rule 7.

h. If it is necessary to determine the ownership of or right to use a water right that is the subject of a protest to the decennial abandonment list in order to determine whether the water right has been abandoned, in whole or in part, then the water judge may exercise jurisdiction over any such controversy. If the water judge elects to exercise jurisdiction over such a controversy, the water judge shall order any party to serve additional notice under C.R.C.P. Rule 4, and to file such supplemental pleadings as the water judge finds necessary or appropriate to resolve such controversy. Any such controversy may be resolved by separate hearing and under a preliminary case management order prior to implementing the case management procedures of Water Court Rule 11 as to the Division Engineer's claim of abandonment. If the water judge does not elect to exercise jurisdiction over such controversy, then the water judge may order the applicable parties to commence a separate proceeding to resolve the controversy and stay further proceedings on the abandonment claim until the that controversy is resolved. If the water judge exercises jurisdiction over issues of ownership in such abandonment proceedings, the water judge will consider any requests by a party as to the place of trial, and venue is proper within any county in the water division notwithstanding C.R.C.P. 98.

i. Any order of the water court in a bifurcated protest case resolving the alleged abandonment of all or part of any water right that is the subject of a protest shall be entered in the bifurcated protest case and in the original abandonment case.

j. Within 63 days of resolution of all bifurcated protest cases, the Division Engineer shall file a motion in the original abandonment case for a judgment and decree listing: (1) the final decennial abandonment list as filed with the court by the Division Engineer; (2) identification of all orders by case number and date in the bifurcated protest cases and the resolution of the alleged abandonment of all or part of any water right that was the subject of a protest; and (3) a complete listing of the water rights, in whole or in part, abandoned by the water court. No conferral with any person shall be required prior to the Division Engineer filing the motion. In each bifurcated protest case, the Division Engineer shall simultaneously file notice of the filing of the motion in the original abandonment case and a copy of the proposed judgment and decree. Any party to a bifurcated protest case objecting to the form of the proposed judgment and decree may file a response to the Division Engineer's motion in the original abandonment case solely to identify any clerical errors in the proposed judgment and decree within 21 days of the date that notice of the motion's filing was filed and served in the bifurcated protest case, and the Division Engineer may file a reply.

Source: Entire rule added and effective May 31, 2018; (b) amended and effective December 13, 2018.

Rule 13. Modification of Rules

The requirements of these rules may be modified with approval of the water court upon agreement of the parties, or by the court, in exceptional cases to meet emergencies or to avoid substantial injustice or great hardship. Any request for modification shall be presented to the judge before whom the case is pending and shall state in writing the grounds supporting it. The opposing party shall be given reasonable notice and an opportunity to contest the request in writing.

Source: Entire chapter added August 13, 1990, effective September 1, 1990; entire rule amended and adopted June 24, 2004, effective July 1, 2004; committee comment added and adopted November 3, 2011, effective January 1, 2012; entire rule renumbered, effective May 31, 2018.

Editor's note: This Rule was numbered originally as Rule 12, but was renumbered to Rule 13 in accordance with Rule Change 2018(08), effective May 31, 2018.

COMMITTEE COMMENT

The amendment to the water court rules effective January 1, 2012 adopt the ''rule of 7'' numbering for procedural time periods specified in these water court rules. Statutorily-prescribed time periods incorporated into the rules have not been changed, except to express those time periods in numbers instead of words.

The amendments to water court rule 3 effective January 1, 2012 address applications that contain multiple claims, rights and structures, including applications filed by multiple applicants. Deletion of the words ''and that each has the same ownership'' from the former water court rule 3(b), now numbered water court rule 3(b)(1), is not intended to alter or change any provision of law pertaining to ownership of a claim, right or structure that may otherwise be applicable to the adjudication of an application.

APPENDIX TO CHAPTER 36

Uniform Local Rules for all State Water Court Divisions

APPENDIX TO CHAPTER 36

COLORADO WATER COURT FORMS

(Forms are available on the Colorado judicial branch website at https://www.courts.state.co.us.)

SPECIAL FORM INDEX

INDEX TO
UNIFORM LOCAL RULES
FOR ALL STATE WATER COURT DIVISIONS

CHAPTER 37

Rules Governing the Commissions on Judicial Performance

Repealed by the

SUPREME COURT OF COLORADO

February 15, 2018

CHAPTER 38

Public Access to Information and Records

Adopted by the

SUPREME COURT OF COLORADO

February 23, 1999, effective immediately

ANALYSIS BY RULE

CHAPTER 38

PUBLIC ACCESS TO INFORMATION AND RECORDS

Rule 1. Public Access to Information and Records

These rules shall be known and cited as the Public Access to Information and Records Rules or P.A.I.R.R.

The purpose of this rule is to provide the public with reasonable access to Judicial Branch documents and information while protecting the privacy interests of parties and persons. In addition, this rule is intended to provide direction to Judicial Branch personnel in responding to public records requests.

The Chief Justice is authorized to issue directives regarding access of the public to documents and materials made, received, or maintained by the courts. Such Directives of the Chief Justice are orders of the Supreme Court and shall govern release of records to the public. The Chief Justice on behalf of the Supreme Court is authorized, in the implementation of this rule, to appoint committees and assign custodians of records, and to designate the functions of such committees and custodians of records, as the Chief Justice may determine.

The Chief Justice has issued CJD 05-01, which is authorized pursuant to this rule without further action. Pursuant to CJD 05-01, the Chief Justice has appointed a Public Access Committee to adopt policy. The policy of that Committee is effective without further action. Because policy concerning public access to information is in development stages, as are components of the ICON system, the policy of any duly authorized committee appointed by the Chief Justice is effective when adopted. This rule is adopted by the Court on an interim basis, pending a final proposal by the Public Access Committee, public comment thereon, and further action by the court.

Custodians of records within the judicial branch are not authorized to release any records or material to the public inconsistent with this rule or the Chief Justice Directives. This rule is intended to be a rule of the Supreme Court within the meaning of the Colorado Public Records Act, including sections 24-72-204(1)(c) and 24-72-305(1)(b) (7 C.R.S.).

Source: Entire chapter adopted and effective February 23, 1999; entire rule amended and effective February 29, 2012; entire chapter amended and effective October 30, 2015.

Rule 2. Public Access to Administrative Records of the Judicial Branch

This rule governs public access to all records maintained for the purpose of managing the administrative business of the Judicial Branch of the State of Colorado. Using the Colorado Open Records Act (CORA), sections 24-72-200.1 to -206, C.R.S. (2015), as a guide, the Supreme Court published a proposed Rule governing access to administrative records of the Judicial Branch, and the Chief Justice signed Chief Justice Directive 15-01 to govern interim access to administrative records. The Colorado Supreme Court received comments and held a public hearing on the proposed rule. The Supreme Court revised the rule in response to the comments received. Although CORA served as a guide in drafting this rule, the rule and CORA are not identical. Many of the rule's deviations from CORA reflect simple changes to language and streamlined organization of the rule for clarity and to better serve the public. Other, substantive deviations from CORA reflect the unique nature of the records and operations of the Judicial Branch. These changes are addressed in comments throughout the rule. This rule pertains only to administrative records and does not contemplate or control access to court records, which is governed by P.A.I.R.R. 1 and

Chief Justice Directive 05-01. This rule is intended to be a rule of the Supreme Court within the meaning of CORA, including section 24-72-204(1)(c), C.R.S. (2015).

SECTION 1

DEFINITIONS

For purposes of Chapter 38, Rule 2, the following definitions apply:

(a) ''Administrative record'' means a record maintained for the purpose of managing the business or performing the duties of the Judicial Branch that is not defined as a court record in P.A.I.R.R. 1 and Chief Justice Directive 05-01.

(b) ''Confidential personal information'' means a person's home address, telephone number, social security number, birth date, bank account information, tax identification number, personal signature, personal email addresses, or similar unique identifying information other than a person's name.

COMMENT: CORA does not define ''confidential personal information'' or any similar term. The disclosure provisions in this rule permit the disclosure of many records so long as confidential personal information is redacted or otherwise not disclosed. This definition provides clear guidance to the public and to custodians regarding what information can be disclosed.

(c) ''Custodian'' means the person designated by federal or state statute, court rule, or court order as the keeper of the record, regardless of possession. Where no federal statute or regulation, state statute, court rule, or court order designates, the custodian is as provided in this subsection:

(1) For Colorado State Courts and Probation, the custodian is the Chief Justice. The Chief Justice has delegated custodial authority to the following: the chief judge in each judicial district; the chief judge of the court of appeals; and the presiding judge of the Denver Probate and Denver Juvenile courts in their respective courts. Each chief judge or presiding judge may delegate authority to the district administrator, clerk of court, chief probation officer, or other designee.

(2) For the Office of the State Court Administrator, the custodian is the State Court Administrator or his or her designee.

(3) For the Office of the Presiding Disciplinary Judge, the custodian is the Presiding Disciplinary Judge or his or her designee.

(4) For the Office of Judicial Performance Evaluation, the custodian is the Executive Director of the Office of Judicial Performance Evaluation or his or her designee.

(5) For the Office of Attorney Regulation Counsel and the Office of Attorney Registration, the custodian is the Attorney Regulation Counsel or his or her designee.

(6) For the Colorado Lawyer Assistance Program, the custodian is the Executive Director of the Colorado Lawyer Assistance Program or his or her designee.

(7) For the Colorado Attorney Mentor Program, the custodian is the Executive Director of the Colorado Attorney Mentor Program or his or her designee.

(8) For the Office of Alternate Defense Counsel, the custodian is the Director of the Office of Alternate Defense Counsel or his or her designee.

(9) For the Office of the Child's Representative, the custodian is the Executive Director of the Office of the Child's Representative or his or her designee.

(10) For the Office of the State Public Defender, the custodian is the State Public Defender or his or her designee.

(11) For the Office of the Respondent Parents' Counsel, the custodian is the Executive Director of the Office of the Respondent Parents' Counsel or his or her designee.

(d) ''Financial record'' means any documentation maintained to show the receipt, management or disbursement of funds by the Judicial Branch.

(e) The ''Judicial Branch'' includes Colorado State Courts and Probation, the Office of the State Court Administrator, the Office of the Presiding Disciplinary Judge, the Office of Judicial Performance Evaluation, the Office of Attorney Regulation Counsel, the Office of Attorney Registration, the Colorado Lawyer Assistance Program, the Colorado Attorney Mentor Program, the Office of Alternate Defense Counsel, the Office of the Child's

Representative, the Office of the State Public Defender, and the Office of the Respondent Parents' Counsel. The Judicial Branch does not include the Commission on Judicial Discipline, Independent Ethics Commission, or the Independent Office of the Child Protection Ombudsman.

COMMENT: The Independent Ethics Commission was created by article 29, section 5 of the Colorado Constitution, and is an independent and autonomous constitutional entity. The Supreme Court does not believe it is appropriate to promulgate a rule governing access to records of a separate constitutional entity. The Commission on Judicial Discipline is also a separate constitutional entity, created by article 6, section 23 of the Colorado Constitution. Section 24-72-401, C.R.S. (2015) governs the confidentiality of information and records of the Commission on Judicial Discipline. The Supreme Court presumes that the legislature intended section 24-72-401, C.R.S. (2015), and not CORA to control the confidentiality of Commission on Judicial Discipline records. The legislation creating the Independent Office of the Child Protection Ombudsman specifies that it is subject to CORA. § 19-3.3-102(5), C.R.S. (2015).

(f) ''Person'' means any natural person acting in an official or personal capacity, and any corporation, limited liability company, partnership, firm, or association.

(g) ''Person in interest'' means the person who is the subject of a record.

(h) ''Personnel file'' means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure under this rule or any other provision of law. ''Personnel file'' does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, dates of employment, classification, job title, job description, salary range, performance ratings, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

SECTION 2

ACCESS TO ADMINISTRATIVE RECORDS

(a) All Judicial Branch administrative records shall be available for inspection by any person at reasonable times, except as provided in this rule or as otherwise provided by federal statute or regulation, state statute, court rule, or court order. The custodian of any administrative record shall make policies governing the inspection of administrative records that are reasonably necessary to protect the records and prevent unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office.

(b) The custodian must take reasonable measures to locate any specific administrative record sought and to ensure public access to the administrative record without unreasonable delay or unreasonable cost.

(c) This rule does not preclude the Judicial Branch from obtaining and enforcing trademark or copyright protection for any administrative record. The Judicial Branch is specifically authorized to obtain and enforce such protection in accordance with applicable federal law. This authorization does not restrict public access to or fair use of copyrighted materials and does not apply to writings that are merely lists or other compilations.

SECTION 3

EXCEPTIONS AND LIMITATIONS ON ACCESS TO RECORDS

(a) Exceptions and Limitations on Access to Records. The custodian of any administrative record shall allow any person to inspect a record or any portion thereof except based on the following grounds or as provided in subsection (b) or (c):

(1) Such inspection would be contrary to any state statute;

(2) Such inspection would be contrary to any federal statute or regulation;

(3) Such inspection is prohibited by court order or court rule; or

(4) Such inspection could compromise the safety or security of a Judicial Branch employee.

COMMENT: Paragraph (4) of this subsection is not in CORA. This provision recognizes that the records of the Judicial Branch contain information that could jeopardize the safety or security of its employees, and the Judicial Branch has an obligation to its employees to not release such information.

(b) May Deny Inspection. Unless otherwise provided by federal statute or regulation, state statute, court rule, or court order, the custodian may deny inspection of the following records on the ground that disclosure would be contrary to the public interest:

(1) Information related to research projects conducted by or in affiliation with the Judicial Branch.

(2) E-mail addresses provided by a person to the Judicial Branch for the purpose of future electronic communications to the person from the Judicial Branch.

(3) E-mail addresses of any person currently or formerly associated with the Judicial Branch by virtue of employment, internship, volunteer position, contracting, or appointment to a board, commission, or committee.

COMMENT: CORA does not have a similar provision governing e-mail addresses of employees. This provision is intended to protect against improper ex parte contacts and to protect personal and Judicial Branch e-mails from being subject to phishing, marketing, or other security risks.

(4) Individual signatures that constitute confidential personal information.

COMMENT: This provision is not in CORA. The Judicial Branch protects individual signatures because they can be misappropriated and subject to improper and illegal use.

(5) Contracts and assignment letters related to the Senior Judge Program unless confidential personal information has been redacted.

COMMENT: The Senior Judge Program is unique to the Judicial Branch, and the Judicial Branch has an interest in protecting the confidential personal information of judges in the Senior Judge Program.

(6) Financial records of judges and justices, Judicial Branch employees, or payees, unless confidential personal information has been redacted.

COMMENT: The rule is intended to protect the confidential personal information of judges and justices, Judicial Branch employees, and payees. Judges and justices are required to provide periodic financial disclosures to the Secretary of State. §§ 24-6-202, 203, C.R.S. (2015).

(7) Written communication from the public implying that the author intended the communication to be confidential and written communication from the public for the purpose of requesting assistance with personal matters affecting the author that are not publicly known, as well as any communication from the Judicial Branch in response.

COMMENT: The Judicial Branch regularly receives unsolicited correspondence from the public with highly personal information. This provision recognizes that disclosure of these personal communications may be contrary to the public interest. CORA contains a similar provision regarding correspondence between a constituent and an elected official on a personal and private matter. § 24-72-202(6)(a)(II)(C), C.R.S. (2015).

(8) Records related to legislation, including documents related to fiscal notes, proposed or introduced legislation, and the drafting of bills or amendments.

COMMENT: CORA addresses drafts of legislation and documents relating to drafting as part of its ''work product'' exception to disclosure. § 24-72-202(6.5)(b), C.R.S. (2015). The Judicial Branch takes a similar approach here.

(9) All data and records pertaining to administration of a licensing or certification examination, including application materials, test questions, applicant answers, scoring keys, all grading information and materials, and graded answers.

COMMENT: This provision is not in CORA. The Judicial Branch administers certain licensing and certification examinations, including the bar examination for attorneys. This provision recognizes that disclosure of exam materials or individual application materials may be contrary to the public interest.

(10) Security records, including records regarding security plans developed or maintained by the Judicial Branch, such as:

(A) Details of security plans and arrangements, investigation reports, audit reports, assessments reports, specific incident reports, warnings, investigations, emergency plans, building floor plans and blueprints, building access details, equipment, visitor and vendor logs, surveillance, network and systems topology, and network and systems security design;

(B) Reports of loss that relate to security measures;

(C) Any records of the intelligence information or security procedures of any sheriff, prosecuting attorney, or other law enforcement agency, or investigatory files compiled for any law enforcement purpose related to security measures;

(D) Portions of records of the expenditure of public moneys containing details of security plans and arrangements or investigations. Records of the expenditure of public moneys on security arrangements or investigations, including contracts for security plans and arrangements and records related to the procurement of, budgeting for, or expenditures on security systems, are otherwise available for inspection; and

(E) Any record provided by another public entity that contains details of security arrangements or investigations. The Judicial Branch custodian must refer a request to inspect the record to the public entity that provided the record and shall disclose to the requestor the name of the public entity.

This paragraph (10) does not prohibit the custodian from transferring records containing details of security arrangements or investigations to the Division of Homeland Security and Emergency Management in the Department of Public Safety, the governing body of any city, county, or other political subdivision of the state, or any federal, state, or local law enforcement agency. The custodian shall not transfer any record received from a nongovernmental entity without the prior written consent of the entity unless such information is already publicly available.

COMMENT: CORA contains a similar provision. § 24-72-204(2)(a)(VIII), C.R.S. (2015). This rule provides more specific detail on the types of security records maintained by the Judicial Branch.

Notwithstanding any provision to the contrary in this subsection (b), the custodian shall deny inspection of any record that is confidential by federal statute or regulation, state statute, court rule, or court order.

(c) Must Deny Inspection. Unless otherwise provided by federal statute or regulation, state statute, court rule, or court order, the custodian must deny inspection of the following records:

(1) Medical, mental health, sociological, and scholastic achievement data on individual persons and groups from which individuals can be identified, unless requested by the person in interest.

(2) Personnel files.

This paragraph (2) does not prevent the person in interest from requesting information from his or her own personnel file or from granting written, signed permission for a third party to access specific components of his or her personnel file that are subject to inspection by the employee.

(3) (A) Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file; except that, an administrative agency investigating the complaint may, upon a showing of necessity to the custodian of records, gain access to information necessary to the investigation of such a complaint. This paragraph shall not apply to records of sexual harassment complaints and investigations that are included in court files and records of court proceedings. Disclosure of all or a part of any records of sexual harassment complaints and investigations to the person in interest is permissible to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved. This paragraph shall not preclude disclosure of all or part of the results of an investigation of the general employment policies and procedures of an agency, office, department, or division, to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved.

(B) A person in interest under this paragraph (3) includes the person making a complaint and the person whose conduct is the subject of such a complaint.

(C) A person in interest may make a record maintained pursuant to this paragraph (3) available for public inspection when such record supports the contention that a publicly reported, written, printed, or spoken allegation of sexual harassment against such person is false.

(4) Letters of reference.

(5) Trade secrets and proprietary information including copyrighted and trademarked materials, and other intellectual property constituting trade secrets and proprietary information; software programs; network and systems architectural designs; network, system, and individual login and logon credentials and passwords; source code; source documentation; project management materials developed or maintained by the Judicial Branch; information in tangible or intangible form relating to released and unreleased Judicial Branch software or hardware, user interface specifications, use case documents, images and design screens, database design structures and architecture; records of investigations conducted by Judicial Information Security, records of the intelligence information or security procedures relating to security events, incidents, or breach, and security structure, architecture, procedures, policies, and investigations; the Judicial Branch's original design ideas; the Judicial Branch's non-public business policies and practices relating to software development and use; and the terms and conditions of any actual or proposed license agreement or other agreement concerning the Judicial Branch's products and licensing negotiations.

This paragraph (5) does not prohibit the custodian from transferring records to the Colorado Chief Information Security Officer or other state or federal agencies as determined to be necessary by the custodian for information security purposes.

COMMENT: CORA contains a similar provision. § 24-72-204(3)(a)(IV), C.R.S. (2015). This provision of the rule is broader than CORA and contains additional protection of information technology records, including trade secrets and proprietary information. The Judicial Branch relies heavily on its Information Technology infrastructure and has invested in proprietary systems that may not be subject to disclosure.

(6) Library and museum records contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions.

(7) Privileged information; confidential legal, commercial, financial, geological, or geophysical data; and confidential personal information.

(8) Names, addresses, e-mail addresses, telephone numbers, and personal financial information of users of public facilities or cultural services that are owned and operated by the Judicial Branch. This paragraph does not prohibit the publication of such information in an aggregate or statistical form if the identity, location, or habits of individuals are not revealed. This paragraph does not prohibit the custodian from transmitting data to any agent of an investigative branch of a federal agency or any criminal justice agency as defined in section 24-72-302(3), C.R.S. (2015), who makes a request to the custodian to inspect such records and who asserts that the request for information is reasonably related to an investigation within the scope of the agency's authority and duties.

(9) With the exception of any records that are accessible pursuant to C.R.C.P. 251, any records related to reports of misconduct made to the Office of Attorney Regulation Counsel.

COMMENT: This provision is not in CORA. Records of reports of misconduct made to the Office of Attorney Regulation Counsel are governed by C.R.C.P. 251 and that Rule should not be circumvented by P.A.I.R.R. 2.

(10) Useful Public Service supervision files. This paragraph does not prevent the disclosure of records related to nonprofit agencies partnering with the Judicial Branch in the Useful Public Service program once signature verification pages have been redacted.

COMMENT: This provision is not in CORA. Useful Public Service supervision files are unique to the Judicial Branch.

(11) Portions of records that reveal a crime victim's confidential personal information.

COMMENT: This provision is not in CORA. This rule recognizes the confidentiality concerns of crime victims and is intended to protect their safety, security, and confidential personal information.

(12) Juror records, except as provided by federal or state statute, court rule, or court order. This paragraph (12) does not prohibit the publication or disclosure of information in de-identified aggregate or statistical form.

COMMENT: This provision is not in CORA. Juror records are unique to the Judicial Branch and must remain confidential to protect juror safety and security. Certain juror records are addressed by statute. §§ 13-71-101 to -145, C.R.S. (2015).

(13) Collection files pertaining to a person, including collections investigator files, with the exception that such files shall be available to the person in interest to the extent permitted by federal statute or regulation, state statute, court rule, or court order. Information regarding restitution collections efforts and payment plans shall be available to the victim(s) of the offender's crime(s) after confidential personal information has been redacted. Aggregate or statistical information related to collection files is available for inspection.

COMMENT: This provision is not in CORA. The Judicial Branch is responsible in many cases for collections and collections investigations related to court costs, fines, fees, and restitution. These files contain confidential personal and financial information. This provision strikes a balance between protection of certain offender financial information and information available to a crime victim owed restitution.

(14) Search warrants that do not have a return of service, except when requested by the law enforcement agency that sought the warrant.

COMMENT: This provision is not in CORA. Search warrant records are unique to the Judicial Branch, and search warrant records without a return of service may contain confidential case or investigation information.

(15) Individual-level responses to surveys conducted by or for the Judicial Branch to collect Judicial Branch performance evaluation information. The aggregate results of such surveys are available for inspection.

COMMENT: This provision is not in CORA. The Judicial Department relies upon honest and frank feedback regarding the performance of the branch. If individual-level responses are not expected to be confidential, individuals may be dissuaded from providing reliable evaluations.

(16) Draft reports and related documents prepared by or for the Judicial Branch for internal use in evaluating the performance of the Judicial Branch.

COMMENT: This provision is consistent with the definition of ''work product'' under CORA. §§ 24-72-202(6), (6.5), C.R.S. (2015).

(17) Reports and related documents prepared by the Judicial Branch to monitor protected party proceedings unless ordered by a judge in a specific court action. Aggregate or statistical information related to protected party proceedings is available for inspection.

COMMENT: This provision is not in CORA. Protected party proceedings are unique to the Judicial Branch, and confidentiality in these cases must be maintained to protect minors and those who do not have the capacity to proceed in court on their own.

(18) Purchasing records related to a service or product purchased from a vendor that are determined to be confidential pursuant to applicable procurement rules. Records related to the purchasing process, including criteria and scoring, are not available for inspection until the purchasing process is finalized and any information identifying the scorekeeper on the scoring sheets has been redacted.

COMMENT: Confidential purchasing records are addressed generally in CORA as confidential commercial and financial information. § 24-72-204(3)(a)(IV), C.R.S. (2015). This provision of the rule specifies more clearly that purchasing records determined to be confidential under the applicable procurement rules cannot be disclosed.

(19) The following financial records:

(A) Identifying bank account information such as bank account number, Public Deposit Protection Act account number, and account owner signature card;

(B) Federal tax identification information including Employer Identification Number; and

COMMENT: This provision is not in CORA. The Judicial Branch does not disclose federal tax information.

(C) Financial records that reveal a crime victim's or a witness's confidential personal information.

COMMENT: This provision is not in CORA. The Judicial Branch has a strong interest in protecting the confidential personal information of witnesses and crime victims.

(20) Records regarding an independent contractor's personal financial information and records maintained for the purpose of evaluating an independent contractor's contract with respect to qualifications and performance under the contract, subject to the disclosures allowed under paragraph (18) of this subsection.

(21) Investigation records, such as:

(A) Any record of civil or administrative investigations authorized by federal statute or regulation, state statute, court rule, or court order conducted by the Judicial Branch unless the record is available for inspection pursuant to federal statute or regulation, state statute, court rule, or court order; and

(B) Any record of an internal personnel investigation, except that records of actions taken based on such investigation must be open to inspection. For complaints involving sexual harassment, records of the internal personnel investigation, including records of actions taken based upon such investigation, are not open to inspection except as provided in Section (3)(c)(3). Any records of investigations referred to the Commission on Judicial Discipline are governed by the Colorado Rules of Judicial Discipline.

COMMENT: CORA does not specifically address internal personnel investigations. This rule strikes a balance between providing a thorough and confidential process for investigating personnel issues and disclosing any action taken as a result of the investigation.

(22) Judicial application records submitted by or on behalf of an applicant for any judicial office in any court of record who is not listed on the nominee list certified to the governor as described in article VI, section 20 of the Colorado Constitution, unless local commission rules permit disclosure of such information. Portions of the Judicial Nominating Commission Application for Colorado State Court Judgeship designated as confidential, including letters of reference, are not available for inspection. The public portions of the applications of the nominees on the list certified to the governor are available for inspection until a judicial appointment is made. After a judicial appointment is made, the public portions of the application only of the person appointed are available for inspection.

COMMENT: Judicial application records are unique to the Judicial Branch. However, these applications are similar to applications for an executive position, which are protected from disclosure under CORA. § 24-72-204(3)(a)(XI)(A), C.R.S. (2015). The rule recognizes that some local commission rules may permit disclosure of certain information regarding all applicants, and the rule permits such disclosure.

(23) Work product, including all advisory or deliberative materials assembled for the benefit of the Judicial Branch that express an opinion or are deliberative in nature and are communicated for the purpose of assisting the Judicial Branch in performing its duties, such as:

(A) Communication, notes, and memoranda that relate to or serve as background information for such duties; and

(B) Preliminary drafts and discussion copies of documents that express a decision, determination, or conclusion by the Judicial Branch.

(24) Records protected under the common law governmental or deliberative process privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the Judicial Branch, unless the privilege has been waived. In some circumstances, public disclosure of such records may cause substantial injury to the public interest. If any administrative record is withheld pursuant to this paragraph, the custodian must provide a sworn statement describing each record withheld, explaining why each such document is privileged and why disclosure would cause substantial injury to the public interest. If the requestor so requests, the custodian must apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in subsection (d) of this section. All persons entitled to claim the privilege with respect to the

records in issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.

(25) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of a judge or court as part of the judicial decision-making process utilized in disposing of cases and controversies before Colorado courts unless filed as part of the court record and thus subject to Chief Justice Directive 05-01.

COMMENT: This provision is not in CORA.

(d) Petition for Order Permitting Restriction.

(1) In addition to any of the foregoing, if in the opinion of the custodian access to the contents of a record would do substantial injury to the public interest, notwithstanding the fact that the record might otherwise be available for inspection, or if the custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if this rule restricts access to the record, the custodian may petition the district court of the district in which the record or the custodian is located for an order permitting restriction of access to the record or for the court to determine if access to the record is restricted. A hearing on the petition shall be held at the earliest practical time. The person seeking access to the record must be served with notice of the hearing pursuant to the Colorado Rules of Civil Procedure and has the right to appear and be heard.

(2) In the case of a record otherwise available for inspection pursuant to this Rule, after a hearing the court may, upon a finding that access would cause substantial injury to the public interest, issue an order authorizing the custodian to restrict access. In the case of a record that may be restricted from access pursuant to this rule, after a hearing the court may, upon a finding that access to the record is restricted, issue an order restricting access. In an action brought pursuant to this subsection (d), the custodian has the burden of proof.

(3) The court costs and attorney fees provision of section 5 does not apply to petitions filed pursuant to this subsection (d) if the custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if this rule restricts access to the record without a ruling by the court.

SECTION 4

PROCEDURE TO ACCESS RECORDS

COMMENT: This rule creates a different process than CORA for accessing records but with similar timeframes. Under the rule, the Judicial Branch responds to a request for inspection within three business days of receipt of the request. Certain extenuating circumstances specified in the rule may require additional time for a response. Any fees charged must be consistent with Chief Justice Directive 06-01, but the fees are similar to the fees under CORA.

(a) Request for Inspection. Each Judicial Branch agency will develop and make information available to the public outlining how to obtain access to administrative records pursuant to this rule. Any request for inspection must be made in accordance with the adopted procedures.

(b) Response. Within three business days of receipt of a request for inspection, the custodian must provide one or more of the following responses:

(1) The record is available for inspection.

(A) When a record is available for inspection, the custodian must provide access to a record or provide written notice of a time and location for inspection of the record within a reasonable time. Production is subject to payment of any fee required under subsection (c) of this section; and

(B) The custodian may determine whether the record will be provided in print or electronic format. If the requestor is unable to use or access records provided in electronic format, the custodian will provide a copy, printout, or photograph of the record.

(2) The record is not available for inspection.

(A) When a record is not available for inspection, the custodian must provide written notice that:

(i) The record requested is not maintained by the custodian to whom the request was made;

(ii) The request did not provide information sufficient to identify the record sought; or

(iii) The record is not available for inspection pursuant to section 3 of this rule.

(B) If the custodian denies access to a record, the requestor may request a written statement of the grounds for the denial. Upon receipt the custodian must, within a reasonable time, provide a written statement setting forth the grounds for denial.

(3) The custodian requires an additional seven business days to respond because extenuating circumstances exist. A finding that extenuating circumstances exist must be made in writing by the custodian and provided to the requestor. Extenuating circumstances exist only when:

(A) A broadly stated request is made that encompasses all or substantially all of a large category of records and the request is without sufficient specificity to allow the custodian reasonably to prepare or gather the records within the three-day period; or

(B) A broadly stated request is made that encompasses all or substantially all of a large category of records and the agency is unable to prepare or gather the records within the three-day period because all or substantially all of the resources necessary to respond to the request are dedicated to meeting an impending deadline or to a period of peak demand that is either unique or not predicted to recur more frequently than once a month; or

(C) The request involves such a large volume of records that the custodian cannot reasonably prepare or gather the records within the three-day period without substantially interfering with the custodian's obligation to perform other responsibilities.

(c) Fees.

(1) A custodian may impose a fee in response to a record request if the custodian has, before the date of receiving the request, either posted on the custodian's website or otherwise made publicly available a written policy that specifies the applicable conditions and fees for research, retrieval, redaction, copying, and transmission of a record. Assessment of fees shall be consistent with Chief Justice Directive 06-01. Where the fee for a certified copy or other copy, printout, or photograph of a record is specifically prescribed by federal statute or regulation, state statute, court rule, or court order, the specific fee shall apply.

(2) The custodian may notify the requestor that a copy of the record is available but will only be produced once the custodian either receives payment or makes arrangements for receiving payment for all costs associated with records research, retrieval, redaction, copying, and transmission and for all other fees lawfully imposed.

SECTION 5

RESOLUTION OF DISPUTES

(a) Any person denied inspection of a record under this rule may petition the district court of the district in which the record or the custodian is located for an order directing the custodian to show cause why the custodian should not permit inspection of the record. At least three business days before filing a petition with the district court, the person who has been denied inspection of a record must file a written notice with the custodian who denied inspection of the record informing the custodian that the person intends to file a petition with the district court. A hearing on a petition shall be held at the earliest practicable time.

(1) Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing requestor in an amount to be determined by the court. No court costs and attorney fees may be awarded to a person who is a party engaged in

litigation with a Judicial Branch agency and who petitions the court for an order pursuant to this section 5 for access to a record of the Judicial Branch agency if the court finds that the record sought is related to the pending litigation and is discoverable pursuant to applicable rules of procedure.

(2) If the court finds that the denial of the right of inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian if the court finds that the petition was frivolous, vexatious, or groundless.

(b) In defense against a petition for an order permitting inspection, the custodian may raise any issue that could have been raised and is not limited by any response under sections 3 or 4 of this rule.

Source: Entire chapter amended and effective October 30, 2015; section 1(c)(11) added and 1(e) amended, 3(c)(22) added and 3(c)(23) to 3(c)(25) renumbered, effective September 22, 2016; IP, section 1 IP(c), (e), and (e) comment, section 2(a), section 3 IP(b), (10) comment, IP(c), (c)(3), (c)(5), (c)(9), (c)(9) comment, (c)(12), (c)(12) comment, (c)(13), (c)(13) comment, (c)(18) comment, (c)(21), and section 4(c) amended and (c)(25) and (c)(25) comment added, effective May 31, 2018.

Rule 3. Media Coverage of Court Proceedings

(a) Expanded Media Coverage: A judge may authorize expanded media coverage of court proceedings, subject to the guidelines set forth below.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(A) ''Proceeding'' means any trial, hearing, or any other matter held in open court which the public is entitled to attend.

(B) ''Photograph'' and ''photography'' means all recording or broadcasting of visual images, by means of still photographs, videotape, television broadcasts, motion pictures, or otherwise.

(C) ''Expanded media coverage'' means any photography or audio recording of proceedings.

(D) ''Judge'' means the justice, judge, magistrate, or other judicial officer presiding over the proceedings. In proceedings with more than one judge presiding, any decision required shall be made by a majority of the judges.

(E) ''Media'' means any news gathering or reporting agency and the individual persons involved, and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, or any other news reporting or news gathering agency whose function it is to inform the public or some segment thereof.

(2) **Standards for Authorizing Coverage.** In determining whether expanded media coverage should be permitted, a judge shall consider the following factors:

(A) Whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial;

(B) Whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court; and

(C) Whether expanded media coverage would create adverse effects which would be greater than those caused by traditional media coverage.

(3) **Limitations on Expanded Media Coverage.** Notwithstanding an authorization to conduct expanded media coverage of a proceeding, there shall be no:

(A) Expanded media coverage of pretrial hearings in criminal cases, except advisements and arraignments;

(B) Expanded media coverage of jury voir dire;

(C) Audio recording or ''zoom'' close-up photography of bench conferences;

(D) Audio recording or close-up photography of communications between counsel and client or between co-counsel;

(E) Expanded media coverage of in camera hearings;

(F) Close-up photography of members of the jury.

(4) **Authority to Impose Restrictions on Expanded Media Coverage.** A judge may restrict or limit expanded media coverage as may be necessary to preserve the dignity of

the court or to protect the parties, witnesses, or jurors. A judge may terminate or suspend expanded media coverage at any time upon making findings of fact that: (1) rules established under this Rule or additional rules imposed by the judge have been violated; or (2) substantial rights of individual participants or rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

(5) **Conditions for Coverage.** Expanded media coverage shall be conducted only under the following conditions:

(A) Equipment Limitations.

(i) Video. Only one person at a time shall be permitted to operate a videotape, television, or motion picture camera. There shall be only one such camera at a time in the courtroom, except that, at the discretion of the judge, the camera operator may have a second camera. The camera operator may use a tripod, but shall not change location while court is in session.

(ii) Audio. The court's audio system shall be used if technically suitable and, in that event, there must be no interference with the court's use of its system. If the court's system is not technically suitable, then the person conducting expanded media coverage may install an audio recording system at his or her own expense upon first obtaining approval of the judge. All microphones and related wiring shall be unobtrusive and shall not interfere with the movement of those in the courtroom.

(iii) Still Cameras. Only one person at a time shall be permitted to operate still cameras, which shall make as little noise as possible. The still photographer may use a tripod, but shall not change location while court is in session.

(iv) Lighting. No movie lights, flash attachments, or sudden lighting changes shall be permitted during a proceeding. No modification or addition of lighting equipment shall be permitted without the permission of the judge.

(v) Operating Signals. No visible or audible light or signal (tally light) shall be used on any equipment.

(B) Pooling Arrangements. The media shall be solely responsible for designating one media representative to conduct each of the categories of expanded media coverage listed in subsection (I) of this section, and for arranging an open and impartial distribution scheme with a distribution point located outside of the courtroom. If no agreement can be reached on either of these matters, then there shall be no expanded media coverage of the type for which no pooling agreement has been made. Neither judges nor other court personnel shall be called upon to resolve any disputes concerning such pooling arrangements.

(C) Conduct of Media Representatives. Persons conducting expanded media coverage shall conduct themselves in a manner consistent with the decorum and dignity of the courtroom. The following practices shall apply:

(i) Equipment employed to provide expanded media coverage shall be positioned and operated so as to minimize any distraction;

(ii) Identifying marks, call letters, logos, symbols, and legends shall be concealed on all equipment. Persons operating such equipment shall not wear clothing bearing any such identifying information;

(iii) Equipment used to provide expanded media coverage shall not be placed in, or removed from, the courtroom while court is in session. No film, videotape, or lens shall be changed within a courtroom while court is in session.

(6) **Procedures.** The following procedures shall be followed in obtaining authorization for expanded media coverage:

(A) Request for Expanded Media Coverage. A written request shall be submitted to the judge at least one day before expanded media coverage is requested to begin, unless a longer or shorter time is required or permitted by the judge. Copies of the request shall be given to counsel for each party participating in the proceeding. The request shall include the following:

(i) The name, number, date and time of the proceeding;

(ii) The type (audio, video or still photography) of expanded media coverage requested and a description of the pooling arrangements required by section (e)(II), if any, including the identity of the designated representatives.

(B) Objections. Any party or witness may lodge with the judge a written objection to expanded media coverage of all or a portion of a proceeding.

(C) Judicial Authorization. The judge shall rule on a request or objection within a reasonable time prior to the proceeding or promptly after the request or objection if the proceeding has begun. The ruling shall be made on the record and the reasons therefore set forth briefly.

(D) The media or any witness may not appeal, or seek review by original proceeding, the granting or denial of expanded media coverage. A party to the case may seek review of a ruling by original proceeding, if otherwise appropriate, or by post-trial appeal.

(b) Other Use of Media.

(1) A judge may authorize the use of electronic or photographic means for the perpetuation of a record, or for purposes of judicial administration.

(2) A judge may authorize the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

Source: Entire rule added and adopted June 24, 2010, effective July 1, 2010; entire chapter amended and effective October 30, 2015.

ANNOTATION

Law reviews. For article, ''Expanded Media Coverage in Colorado Courts'', see 40 Colo. Law. 39 (Sept. 2011).

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litigation with a Judicial Branch agency and who petitions the court for an order pursuant to this section 5 for access to a record of the Judicial Branch agency if the court finds that the record sought is related to the pending litigation and is discoverable pursuant to applicable rules of procedure.

(2) If the court finds that the denial of the right of inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian if the court finds that the petition was frivolous, vexatious, or groundless.

(b) In defense against a petition for an order permitting inspection, the custodian may raise any issue that could have been raised and is not limited by any response under sections 3 or 4 of this rule.

Source: Entire chapter amended and effective October 30, 2015; section 1(c)(11) added and 1(e) amended, 3(c)(22) added and 3(c)(23) to 3(c)(25) renumbered, effective September 22, 2016; IP, section 1 IP(c), (e), and (e) comment, section 2(a), section 3 IP(b), (10) comment, IP(c), (c)(3), (c)(5), (c)(9), (c)(9) comment, (c)(12), (c)(12) comment, (c)(13), (c)(13) comment, (c)(18) comment, (c)(21), and section 4(c) amended and (c)(25) and (c)(25) comment added, effective May 31, 2018.

Rule 3. Media Coverage of Court Proceedings

(a) Expanded Media Coverage: A judge may authorize expanded media coverage of court proceedings, subject to the guidelines set forth below.

(1) **Definitions.** As used in this section, unless the context otherwise requires:

(A) ''Proceeding'' means any trial, hearing, or any other matter held in open court which the public is entitled to attend.

(B) ''Photograph'' and ''photography'' means all recording or broadcasting of visual images, by means of still photographs, videotape, television broadcasts, motion pictures, or otherwise.

(C) ''Expanded media coverage'' means any photography or audio recording of proceedings.

(D) ''Judge'' means the justice, judge, magistrate, or other judicial officer presiding over the proceedings. In proceedings with more than one judge presiding, any decision required shall be made by a majority of the judges.

(E) ''Media'' means any news gathering or reporting agency and the individual persons involved, and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, or any other news reporting or news gathering agency whose function it is to inform the public or some segment thereof.

(2) **Standards for Authorizing Coverage.** In determining whether expanded media coverage should be permitted, a judge shall consider the following factors:

(A) Whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial;

(B) Whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum and dignity of the court; and

(C) Whether expanded media coverage would create adverse effects which would be greater than those caused by traditional media coverage.

(3) **Limitations on Expanded Media Coverage.** Notwithstanding an authorization to conduct expanded media coverage of a proceeding, there shall be no:

(A) Expanded media coverage of pretrial hearings in criminal cases, except advisements and arraignments;

(B) Expanded media coverage of jury voir dire;

(C) Audio recording or ''zoom'' close-up photography of bench conferences;

(D) Audio recording or close-up photography of communications between counsel and client or between co-counsel;

(E) Expanded media coverage of in camera hearings;

(F) Close-up photography of members of the jury.

(4) **Authority to Impose Restrictions on Expanded Media Coverage.** A judge may restrict or limit expanded media coverage as may be necessary to preserve the dignity of

the court or to protect the parties, witnesses, or jurors. A judge may terminate or suspend expanded media coverage at any time upon making findings of fact that: (1) rules established under this Rule or additional rules imposed by the judge have been violated; or (2) substantial rights of individual participants or rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

(5) **Conditions for Coverage.** Expanded media coverage shall be conducted only under the following conditions:

(A) Equipment Limitations.

(i) Video. Only one person at a time shall be permitted to operate a videotape, television, or motion picture camera. There shall be only one such camera at a time in the courtroom, except that, at the discretion of the judge, the camera operator may have a second camera. The camera operator may use a tripod, but shall not change location while court is in session.

(ii) Audio. The court's audio system shall be used if technically suitable and, in that event, there must be no interference with the court's use of its system. If the court's system is not technically suitable, then the person conducting expanded media coverage may install an audio recording system at his or her own expense upon first obtaining approval of the judge. All microphones and related wiring shall be unobtrusive and shall not interfere with the movement of those in the courtroom.

(iii) Still Cameras. Only one person at a time shall be permitted to operate still cameras, which shall make as little noise as possible. The still photographer may use a tripod, but shall not change location while court is in session.

(iv) Lighting. No movie lights, flash attachments, or sudden lighting changes shall be permitted during a proceeding. No modification or addition of lighting equipment shall be permitted without the permission of the judge.

(v) Operating Signals. No visible or audible light or signal (tally light) shall be used on any equipment.

(B) Pooling Arrangements. The media shall be solely responsible for designating one media representative to conduct each of the categories of expanded media coverage listed in subsection (I) of this section, and for arranging an open and impartial distribution scheme with a distribution point located outside of the courtroom. If no agreement can be reached on either of these matters, then there shall be no expanded media coverage of the type for which no pooling agreement has been made. Neither judges nor other court personnel shall be called upon to resolve any disputes concerning such pooling arrangements.

(C) Conduct of Media Representatives. Persons conducting expanded media coverage shall conduct themselves in a manner consistent with the decorum and dignity of the courtroom. The following practices shall apply:

(i) Equipment employed to provide expanded media coverage shall be positioned and operated so as to minimize any distraction;

(ii) Identifying marks, call letters, logos, symbols, and legends shall be concealed on all equipment. Persons operating such equipment shall not wear clothing bearing any such identifying information;

(iii) Equipment used to provide expanded media coverage shall not be placed in, or removed from, the courtroom while court is in session. No film, videotape, or lens shall be changed within a courtroom while court is in session.

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(i) The name, number, date and time of the proceeding;

(ii) The type (audio, video or still photography) of expanded media coverage requested and a description of the pooling arrangements required by section (e)(II), if any, including the identity of the designated representatives.

(B) Objections. Any party or witness may lodge with the judge a written objection to expanded media coverage of all or a portion of a proceeding.

(C) Judicial Authorization. The judge shall rule on a request or objection within a reasonable time prior to the proceeding or promptly after the request or objection if the proceeding has begun. The ruling shall be made on the record and the reasons therefore set forth briefly.

(D) The media or any witness may not appeal, or seek review by original proceeding, the granting or denial of expanded media coverage. A party to the case may seek review of a ruling by original proceeding, if otherwise appropriate, or by post-trial appeal.

(b) Other Use of Media.

(1) A judge may authorize the use of electronic or photographic means for the perpetuation of a record, or for purposes of judicial administration.

(2) A judge may authorize the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

Source: Entire rule added and adopted June 24, 2010, effective July 1, 2010; entire chapter amended and effective October 30, 2015.

ANNOTATION

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